No. _____

IN THE
Supreme Court of the United States

MERCK & CO., INC., *ET AL.*,

Petitioners,

v.

RICHARD REYNOLDS, STEVEN LEVAN, JEROME HABER, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Did the Third Circuit err in holding, in accord with the Ninth Circuit but in contrast to nine other Courts of Appeals, that under the "inquiry notice" standard applicable to federal securities fraud claims, the statute of limitations does not begin to run until an investor receives evidence of scienter without the benefit of any investigation?

RULE 14.1(b) STATEMENT

The petitioners, who were the defendants-appellees below, are Merck & Co., Inc. and certain of its current and former officers and directors: Raymond V. Gilmartin, Kenneth C. Frazier, Richard C. Henriques, Jr., Peter S. Kim, Judy C. Lewent, Alise S. Reicin, Edward M. Scolnick, Lawrence A. Bossidy, William G. Bowen, Johnnetta B. Cole, William B. Harrison, Jr., William N. Kelley, Heidi G. Miller, Thomas E. Shenk, Anne M. Tatlock, Samuel O. Thier, David Anstice, Richard T. Clark, Celia Colbert, Linda M. Distlerath, Caroline Dorsa, Bernard J. Kelley, Per G.H. Lofberg, Per Wold-Olsen, and Lloyd C. Elam.

The respondents, who were the plaintiffs-appellants below, are lead plaintiffs Richard Reynolds, Steven LeVan, Marc Nathanson, and Jerome Haber, and additional plaintiffs Loren Arnoff, Robert Edwin Burns, Jan Charles Finance S.A., Martin Mason, Frank H. Saccone, Charlotte Savarese, Joe Savarese, Joseph Goldman, Sherri B. Knuth, Joseph S. Fisher, M.D., Naomi Raphael, Rhoda Kanter, Park East, Inc., and Union Asset Management Holding AG, on behalf of its funds.

RULE 29.6 STATEMENT

Petitioner Merck & Co., Inc. states that it has no parent corporation and that no publicly held corporation owns more than 10% of its stock.

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JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 2008. The order denying petitioners' motion for rehearing *en banc* was entered on October 17, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The question presented by this petition involves 28 U.S.C. § 1658(b), entitled "Time limitations on the commencement of civil actions arising under Acts of Congress," which provides in relevant part:

> (b) [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c (a)(47)), may be brought not later than the earlier of—
>
> (1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

INTRODUCTION

This case presents the important and recurring question of when the statute of limitations begins to run on a federal securities fraud claim. Although there is broad agreement that the limitations period commences once an investor is placed on "inquiry notice" of its claim, the Courts of Appeals construe "inquiry notice" in inconsistent and irreconcilable ways, yielding conflicting and unpredictable results. In the last year alone, two Courts of Appeals – the Ninth Circuit, and the Third Circuit, in its opinion below – have further widened this split. Given the abiding and increasing uncertainty in this area of the law, this Court should clarify the proper measure of the statute of limitations for securities fraud claims, an issue it has not revisited since its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), nearly two decades ago.

In *Lampf*, this Court held that the statute of limitations for securities fraud claims should be governed by a uniform, nationwide standard. *See Lampf*, 501 U.S. at 364. Under *Lampf*, which was ratified and codified by Congress, a federal securities fraud claim brought under section 10(b) of the Securities Exchange Act of 1934 (and Securities and Exchange Commission Rule 10b-5 promulgated thereunder) must be brought within two years "after the discovery of the facts constituting the violation." *See* 28 U.S.C. § 1658(b). Every Court of Appeals to consider this provision has held that the statute of limitations may be triggered by "inquiry notice" as well as actual notice. Under the inquiry notice standard

as typically applied, a plaintiff, once placed on notice of the possibility that it has been defrauded, has a duty to investigate potential claims.

Despite this general agreement, Courts of Appeals are increasingly divided on when the statute of limitations starts to run under an "inquiry notice" standard. Before the past year, Courts of Appeals generally followed one of two inconsistent approaches. Some Courts of Appeals held that the statute of limitations begins to run from the moment a potential plaintiff possesses enough facts to suggest the *possibility* that it has been defrauded. Other Courts of Appeals, in contrast, held that the statute of limitations begins to run on what might be a significantly later date: when a reasonable investor, alerted to the possibility of fraud and under a duty to investigate, would have discovered facts sufficient to bring suit.

Until recently, courts following both approaches agreed that an investor's duty to investigate potential fraud is triggered when the investor knows, or has reason to know, that a representation on which it relied was false. In the past year, however, two Courts of Appeals separately adopted yet a third interpretation of the inquiry notice standard, breaking with the other Courts of Appeals in holding that no duty to investigate arises, and the statute of limitations does not begin to run, until the plaintiff receives specific evidence of the elements of its claim without the benefit of any investigation.

In the first of these cases, *Betz v. Trainer Wortham & Co.*, 519 F.3d 863 (9th Cir. 2008), the Ninth Circuit held that the duty to investigate possi-

ble fraud is not triggered unless a plaintiff fortuitously encounters evidence that a statement was not only false, but *knowingly* false, when it was made – *i.e.*, that it was made with scienter. According to the Ninth Circuit, only then is a plaintiff obligated to inquire into whether it was the victim of fraud. *See Betz*, 519 F.3d at 873. A petition for *certiorari* is currently pending in *Betz*. *See* Petition for a Writ of Certiorari, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (May 27, 2008) ("*Betz* Pet."). This Court has invited the Solicitor General to file a brief expressing the views of the United States on the petition. *See Trainer Wortham & Co. v. Betz*, 129 S. Ct. 339 (2008).

Shortly after *Betz*, the Third Circuit reached a similar holding in the present case, where respondents allege that petitioners made knowing misrepresentations regarding the safety of VIOXX® ("Vioxx"), a pharmaceutical formerly manufactured and sold by petitioner Merck & Co., Inc. ("Merck"). Respondents conducted no investigation into the possibility that Merck made such alleged misrepresentations despite (1) a public letter from the Food and Drug Administration ("FDA") addressed to Merck concerning Merck's alleged misrepresentations about the cardiovascular safety of Vioxx; (2) an article in *The New York Times* attributing to a Merck scientist an acknowledgment that Vioxx may increase the risk of heart attacks, and (3) the filing of numerous lawsuits alleging that Merck had misrepresented the cardiovascular safety of Vioxx. In reversing the District Court's dismissal of respondents' claims as time-barred, the Third Circuit – over a vigorous dissent (and, later, four votes for rehearing *en banc*) – joined

the Ninth Circuit in holding that an investor must possess evidence of scienter before a duty to investigate is triggered. Indeed, the Third Circuit went even farther than the Ninth Circuit in holding that some kind of investor reaction to the disclosed information – namely, a change in analyst ratings for a company's stock or a significant drop in its stock price – is required before a duty to inquire arises. In so holding, the Third Circuit has excused an investor from asking a single question until it has evidence not just of scienter, but of materiality and loss causation as well.

In addition to further dividing the Courts of Appeals, the new approach followed by the Third and Ninth Circuits runs contrary to the fundamental purpose of inquiry notice – to encourage the timely filing of fraud claims by placing an affirmative burden on plaintiffs to investigate potential claims. Ignoring this goal, the Third and Ninth Circuits have essentially read the "inquiry" out of inquiry notice. Where other circuits impose a duty to investigate once a plaintiff is on notice of the *possibility* of fraud, under the Third and Ninth Circuits' standard, no such duty arises unless evidence supporting specific elements of a fraud claim falls into an investor's lap.

In practice, this three-way circuit split ensures that the same claim will be time-barred in some circuits, but allowed in others. Consider the case below: in the Eleventh and Fourth Circuits, where the statute of limitations begins to run as soon as a plaintiff receives "storm warnings" of possible fraud, respondents' claims would be time-barred. *See infra* p. 25. The result would likely be the same in the Second Circuit. *See infra* pp. 25-26. But in the

Ninth Circuit after *Betz*, a court would likely agree with the analysis below and find respondents' claims timely because there was no widespread evidence of scienter more than two years before respondents filed suit. *See infra* p. 27. The fate of respondents' claims in most other circuits, meanwhile, is unknown, likely turning on factors that were never addressed by the court below. *See infra* pp. 26-27. Far from fulfilling Congress's desire for a uniform national standard governing the statute of limitations for federal securities fraud claims, these divergent outcomes encourage plaintiffs to forum-shop, burden parties with uncertainty, and leave investors unsure of their obligations to pursue potential claims.

Eighteen years after *Lampf*, there is still no consensus on when the statute of limitations begins to run on a securities fraud claim, nor is there agreement on the proper scope of a plaintiff's obligation to investigate potential fraud. Instead, an irreconcilable and growing circuit split has emerged. This Court should resolve it.

STATEMENT

This suit arises out of Merck's development and sale of the prescription pain medication Vioxx and Merck's alleged misrepresentations regarding the drug's alleged cardiovascular risks.[1]

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[1] Petitioners draw the following alleged facts from respondents' original and amended complaints, as well as public documents of which this Court may properly take judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S.

Vioxx is a member of a class of pain medications known as non-steroidal anti-inflammatory drugs ("NSAIDs"). Most NSAIDs block two enzymes, one that helps maintain the lining of the stomach, and another that triggers pain and inflammation. Vioxx, blocking only the latter, was designed to reduce pain and inflammation without serious gastrointestinal ("GI") side effects.

In January 1999, Merck commenced a study called "VIGOR" to compare the GI effects of Vioxx with those of another NSAID, naproxen. The publicly reported results of the study indicated a lower incidence of GI events, but also a higher rate of serious cardiovascular events, in the patients taking Vioxx as compared to those taking naproxen. JA 714.[2]

There were several possible explanations for this disparity. One was that naproxen prevented blood clots, protecting patients against possible heart attacks (the "naproxen hypothesis"); another was that Vioxx increased the possibility of blood clots, raising the risk of cardiovascular events. In its announcement of the VIGOR results, Merck favored the naproxen hypothesis: "[S]ignificantly fewer thromboembolic events were observed in patients taking naproxen in this GI outcomes study, which is consistent with naproxen's ability to block platelet aggregation. This effect on these events had not been ob-

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308, 127 S.Ct. 2499, 2509 (2007). As it did below, Merck accepts these facts as true only for purposes of this filing.

[2] "JA" refers to the Joint Appendix that was filed by the parties in the Third Circuit.

served previously in any clinical studies for naproxen." JA 765.

A. Merck Advocates the Naproxen Hypothesis.

In April 2000, Merck publicly stated its belief that the difference in thrombotic event rates between Vioxx and naproxen in the VIGOR trial was likely due to the naproxen hypothesis. *See* JA 2288. This interpretation of the VIGOR data sparked a vigorous public debate concerning the naproxen hypothesis and alternative explanations for the VIGOR results. For example, on April 27, 2000, Reuters published an article in which it reported that analysts were "not reassured by Merck's suggestion that naproxen conferred protection against heart attacks and strokes" and quoted Roche Holdings Ltd., a manufacturer of naproxen, as stating: "To our knowledge, naproxen does not prevent heart attack or stroke." *Id.*

B. The FDA Issues a Warning Letter to Merck Concerning Its Alleged Misrepresentations Regarding the Cardiovascular Safety of Vioxx.

On September 17, 2001, the FDA issued a Warning Letter to Merck stating that Merck had "engaged in a promotional campaign for Vioxx that minimize[d] the potentially serious cardiovascular findings that were observed in the [VIGOR] study, and thus, misrepresent[ed] the safety profile for Vioxx." JA 713. The FDA stated that "[a]lthough the exact reason for the increased rate of [myocardial infarctions ('MIs')] observed in the Vioxx treatment group is unknown," Merck had "selectively" pre-

sented the hypothesis that the VIGOR results were due to the cardioprotective effects of naproxen without disclosing that the naproxen hypothesis "has not been demonstrated by substantial evidence, and that there is another reasonable explanation, that Vioxx may have pro-thrombotic properties." *Id.* According to respondents' own allegations, "FDA Warning Letters are sent only to address serious circumstances." JA 1280 ¶ 79.

The Warning Letter was published on the FDA's public website on September 21, 2001. *See* App. 72a. Upon its release, the Warning Letter received immediate and widespread media and analyst coverage. *See* App. 72a-75a. For example, on September 25, 2001, *The Wall Street Journal* reported, "Federal regulators warned Merck & Co. for improper marketing of its blockbuster arthritis drug Vioxx, saying the company had misrepresented the drug's safety profile and minimized its potential risks. . . . While the FDA sends out dozens of routine citations annually, it issues only a handful of these more-serious warning letters each year." JA 2361. Similarly, on September 26, 2001, *The New York Times* reported, "The [FDA] has ordered Merck & Company to cease promotions intended to persuade doctors to prescribe its arthritis painkiller Vioxx, saying the promotions minimize potential risks." JA 2363.

The publication of the FDA Warning Letter was immediately followed by a sharp decline in the price of Merck's stock. On September 25, 2001, Reuters reported that "[s]hares of Merck & Co. fell on Tuesday after U.S. regulators accused the firm of making unsubstantiated claims about its hot-selling arthritis drug Vioxx and downplaying a possible risk of heart

attack from taking the medicine." JA 2357. Between September 20, 2001 and September 25, 2001, Merck's stock price declined by $4.40, or 6.6%. JA 1773.

On October 9, 2001, *The New York Times* published an article that discussed the FDA Warning Letter in which it quoted petitioner Dr. Edward Scolnick, then president of Merck Research Laboratories, as stating that "'[t]here are two possible interpretations'" of the VIGOR study data: "'Naproxen lowers the heart attack rate, or Vioxx raises it.'" JA 2367. From January 1, 2001, to October 9, 2001, as the public debate concerning the naproxen hypothesis intensified, Merck's stock price declined by $24.32, or 27.4%. JA 1770-73.

C. Lawsuits are Filed Alleging that Merck Had Misrepresented the Cardiovascular Risks of Vioxx.

On May 29, 2001, the first Vioxx-related product liability class action was filed in the United States District Court for the Eastern District of New York. JA 1747-61. The plaintiffs in that suit alleged that "Merck's own research [demonstrated that] users of Vioxx were four times as likely to suffer heart attacks as compared to [users of] other less expensive medications" but that Merck took "no affirmative steps to communicate this critical information to class members." JA 1748 ¶ 3.

Shortly after the FDA published the Warning Letter, three additional product liability and consumer fraud lawsuits were filed against Merck, all alleging that Merck had misrepresented the cardio-

vascular safety of Vioxx: (1) on September 27, 2001, a consumer fraud class action was filed in New Jersey state court, alleging that "Merck [had] omitted, suppressed, or concealed material facts concerning the dangers and risks associated with the use of Vioxx, including . . . cardiovascular problems," JA 1557 ¶ 32; (2) on September 28, 2001, an action asserting both product liability and fraud claims was filed in Utah state court, alleging that Merck had "misrepresented that Vioxx was a safe and effective way to relieve osteoarthritis, management of acute pain in adults, and treatment of menstrual pain, when in fact the drug causes serious medical problems such as an increased risk of cardiovascular events," JA 1574; and (3) on October 1, 2001, an action asserting product liability claims was filed in Alabama state court, alleging that Merck failed to disclose that "Vioxx causes heart attacks," JA 1611 ¶ 19.

D. Merck Withdraws Vioxx from the Market.

On September 30, 2004, Merck announced that it was voluntarily withdrawing Vioxx from the market based on new results from an ongoing study (named "APPROVe") showing an "increased risk of confirmed cardiovascular events beginning after 18 months" of continuous use. JA 583-84.

E. Respondents File Suit.

On November 6, 2003, respondents filed the first Vioxx-related securities fraud class action in the United States District Court for the Eastern District of Louisiana, alleging that petitioners had misrepresented "the cardiovascular risks associated with

VIOXX." JA 1224. Numerous additional Vioxx-related securities actions were filed thereafter. On February 23, 2005, the Judicial Panel on Multidistrict Litigation ("JPML") issued a Transfer Order, transferring all Vioxx-related securities, derivative and ERISA actions pending in the federal courts to the United States District Court for the District of New Jersey (the "District Court") "for coordinated or consolidated pretrial proceedings." JA 442-43. On May 5, 2005, the District Court "consolidated for all purposes" all pending and subsequently-filed Vioxx-related securities actions. JA 445-63.

On June 14, 2005, respondents filed their operative Complaint. Like the November 2003 complaint, the Complaint asserts various claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, based on allegations that "Defendants misrepresented the [cardiovascular] safety profile of Vioxx." JA 470 ¶ 10.

F. The District Court Dismisses Respondents' Claims as Time-Barred.

Defendants moved to dismiss respondents' claims, arguing in part that they were barred by the two-year statute of limitations. *See* 28 U.S.C. § 1658(b).[3] In analyzing this argument, the District

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[3] Under 28 U.S.C. § 1658(b), securities fraud claims must be brought the earlier of (a) two years after the discovery of the facts constituting the violation or (b) five years after the violation. Petitioners did not make any argument below concerning the statute of repose.

Court applied the Third Circuit's two-step inquiry notice test.

Under this test, a defendant must first establish that, as of a particular date, there existed "'storm warnings'" sufficient to alert a reasonable investor of ordinary intelligence to possible wrongdoing on the part of the defendants. *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (quoting *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002)). Under Third Circuit law, "storm warnings may take numerous forms" and include any information that would alert a reasonable investor to the possibility that the defendants engaged in "the general fraudulent scheme" alleged in the complaint. *In re NAHC*, 306 F.3d at 1326 & n.5. If the defendants establish the existence of "storm warnings," then the second part of the inquiry notice test is reached, and "'the burden shifts to the plaintiff[] to show that [it] exercised reasonable due diligence and yet w[as] unable to discover [its] injuries.'" *Benak*, 435 F.3d at 400 (quoting *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 252 (3d Cir. 2001)). "[I]f storm warnings existed, and the [plaintiff] chose not to investigate, [it] will [be] deem[ed] . . . on inquiry notice of [its] claims" as of the date the "storm warnings" first appeared. *Id.* at 401 (quoting *Mathews*, 260 F.3d at 252 n.16).

Respondents failed to conduct any investigation into possible fraud by Merck. App. 98a. Thus, petitioners' statute of limitations argument presented a single legal question: when did public information regarding Merck's statements about the cardiovascular risks of Vioxx create "storm warnings," giving

rise to respondents' duty to investigate the possibility of fraud? *See* App. 83a-84a.

Answering this question, the District Court held that there were clear "storm warnings" of the possibility that petitioners had misrepresented Vioxx's cardiovascular safety by October 9, 2001 – the date on which *The New York Times* published the article in which petitioner Dr. Scolnick was reported as stating that Vioxx "may raise the risk of heart attack or other thrombotic event." App. 84a-90a. It characterized the "mix of information" available to investors by that date as "more akin to thunder, lightning and pouring rain than subtle warnings of a coming storm." App. 94a.

Moving to the second step in the inquiry notice analysis, the District Court held that, because respondents did "not argue[] that they conducted a diligent investigation" within two years of October 9, 2001, and because "nothing in the Complaint demonstrate[d] that they were unable to uncover pertinent information during the limitations period," respondents were on inquiry notice of their claims as of October 9, 2001, at the latest – more than two years before they filed suit on November 6, 2003. App. 98a. Accordingly, the District Court dismissed respondents' claims as time-barred. App. 98a-99a.

G. The Third Circuit Reverses.

The Third Circuit reversed, purporting to employ the same two-step inquiry notice test utilized by the District Court. In doing so, the Third Circuit reiterated that the first step in the analysis is an objective assessment of "whether the defendant had met

its burden to show the existence of storm warnings." App. 24a-25a (internal quotation marks omitted). The second step, the Third Circuit confirmed, was an inquiry, "both subjective and objective, into whether the plaintiffs had met their burden to show that they exercised reasonable diligence and yet were unable to discover their injuries." App. 25a (internal quotation marks omitted).

In its analysis, the Third Circuit indicated that heavy, if not dispositive, weight should be accorded to the reactions of analysts and the stock market to the alleged storm warnings cited by petitioners. Relying in part on authority from the Ninth Circuit, the Third Circuit stated that these factors are critical because "[d]iscovery of [plaintiffs' losses] leads almost immediately to discovery" of defendant's misrepresentations. App. 37a-38a (internal quotation marks omitted). Thus, "[i]f the disclosure of certain information has no effect on stock prices, it follows that the information disclosed was immaterial as a matter of law." App. 37a (internal quotation marks omitted).

Applying this standard, the Third Circuit held that the statute of limitations did not begin to run unless and until respondents had knowledge that Merck acted with scienter – that is, that Merck's support for the naproxen hypothesis was not held "in earnest." App. 33a. Thus, the Court rejected the proposition that any of the following incidents – taken alone or together – triggered respondents' duty to investigate a possible fraud claim: (1) the robust public debate concerning Merck's interpretation of the VIGOR data, which included several reporters and analysts who questioned Merck's support for the

naproxen hypothesis; (2) the widely publicized Warning Letter, which concerned Merck's alleged misrepresentations regarding the cardiovascular safety of Vioxx; (3) Dr. Scolnick's statement that Vioxx may cause heart attacks; and (4) numerous lawsuits alleging that Merck misrepresented the cardiovascular safety of Vioxx. App. 46a-47a.

According to the Third Circuit, its conclusion was reinforced by the fact that selected analysts and the stock market reacted moderately to these events.[4] App. 44a-45a (stating that the price of Merck stock dipped only "slightly" following publication of the FDA Warning Letter); App. 46a (finding "notable" the fact that there was no "significant movement" in the price of Merck stock following the October 9, 2001 article in *The New York Times*). Thus, the court effectively held that no duty to investigate arose unless and until the stock market reacted to a degree that reflected disclosure of a full-scale fraud.

In a vigorous dissent, Judge Roth argued that any reasonable investor would have investigated *possible* fraud in the face of the "storm warnings" discussed above. The dissent emphasized that knowledge of all of the "details or narrow aspects" of the alleged fraud is not necessary before a duty to investigate arises; instead, knowledge of the possibility that respondents had engaged in the "general

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[4] The Third Circuit ignored the fact that the price of Merck stock declined sharply in the months leading up to October 9, 2001. *See* App. 60a-61a n.21 (Roth, J., dissenting).

fraudulent scheme" alleged in the complaint is enough. App. 50a.

According to the dissent, the FDA Warning Letter alone was sufficient to alert respondents to this possibility because it "clearly and explicitly reprimanded Merck" for its "deceptive and misleading conduct" regarding the cardiovascular risks of Vioxx. App. 51a-54a. The dissent also found significant the filing of numerous lawsuits specifically alleging that Merck had omitted, suppressed, or concealed material facts concerning the cardiovascular safety of Vioxx. App. 57a-58a. The dissent thus agreed with the District Court that respondents' claims were time-barred because respondents failed to investigate in response to clear storm warnings suggesting the possibility of fraud.[5]

Petitioners timely filed a petition for rehearing *en banc*, which was denied by a six-to-four vote. App. 100a-101a.

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to address a central and recurring question of federal securities law: when does the statute of limitations begin to

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[5] The dissent analogized this case to the plot of Hans Christian Anderson's fairytale "The Emperor's New Clothes," arguing that the fact that the price of Merck stock did not plummet following publication of the Warning Letter indicated not that the emperor "was not walking down the street with no clothes on," but only that "analysts saw the emperor's new clothes as Merck described them – not as reality presented." App. 60a (Roth, J., dissenting).

run on a claim brought under section 10(b), and what is a plaintiff's obligation to investigate potential fraud? In the eighteen years since this Court established a "uniform" statute of limitations in *Lampf*, the Courts of Appeals have addressed this issue in sharply divergent ways. Review by this Court is needed to resolve this widening split, which leads to disparate results in an area of national importance.

I. The Third Circuit Has Exacerbated a Growing Circuit Split on the Proper Start Date for the Statute of Limitations for Claims Brought Under Section 10(b).

The Courts of Appeals are sharply divided on when the statute of limitations begins to run on securities fraud claims and the scope of a plaintiff's duty to investigate whether it has been the victim of securities fraud. The result is widespread inconsistency among the circuits, leading to irreconcilable outcomes on similar sets of facts. In the decision below, the Third Circuit deepened this split by joining the Ninth Circuit in adopting a test that thwarts the goals of the inquiry notice standard.

A. The Courts of Appeals Employ Three Sharply Divergent Tests to Determine When the Statute of Limitations Begins to Run.

All but two of the Courts of Appeals have explicitly addressed the appropriate standard to be applied in determining whether the statute of limitations has run on securities fraud claims. "[E]very circuit to have addressed the issue since *Lampf* has held that inquiry notice is the appropriate standard." *See*

Betz, 519 F.3d at 874 (internal quotation marks omitted). These holdings have effectively been endorsed by Congress.[6]

Generally, in determining whether a plaintiff was on notice of its claim, the circuits employ a two-step test. The first step typically assesses whether a plaintiff was alerted to the "possibility" that it had been defrauded. *See, e.g.*, *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1204 (10th Cir. 1998). The second considers when, in the exercise of reasonable diligence, the plaintiff could have discovered the facts underlying its claim. *See, e.g.*, *id.* at 1205. Despite this ostensible agreement, the circuits differ on two central questions, resulting in at least three distinct approaches and often leading to incongruous results. *See id.* at 1200 ("The circuits are not consistent, however, in their determination of exactly when the [statute of limitations] begins to run.").

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[6] Congress enacted the current limitations period in 2002 as part of the Sarbanes-Oxley legislation. *See* Pub. L. No. 107-204, Title VIII, § 804, 116 Stat. 745, 801 (2002). In doing so, Congress extended the statute of limitations from one year to two years and the period of repose from three years to five years, but "opted for [substantive] language identical to the language previously in effect." *Betz*, 519 F.3d at 875. The inquiry notice standard was well-established when Congress acted in 2002, and when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). This canon has been specifically applied to actions brought under § 10(b). *See Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 85-86 (2005); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 n.66 (1982).

The first question that divides the circuits is the precise time at which the statute of limitation begins to run under an inquiry notice standard. Some Courts of Appeals hold that the statute of limitations begins to run the moment the plaintiff is first alerted to "storm warnings" suggesting the possibility of fraud – that is, when a defendant satisfies the first step in the inquiry notice analysis. (*See infra* pp. 20-21.) Other circuits, however, hold that start date for the statute of limitations depends on the answer to the second step in the inquiry notice analysis; in these circuits, the statute of limitations will begin to run from the time that a plaintiff, after exercising reasonable diligence, could have discovered the facts underlying its claim. Courts holding this latter view are themselves split over a second crucial aspect of the inquiry notice test. In some circuits, the statute of limitations begins to run when the plaintiff could have discovered, through a reasonable investigation, the facts underlying the fraud. (*See infra* pp. 21-23.) In others, no duty to investigate arises, and the statute of limitations does not begin to run, until a plaintiff has evidence supporting the specific elements of its claim. (*See infra* pp. 23-25.) The circuits are thus divided into three divergent approaches.

1. The First Approach: Pure "Storm Warnings" (Fourth and Eleventh Circuits, and Sometimes Fifth and Eighth Circuits).

Under the first approach, embodying the most stringent test, the statute of limitations begins to run from the moment that there exist "storm warnings" of possible fraud that would prompt a reasonable investor to investigate whether it had been de-

frauded. The Eleventh and Fourth Circuits follow this approach. *See, e.g.*, *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254-55 (11th Cir. 2002); *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001); *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 177 (4th Cir 2007); *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162-63 (4th Cir. 1992). The Fifth and Eighth Circuits likewise start the statute of limitations clock at the first sign of "storm warnings," provided that a reasonably diligent inquiry could have uncovered the facts supporting a fraud claim within the limitations period. *See, e.g.*, *Bodenhamer v. Shearson Lehman Hutton, Inc.*, 998 F.2d 1013 (5th Cir. 1993) (unpublished table decision); *Jensen v. Snellings*, 841 F.2d 600, 606-07 (5th Cir. 1988) (starting the limitations clock on the "storm warnings" date); *Great Rivers Coop. v. Farmland Indus., Inc.*, 120 F.3d 893, 896, 899 (8th Cir. 1997) (same).

2. The Second Approach: "Storm Warnings" Plus Investigation (First, Sixth, Seventh, and Tenth Circuits, and Sometimes Second Circuit)

Under the second approach, the statute of limitations begins to run based on the second step in the inquiry notice analysis. Once a plaintiff is actually or constructively aware of the possibility it has been defrauded (through "storm warnings" or otherwise), the statute of limitations will begin to run on the date the plaintiff, exercising reasonable diligence, could have discovered the facts underlying the alleged fraud. The First, Sixth, and Tenth Circuits follow this approach. *Sterlin*, 154 F.3d at 1200-01; *see,*

e.g., *New Eng. Health Care Employees Pension Fund v. Ernst & Young LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *Young v. Lepone*, 305 F.3d 1, 8-10 (1st Cir. 2002). The Seventh Circuit also follows this approach but collapses this standard into a single inquiry: when should the plaintiff, exercising reasonable diligence, have possessed sufficient facts not only to incite investigation but also to enable it to tie up loose ends and actually file suit? *See, e.g.*, *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997).[7] The Second Circuit follows either the "pure 'storm warnings'" or "'storm warnings' plus investigation" approach, depending on whether the plaintiff fulfills its duty to investigate.[8] In each of

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[7] Further confusing this area of the law is a split within the second approach on the application of the "reasonable investigation" step in the inquiry notice analysis. For example, in the First Circuit, the plaintiff bears the burden of "showing that she fulfilled her corresponding duty of making a reasonably diligent inquiry into the possibility of fraudulent activity." *Young*, 305 F.3d at 9. The Sixth and Tenth Circuits employ a strictly objective approach, examining what information would be available to an investor who conducted a reasonably diligent investigation. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 563 n.9 (6th Cir. 2005); *Sterlin*, 154 F.3d at 1202 n.20. The Seventh Circuit approach has both objective and subjective components, assessing what information an investor in the plaintiff's position could have uncovered had it investigated possible fraud. *See Fujisawa*, 115 F.3d at 1335.

[8] In the Second Circuit, if the plaintiff is placed on inquiry notice that a representation is false and it fails to conduct an investigation, the statute of limitations will be deemed to have run from the date the duty of inquiry arose, mirroring the first approach. *Shah v. Meeker*, 435 F.3d 244, 251 (2d Cir. 2006). If the plaintiff conducts an investigation, however, then the statute of limitations runs from the time a reasonably diligent

these circuits, a duty to investigate may arise even where – as in the present case – the information available to an investor does not suggest that a defendant's statements, if false, were made with scienter.

3. The Third Approach: Evidence of a Claim Without Investigation (Third and Ninth Circuits).

Under the third, and most lenient, approach, the statute of limitations period likewise begins to run based on the second step in the inquiry notice analysis. But unlike the second approach, the third approach holds that no duty to investigate arises – and the statute of limitations does not begin to run – unless and until the plaintiff has specific evidence of the elements of its claim, including scienter, *without* any investigation. This was the holding of the Ninth Circuit in *Betz*, which was alone among the circuits at the time it adopted this view. *See Betz*, 519 F.3d at 867-68 (Kozinski, J., dissenting from denial of rehearing *en banc*) ("The panel cites no authority supporting its curious notion that an investor isn't on inquiry notice until he has concrete proof of every element of his claim, including scienter. There is no such authority; ten circuits disagree.").

In its opinion below, the Third Circuit joined the Ninth Circuit on the periphery of inquiry notice ju-

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plaintiff would have discovered the facts underlying its securities fraud claim, mirroring the second approach. *See LC Capital Partners, LP v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003).

risprudence. While keeping intact the second component of its inquiry notice test, which looks at the reasonableness of the investigation performed by the plaintiff, the Third Circuit agreed with the Ninth Circuit that no duty to inquire arises, and a court need not even *consider* what information was available to the plaintiff, until even an entirely passive plaintiff stumbles upon direct evidence of, among other things, scienter.

In fact, the Third Circuit went even farther than *Betz*, suggesting that information known to a plaintiff must be legally "material," as demonstrated by downgrades in analysts' ratings and significant declines in stock price, before a duty to investigate is triggered.[9] Thus, under the Third Circuit rule, a plaintiff is not obligated to ask a single question until it has evidence of scienter, materiality, and loss causation – that is, until it has in hand a nearly fully-formed cause of action. That holding is contrary to the law in nearly every other circuit, as well

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[9] While the Third Circuit claimed that it was not establishing a *per se* rule requiring a stock price decline (App. 47a n.16), it made clear that, under its standard, a disclosure prompting a duty to investigate will have a negative effect on the price of a company's stock – and, absent such an effect, the disclosure will not be deemed to create "storm warnings." *See* App. 37a ("If the disclosure of certain information has no effect on stock prices, it follows that the information disclosed was immaterial as a matter of law." (internal quotation marks omitted)). The dissent recognized that the majority was establishing a *de facto* requirement and disputed such a rule. *See* App. 60a ("In my view, fluctuations in stock price and analysts' ratings and projections . . . are *not* a *required* consideration" (emphasis in original)).

as the purpose of inquiry notice itself. *See, e.g.*, *Brumbaugh*, 985 F.2d at 162 ("Commencement of a limitations period need not . . . await the dawn of complete awareness."); *see infra* Part II.C.

B. The Varying Tests Employed by the Courts of Appeals Lead to Directly Contrary Results.

Under the divergent approaches discussed above, it is geography that determines whether a claim is timely. The fate of a plaintiff's claim depends not on the "uniform" national standard intended by *Lampf*, but instead upon the jurisdiction in which a plaintiff files suit or (as often happens in securities fraud cases, and as happened in the case below) the jurisdiction to which the suit is transferred as part of a multi-district litigation.

In the present case, for example, respondents' claims would almost certainly be time-barred if the JPML had transferred the action to the Eleventh or Fourth Circuits. *See, e.g.*, *Grippo v. Perazzo*, 357 F.3d 1218, 1224 (11th Cir. 2004) (holding that the statute of limitations started to run on the date that a reasonable investor would have investigated possible fraud); *Theoharous*, 256 F.3d at 1228; *Brumbaugh*, 985 F.2d at 162 ("Inquiry notice is triggered by evidence of the possibility of fraud, not by complete exposure of the alleged scam.").

The same result would likely attend in the Second Circuit, as several recent cases – with facts nearly identical to those in the case below – confirm. In stark contrast to the Third Circuit opinion below, a district court within the Second Circuit recently

found that plaintiffs were placed on inquiry notice of their securities fraud claims, which centered on the alleged adverse consequences of a pharmaceutical manufactured by the defendant, by related product liability lawsuits and newspaper articles questioning the defendant's interpretation of study data. *See In re Zyprexa Prods. Liability Litig.*, 549 F. Supp. 2d 496, 535-36 (E.D.N.Y. 2008). A recent non-precedential opinion from the Second Circuit reached the same conclusion in a case strikingly similar to *Zyprexa* and the present case. *See Masters v. GlaxoSmithKline*, 271 Fed. Appx. 46, 49 (2d Cir. 2008). Like the plaintiffs in *Zyprexa* (*see* 549 F. Supp. 2d at 541), respondents here admittedly conducted no investigation into the possibility that they had been defrauded (*see* App. 98a). Thus, if the present suit had been brought in or transferred to the Second Circuit, the statute of limitations would likely be deemed to have commenced when the duty of inquiry arose, barring respondents' claims. *See Zyprexa*, 549 F. Supp. 2d at 540; s*ee also Shah*, 435 F.3d at 251.

In the First, Fifth, Sixth, Seventh, Eighth, and Tenth circuits, petitioners would likely have succeeded in establishing that respondents were on notice of potential fraud more than two years before respondents filed suit. *See, e.g.*, *Sterlin*, 154 F.3d at 1203-04 (duty to inquire arose where a single article questioned the truthfulness of defendant's representations). In most circuits, knowledge of the mere *possibility* that the defendant has made a misrepresentation is sufficient to trigger the duty to inquire. *See*, *e.g.*, *Great Rivers*, 120 F.3d at 897; *LaSalle v. Medco Research, Inc.*, 54 F.3d 443 (7th Cir. 1995); *see*

also Betz Pet. at 16-19. In these circuits, therefore, the timeliness of respondents' claims would depend upon the results of a reasonably diligent investigation into the possibility that they had been defrauded – facts never considered by the Third Circuit.[10]

Only the Ninth Circuit would agree with the Third Circuit's rationale in holding that respondents' claims were timely. Applying *Betz*, the Ninth Circuit would likely find, as the Third Circuit did, that the FDA Warning Letter, the October 9, 2001 *New York Times* article, multiple product liability lawsuits, and the vigorous public debate surrounding the naproxen hypothesis did not give rise to a duty to investigate possible fraud because they did not provide any specific evidence that any of Merck's statements regarding the cardiovascular safety of Vioxx, if false, were knowingly false when made.

Thus, the patchwork of inquiry notice standards leads directly to conflicting, inconsistent, and unpredictable outcomes that invite potential plaintiffs to forum shop for the most lenient statute of limitations.

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[10] Because the circuits apply different tests in examining the "reasonable investigation" prong of the inquiry notice standard (*see supra* note 7), it is impossible to know whether they would reach the same result in this or any other case. This kind of unpredictability is the natural result of a circuit split as deep as the one presented here.

C. The Third and Ninth Circuits' Approach Thwarts the Goals of Inquiry Notice.

The rule announced by the Ninth Circuit in *Betz*, and followed by the Third Circuit below, fundamentally conflicts with the goals of inquiry notice. As conceived, inquiry notice encourages investors to "tak[e] the actions necessary to bring the fraud to light," *Brumbaugh*, 985 F.2d at 162, and "discourage[s] [them] from adopting a wait-and-see approach" to their investments, *Sterlin*, 154 F.3d at 1202. *See also Tregenza v. Great Am. Commcn's Co.*, 12 F.3d 717, 722 (7th Cir. 1993) (inquiry notice is designed to prevent "the opportunistic use of federal securities law to protect investors against market risk"); *Jensen*, 841 F.2d at 607 (the inquiry notice standard is "intended to ensure fairness to defendants against claims that have been allowed to slumber" (internal quotation marks omitted)). The approach articulated by the Third and Ninth Circuits runs afoul of these goals in several crucial respects.

First, under the Third and Ninth Circuits' standard, the "inquiry" requirement of the "inquiry notice" standard is little more than a formality. In other circuits, the touchstone of the inquiry notice analysis is precisely that – an examination of what facts a reasonable inquiry could have uncovered. The Third and Ninth Circuits, in contrast, focus on the information available to the plaintiff *without* the exercise of reasonable diligence. Unless specific evidence of scienter is one such piece of information, the inquiry notice analysis ends. Under such a test, it is unclear what purpose (if any) is served by the "inquiry" step of the inquiry notice standard. After a

plaintiff fortuitously encounters evidence of scienter, materiality and loss causation, there is not much left for it to investigate.

Second, the Third and Ninth Circuits' standard contravenes the central purpose of the inquiry notice standard by encouraging a plaintiff to disregard "storm warnings" of possible fraud. If an investor has no duty to investigate unless it happens to stumble upon evidence of specific elements of its claim, then it has every incentive to ignore the possibility of fraud to postpone the statute of limitations. *See Fujisawa*, 115 F.3d at 1337 ("It would be highly undesirable if, suspecting securities fraud, an investor could sit back and wait out the entire . . . repose period before suit."). If, on the other hand, a plaintiff is obligated to investigate "storm warnings" of fraud and is penalized for failing to conduct an investigation, investors are encouraged to root out fraud at an early date. *See id*; s*ee generally Shah*, 435 F.3d at 249-52. The standard followed by most Courts of Appeals fosters early discovery of fraud by holding that evidence of specific elements of a fraud claim is not required to trigger a duty to investigate. *See supra* pp. 20-23. Under the Third Circuit standard, in contrast, there is no reason for an investor to take any action in the face of possible fraud unless specific evidence of scienter materializes, for any failure to investigate will be forgiven *even if* such evidence could have been uncovered by a reasonably diligent investigation.

Third, while largely relieving putative plaintiffs of their obligation to investigate potential claims, the Third and Ninth Circuit standard ties defendants' hands in critical ways. For example, if evidence of

the elements of a plaintiff's claim is required before a duty to investigate is triggered, a defendant is forced to choose between a motion to dismiss on statute of limitations grounds and one based on the sufficiency of the pleading under Rule 12(b)(6). To argue the former in the Third or Ninth Circuit, a defendant must show that a plaintiff has evidence of the elements of its claim, whereas to argue the latter requires a defendant to show that a plaintiff lacks that very same evidence.[11]

Fourth, far from the original intent of inquiry notice, the standard adopted by the Third and Ninth Circuit sharply restricts – if not abolishes altogether – the two-year statute of limitations in securities fraud cases.[12] Under this standard, the only claim that will be time-barred is one where all potential plaintiffs somehow neglect to bring suit after having

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[11] The Third Circuit itself highlights this tension when it calls "ironic" the fact that the dissent, "although noting what might be viewed as Merck's misrepresentations, would apply the statute of limitations to deprive plaintiffs of the opportunity to prove a viable case against Merck for such misrepresentations." *See* App. 47a n.16. That, of course, proves too much, as it is always true that a limitations bar deprives a plaintiff of the opportunity to prove its claims, regardless of whether the claims have merit.

[12] For example, in cases where there is an insignificant drop in the price of a company's stock, no duty to investigate will arise, and the statute of limitations will not run, because any public disclosure was "immaterial as a matter of law." App. 37a. And where there *is* a significant drop in the price of a company's stock, a securities fraud suit will follow almost inevitably, bringing the plaintiff well within the statute of limitations period even if it could have uncovered facts sufficient to state a claim years earlier.

specific evidence of the elements of their claims for more than two years. Such a result misses the point of inquiry notice, whose purpose is not to punish neglectfulness, but to encourage affirmative diligence in ferreting out potential fraud. *See, e.g.*, *Jensen*, 841 F.2d at 607 ("The requirement of diligent inquiry imposes an affirmative duty upon the potential plaintiff."); *Brumbaugh*, 985 F.2d at 163 ("Faced with numerous warnings of an investment's potential risk, the investor cannot simply wait to see if those risks materialize before filing suit.").

II. This Case Presents an Issue of National Importance.

As this Court has repeatedly recognized, the fair and effective operation of federal securities laws is of critical national importance. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008) ("[A] dynamic, free economy presupposes a high degree of integrity in all of its parts, an integrity that must be underwritten by rules enforceable in fair, independent, accessible courts."); *Dabit*, 547 U.S. at 78 ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

Recognizing the central importance of the securities laws, this Court established in *Lampf* a nationwide, uniform statute of limitations for securities fraud claims. As members of this Court observed, this holding was required both by principles of statutory interpretation and by the twin goals of predictability and judicial economy. *See Lampf*, 501 U.S. at 369 (O'Connor, J., dissenting) ("[P]redictability and

judicial economy counsel the adoption of a uniform federal statute of limitations for actions brought under 10(b) and Rule 10b-5"); *id.* at 374 (Kennedy, J., dissenting) ("[A] uniform federal statute of limitations is appropriate for private actions brought under 10(b)."). Congress confirmed the importance of such uniformity when it codified the holding of *Lampf* shortly thereafter. *See* 28 U.S.C. § 1658(b); *see also Tellabs*, 127 S. Ct. at 2509 (observing Congress's desire for "greater uniformity" in the area of federal securities fraud litigation); *Dabit*, 547 U.S. at 86 (noting a "congressional preference for national standards for securities class action lawsuits" (internal quotation marks omitted)).

Uniformity is absent, however, when the timeliness of plaintiffs' claims depends on the forum in which they are brought. Nor is predictability served when some courts commence the statute of limitations clock upon "storm warnings" of fraud while others forestall the statutory clock until a plaintiff has evidence supporting the elements of its claim without the benefit of any investigation.

The result of these divergent standards is confusion for plaintiffs and defendants alike. Under the current standards employed by the Courts of Appeals, defendants can never be sure when the risk of litigation has passed, and plaintiffs have starkly inconsistent directives from the courts as to their duty to investigate potential claims. Forced to keep an eye on the ever-growing number of inquiry notice standards, lower courts will likewise suffer from this confusion.

These inconsistent standards, and particularly the very lenient standard recently adopted by the Third and Ninth Circuits, also contribute to the increasing cost of litigating securities fraud claims. *See Dabit*, 547 U.S. at 81 (noting Congress's observation that securities fraud class actions were "being used to injure the entire U.S. economy" (internal quotation marks omitted)); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) ("There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.").

There is little sense in allowing the circuits to continue to splinter on an issue that is fundamental to the federal securities laws governing our nation's public companies. This Court should grant review to set a national standard and affirm the promise of *Lampf*.

III. This Case is an Optimal Vehicle for Considering the Question Presented.

As discussed above, the question presented here is also raised by another petition for *certiorari* currently pending before the Court. *See Trainer Wortham & Co. v. Betz*, No. 07-1489 (May 27, 2008); *see supra* p. 4. Because the present case is the superior vehicle for considering when the statute of limitations begins to run under an inquiry notice standard, the Court should grant *certiorari* in this case.

First, this case is the better vehicle because it involves a pure question of law. The Third Circuit reviewed the District Court's dismissal under Rule

12(b)(6), accepting the Complaint's factual allegations as true for the purposes of its decision. *See* App. 20a-21a. The Third Circuit thus rested its decision on a straightforward interpretation of the law, which, as demonstrated above, squarely conflicts with the holdings of other Courts of Appeals on the single issue presented by this petition. *See supra* pp. 18-25. Review of the Third Circuit decision would enable this Court to resolve this division.

Second, this petition involves an archetypal securities fraud case: a large, multi-district class action brought against a defendant-corporation based on alleged misrepresentations to the investing public. In such cases, clarification of the correct legal standard is particularly important because the statute of limitations is often raised early in the litigation pursuant to Rule 12(b)(6), with courts taking judicial notice of publicly available information (for example, in this case, the FDA Warning Letter). Moreover, it is precisely these cases where uncertainty imposes the greatest cost on defendants, as even unmeritorious claims may extract "in terrorem" settlements given the pressure exerted by an enormous number of aggregated claims. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

The *Betz* petition, in contrast, does not raise the question presented as clearly. Unlike this case, *Betz* was decided at the summary judgment stage and thus involves disputed issues of fact. *See Betz*, 519 F.3d at 879. Moreover, the *Betz* petition is complicated by the reasonableness of the plaintiff's investigation, the second question presented by the *Betz* petition. Here, because respondents do not allege that they conducted any investigation, this Court need

not sit as a factfinder and weigh the "reasonableness" of a plaintiff's actions, but instead can decide the legal effect of a plaintiff's failure to perform any investigation at all. Finally, *Betz*, where the plaintiff had actual notice of the alleged misrepresentation, involves an uncommon factual scenario. *See id.* at 872. Rarely does such definitive proof of a misrepresentation appear in a case involving inquiry notice.

Petitioners thus respectfully request that the Court grant *certiorari* in the present case. Petitioners request at a minimum that the Court, as it did in *Betz*, invite the Solicitor General to express the views of the United States on the petition.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

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