No. 08-905

IN THE

Supreme Court of the United States

MERCK & CO., INC., *et al.*,

Petitioners,

—v.—

RICHARD REYNOLDS, *et al.*,

Respondents.

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

BRIEF FOR THE CONNECTICUT RETIREMENT PLANS AND TRUST FUNDS, LOS ANGELES COUNTY

(*Title continued on inside front cover*)

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October 26, 2009

EMPLOYEES RETIREMENT ASSOCIATION, THOMAS P. DINAPOLI, COMPTROLLER OF THE STATE OF NEW YORK, AS TRUSTEE OF THE NEW YORK STATE COMMON RETIREMENT FUND AND AS ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL RETIREMENT SYSTEMS, PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, THE PENNSYLVANIA STATE EMPLOYEES' RETIREMENT SYSTEM AND THE GENERAL TREASURER OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

(*List of parties continued*)

and as Administrative Head of the New York State and Local Retirement Systems, Pennsylvania Public School Employees' Retirement System, Pennsylvania State Employees' Retirement System and the General Treasurer of the State of Rhode Island and Providence Plantations

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INTEREST OF AMICI CURIAE

This *amicus* brief is filed on behalf of public pension systems that serve as fiduciaries to public employees who rely on them to prudently manage their retirement funds.[1] These public funds have a special responsibility to help insure the accountability of participants in the securities markets, and therefore a strong interest in the integrity of, and eliminating fraud in, such markets. Together, the *amici* public pension funds invest an aggregate over $235 billion in the capital markets for over 2.1 million active and retired beneficiaries.[2] The *amici* believe that Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the limitations period for bringing claims thereunder, should be interpreted to achieve Congress's intent to provide redress for misrepresentations and deceptive practices in purchases and sales of securities, while at the same time eliminating premature and vexatious litigation.

The *amici's* overriding responsibility is to provide for the payment of benefits to their members and, in doing so, to invest for the long-term security of their millions of active and retired members. As major

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of the brief. The parties' blanket consent to the filing of *amicus* briefs was lodged with the Clerk of the Court on July 20, 2009.

[2] According to the US Census Bureau's 2009 Statistical Abstract, state and local retirement funds had $3.152 trillion in assets in 2007 ($1.98 trillion in corporate equities). U.S. CENSUS BUREAU, ASSETS, OF PRIVATE AND PUBLIC PENSION FUNDS (2009), http://www.census.gov/compendia/statab/tables/09s1177.xls.

investors with long-term outlooks, the *amici* are vitally concerned with the proper and efficient functioning of U.S. capital markets and are concerned that investors not be harmed by fraudulent conduct. Many state and local governments are constitutionally obligated to guarantee defined benefit retirement plans. Therefore, investment losses due to securities fraud fall directly on state and local governments, and ultimately, on taxpayers. If public pension funds are prevented from recovering money lost to securities fraud, the public will suffer.[3]

In recent years, public pension funds have become increasingly concerned about the integrity of U.S. securities markets. Scandals at Enron, WorldCom, Global Crossing, Tyco, Refco, Fannie Mae, Freddie Mac, Adelphia, Xerox, and numerous other public companies have caused hundreds of billions of dollars in losses to innocent investors. As investors who have been materially harmed by corporate fraud, the *amici* have strong interests in ensuring that the law allows injured investors to recover from perpetrators of fraud.

The *amici* strongly believe that investors' ability to redress corporate wrongdoing through private actions under the Securities Exchange Act of 1934 is essential to deter improper conduct and to recoup losses caused by fraud. Indeed, with the enactment of the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 ("PSLRA"), Congress sought "to increase the likelihood that institutional investors will serve as lead plaintiffs," based on its belief "that

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[3] From 2004 to 2007, investment earnings (as opposed to worker or government contributions) constituted between 74 and 82 percent of public pension funding. *See* http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-Apr09.PblcPnsPlns1.pdf.

increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions." H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 732.

While the *amici* are vitally concerned that redress for securities fraud be available, as significant investors in thousands of corporations that never have been touched by even a taint of fraud, the *amici* also have a strong interest in ensuring that such innocent corporations are not subject to premature securities fraud claims and the expenses required to defend such claims. Because adoption of the Petitioners' arguments will result in the filing of premature lawsuits that may never become fully ripe, the *amici* are submitting this brief to assist this Court in developing rules that adequately protect both investors and companies. The *amici* are also concerned that the legal regime foster investors' trust in management and not require investors to disregard or disbelieve, without significant reason, statements by management regarding issues of significance to the corporation.

SUMMARY OF ARGUMENT

The *amici* support the Respondents and believe that the decision of the Third Circuit in *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, 543 F.3d 150 (3d Cir. 2008), *cert. granted*, 129 S. Ct. 2432 (2009) should be affirmed. The Third Circuit articulated a two-part test to determine when the two-year period begins to run based on inquiry notice. Under the first part, the Court addressed whether the plaintiffs had sufficient information of possible wrongdoing to place them on "inquiry notice" or to

excite "storm warnings" of culpable activity to initiate the running of the statute, and under the second part, whether the limitations period should not be deemed to have started because there was a basis upon which plaintiffs could claim that they were unable to discover their injuries. *See Merck*, 543 F.3d at 161. Addressing the first prong (the second prong was not addressed by the Court), the Third Circuit articulated an inquiry notice standard in securities fraud actions, which requires "sufficient information to suspect that the defendants engaged in culpable activity," before the statute of limitations begins to run.[4] This standard is consistent with the plain language of the statute, comports with Congressional intent, and strikes the proper balance among competing policy concerns, namely, the interests in curbing frivolous, premature and poorly-pled lawsuits, while at the same time ensuring that violators of the securities laws do not escape liability, as well as the need to ensure that corporate defendants are not subject to stale lawsuits.

It is the *amici's* position that injured investors should have access to information concerning each of the core elements of a securities fraud action (false statement, scienter and damages) in order to start the running of the statute of limitations. Thus,

[4] Petitioners repeatedly attempt to conflate these two steps so as to impose on plaintiffs the burden of investigating any misstatement even in the absence of sufficient information to suggest culpable activity, and thus advance a standard of inquiry notice that would trigger the statute of limitations based on mere suspicion. Pet. Br. at 13, 22. *Amici* herein address only the standard and information sufficient to trigger the running of the statute of limitations; the *amici* are not addressing the second part of the Third Circuit's two-part test or the standard and quantum of information sufficient to trigger a duty to investigate.

a misstatement, in and of itself, is not sufficient to trigger the statute. Plaintiffs should not be compelled to initiate litigation following a mere misstatement, absent some indication that it was intentionally false.

In recent years, Congress recognized the complexities of securities fraud and specifically amended the statute of limitations to allow defrauded investors adequate time to prepare a complaint that would meet the heightened pleading standards under the PSLRA. Petitioners attempt to subvert Congress's intent and undermine the purposes of the extended limitations period by asking this Court to adopt an inquiry notice standard that would trigger the statute of limitations at the earliest possible date—before an investor even knows, or could or should have known, that a violation exists.

Contrary to Petitioners' suggestion, there is no need for the Court to curtail the statute of limitations out of concern for "vexatious" securities litigation. Subsequent to the enactment of the PSLRA, fewer securities class actions are being filed than in the past.[5] Institutional investors are being appointed as lead plaintiffs, and previous concerns about lawyer-driven and meritless securities lawsuits have been addressed.

In fact, the standard advanced by Petitioners and their *amici* will promote exactly the types of premature and unnecessary lawsuits that Petitioners claim they seek to avoid and will create an envi-

[5] Cornerstone Research, Securities Class Action Case Filings: 2009 Mid-year Assessment, 2 (2009), available at http://securities.cornerstone.com/pdfs/2009_mid-year_assessment.pdf (noting that securities class action filings in the first half of 2009 "dropped below the historical average.")

ronment that fosters distrust between investors and management. Petitioners propose a standard that would require investors to file lawsuits before they have any indication that anyone violated Section 10(b), resulting in lawsuits that otherwise never would have occurred. Moreover, the standard advanced by Petitioners would foster a climate of distrust between investors and corporate America, as according to Petitioners, shareholders must reject all "words of comfort" by management in addressing arguably bad news about a company. This is contrary to the avowed purpose of the federal securities laws, which were designed to foster an environment in which reasonable investors would, and should, trust management. If management's explanation is credible, then investor trust is reasonable.

To prevent premature and unnecessary litigation, foster investor trust in management and confidence in the integrity of capital markets, while still serving the purpose of the statute of limitations, the Court should affirm the Third Circuit's holding and find that mere misstatements without any indication that they were made with knowledge of their falsity are insufficient to constitute "storm warnings" and trigger the running of the statute of limitations within the meaning of Section 1658(b). Applying the Third Circuit's storm warnings standard to the facts in this case demonstrates that the Respondents' claims were timely, as they did not have, nor could they be charged with having, knowledge of the fraud more than two years before they brought their Section 10(b) claims.

ARGUMENT

I. THE THIRD CIRCUIT'S STORM WARNINGS STANDARD, WHICH REQUIRES SUFFICIENT INFORMATION OF CULPABLE ACTIVITY BEFORE THE STATUTE OF LIMITATIONS BEGINS TO RUN, COMPORTS WITH THE LANGUAGE OF SECTION 1658(b) AND WITH THE PURPOSES AND INTENT OF BOTH THE SARBANES-OXLEY ACT AND THE PSLRA

This case requires the Court to clarify when the statute of limitations for claims for violations of Section 10(b) and Rule 10b-5 commences. 15 U.S.C. 78j(b) ("Section 10(b)"); 17 C.F.R. 240 ("Rule 10b-5"). Section 1658(b) requires that such claims be brought within "2 years after the discovery of the facts constituting the violation; or . . . 5 years after such violation." 28 U.S.C. § 1658(b). The narrow question at bar concerns when a plaintiff has constructive knowledge or "inquiry notice" of facts supporting a Section 10(b) claim such that the Section 1658(b) limitations period begins to run.

The Third Circuit articulated a two-part test to determine when the two-year period begins to run based on inquiry notice. First, in accordance with the majority of other circuits, the Third Circuit explained that "[w]hether the plaintiffs, in the exercise of reasonable diligence, should have known of the basis of their claims depends on whether they had sufficient information of possible wrongdoing to place them on 'inquiry notice' or to excite 'storm warnings' of culpable activity." *See Merck*, 543 F.3d at 161, citing *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P.*, 435

F.3d 396, 400 (3d Cir. 2006) (citations omitted).[6] Inquiry notice, in turn, occurs when a "reasonable investor of ordinary intelligence would have discovered the information and recognized it as a storm warning." *Id.*, citing *In re NAHC Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002) (internal quotations omitted). Second, "if the existence of storm warnings is adequately established the burden shifts to the plaintiffs to show that they exercised reasonable due diligence and yet were unable to discover their injuries." 543 F.3d at 161, citing *DeBenedictis v. Merrill Lynch & Co., Inc.*, 492 F.3d 209, 216 (3d Cir. 2007). In the instant case, the Third Circuit's analysis focused on the first part of the inquiry, *i.e.*, the sufficiency of information of possible wrongdoing necessary to trigger the statute of limitations.

The Third Circuit carefully considered that, in light of the heightened pleading requirements of the PSLRA, 15 U.S.C. § 78u-4(b), and its emphasis on discouraging premature and poorly pled allegations of securities fraud, the facts constituting inquiry notice "must be sufficiently probative of fraud—sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated" so

[6] *See also GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 179 (4th Cir. 2007); *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 970 (11th Cir. 2007); *Wolinetz v. Berkshire Life Ins. Co.*, 361 F.3d 44, 48 (1st Cir. 2004); *Ritchey v. Horner*, 244 F.3d 635, 639 (8th Cir. 2001); *Berry v. Valence Tech., Inc.*, 175 F.3d 699, 705 (9th Cir. 1999); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1196 (10th Cir. 1998); *LaSalle v. Medco Research, Inc.*, 54 F.3d 443, 444 (7th Cir. 1995); *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988). *But see Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 193 (2d Cir. 2003) ("The [existence of] fraud must be probable, not merely possible.").

that a plaintiff can marshall those facts and "file a timely suit." *Merck*, 543 F.3d at 164, citing *Fujisawa Pharm. Co., Ltd. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997). Thus, "in the context of a claim alleging falsely-held opinions or beliefs, investors must have sufficient information to suspect that the defendants engaged in culpable activity, *i.e.*, that they did not hold those opinions or beliefs in earnest" before they will be placed on inquiry notice. *Merck*, 543 at 166. Subsequent courts have interpreted this to mean that under the Third Circuit's standard, investors must possess information that the defendant acted with scienter before the statute of limitations begins to run. *See, e.g.*, *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 348 (3d Cir. 2009). As set forth below, the Third Circuit's holding that storm warnings do not exist until there is a sufficient indication that the defendant has engaged in culpable conduct should be affirmed, as it correctly advances the goals of eliminating premature and unnecessary litigation and allowing investors sufficient time to file their complaint, while also freeing defendants of stale claims.

A. THE THIRD CIRCUIT CORRECTLY HELD THAT, FOR CLAIMS OF SECURITIES FRAUD, THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL PLAINTIFFS POSSESS SOME REASONABLE BASIS TO BELIEVE THAT DEFENDANTS ACTED WITH SCIENTER, WHICH IS A REQUIRED ELEMENT OF A SECURITIES LAW VIOLATION

The plain language of Section 1658(b) explicitly states that the two-year discovery period does not begin to run until a plaintiff "discover[s] . . . the

facts constituting the violation." 28 U.S.C. § 1658(b). A violation of Section 10(b) and Rule 10b-5 consists of the following elements: "(1) a material misrepresentation (or omission); (2) scienter, *i.e.*, a wrongful state of mind; (3) a connection with the purchase or sale of a security (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as 'transaction causation;' (5) economic loss; and (6) 'loss causation,' i.e., a causal connection between the material misrepresentation and the loss." *See Dura Pharms.*, *Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (citations omitted). Thus, to state a claim for securities fraud under Section 10(b) and Rule 10b-5, it is undisputed that a complaint must, *inter alia*, "state with particularity facts giving rise to a strong inference" that a defendant acted with scienter (*i.e.*, knowingly or recklessly). *Tellabs*, *Inc. v. Makor Issues & Rights*, *Ltd.*, 551 U.S. 308 (2007). "Scienter is not incidental to § 10(b), it is elemental." *Alaska*, 554 F.3d at 348.

The Third Circuit correctly held that there are no "storm warnings" of securities fraud unless and until there is a reasonable basis to suspect that a material misstatement was made with intent, *i.e.*, that there is "culpable activity." *See Merck*, 543 F.3d at 161; *Alaska*, 554 F.3d at 348. Contrary to Petitioners' assertion, there is no basis for an investor "to suspect the possibility that the defendant has engaged in securities fraud" (Pet. Br. at 21) absent some notice (actual or constructive) that the defendant acted with knowledge (or reckless disregard) that a statement is false. This proposition has been adopted by numerous courts,[7] while a contrary hold-

[7] *See*, *e.g.*, *Alaska*, 554 F.3d at 348; *Sudo Prop.*, *Inc. v. Terrebonne Parish Consol. Gov't*, 503 F.3d 371 (5th Cir. 2007).

ing (the Petitioners' position) would require a lawsuit to be initiated every time a company admitted to an incorrect statement, even if the mistake was wholly innocent.[8]

(plaintiff did not have inquiry notice of securities fraud where plaintiff had no information that defendant had deliberately misstated projections or that defendant was dishonest, disreputable, or otherwise acting inappropriately); *Law v. Medco Research*, 113 F.3d 781, 786 (7th Cir. 1997) (holding that inquiry notice is not triggered until plaintiffs knew or should have known that defendants "made a representation that was knowingly false"); *Betz v. Trainer Wortham & Co., Inc.*, 519 F.3d 863 (9th Cir. 2008) (plaintiff is not on inquiry notice until there exists suspicion of fraud); *In re Moody's Corp. Secs. Litig*, 599 F. Supp. 2d 493, 505 (S.D.N.Y. 2009) (articles claimed by defendants to be storm warnings did not mention fraud nor were sufficient to raise the probability of fraud); *In re DaimlerChrysler AG Sec. Litig.*, 269 F. Supp. 2d 508, 517 n. 5 (D. Del. 2003) (stating that "I am not persuaded that the statute of limitations starts to run before the plaintiffs have notice that the defendants acted with the requisite scienter in making the false misrepresentations in a Rule 10b-5 case."); *Swack v. Credit Suisse First Boston*, 383 F. Supp. 2d 223, 235 (D. Mass. 2004) ("Had [plaintiff] filed solely based upon the news articles and public information that Defendants claim put her on inquiry notice, her case would have been quickly dismissed . . . . Rather, she filed her complaint only after the Massachusetts investigation uncovered damaging e-mails that provide more specific evidence to support her claims."); *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324, 1341 (N.D. Ga. 1998) ("Plaintiffs are not charged with inquiry notice until they knew or should have known that the Defendant acted with the requisite scienter."); *Great Neck Capital Appreciation Investment Partnership, L.P. v. PricewaterhouseCoopers, L.L.P.*, 137 F. Supp. 2d 1114, 1126 (E.D. Wis. 2001) (finding that company's issuance of press release announcing accounting irregularities did not trigger inquiry notice because press release "contained no facts suggesting that . . . the auditor acted with scienter").

[8] Similarly, there would be no reason to suspect a securities fraud violation absent some knowledge that the violation caused any damages. Nor is it good policy to require the filing of

Petitioners contend that the evidence supporting a particular element of a Section 10(b) claim is distinct from evidence supporting other elements, and that the Third Circuit improperly has required that a statute of limitations only begins to run when a plaintiff has information concerning each "discrete" category of information. *See* Pet. Br. at 22 (questioning "bright-line rule" of inquiry notice requiring a plaintiff to "possess[ ] discrete information specifically relating to scienter"); *id.* at 23 ("Under the court of appeals rule, a plaintiff would not be on inquiry notice until he possesses information specifically relating to all of the elements of the violation, including scienter"). Petitioners are wrong—the Third Circuit has not required information on each separate element of a 10b-5 claim before the limitations period has commenced. Under the Third Circuit's ruling, in order to trigger the limitations period, a plaintiff need only have knowledge that a false statement was made, along with an indication that other elements of the claim can be pled—including for instance, some reasonable basis to believe that the misstatement may have been made with knowledge of its falsity.

Petitioners also contend that the Third Circuit held that the limitations period does not begin to run until plaintiffs possess sufficient information to survive a motion to dismiss. Pet. Br. at 28-9. Again, the Third Circuit's inquiry notice standard contains no such requirement. Instead, the Third Circuit clearly explained that a plaintiff "need not know all of the details or 'narrow aspects' of the alleged

securities fraud suits before the market reacts to a corrective disclosure reflecting the revelation of a fraud, s*ee Dura Pharm.*, 544 U.S. at 344, or before there is any evidence supporting other elements of a Section 10(b) claim, as such evidence may never be developed, so the filing would be unnecessary.

fraud to trigger the limitations period; instead, the period begins to run from 'the time at which plaintiff should have discovered the general fraudulent scheme.' " *Merck*, 543 F.3d at 163 (citing *In re NAHC*, 306 F.3d at 1326 (internal quotations omitted)); *see also Benak*, 435 F.3d at 400 ("Plaintiffs cannot avoid the time bar simply by claiming they lacked knowledge of the details or 'narrow aspects' of the alleged fraud. Rather, the clock starts when they 'should have discovered the general fraudulent scheme.' ") (internal citation omitted). Furthermore, the Third Circuit deliberately restricted the quantum of information required to commence the limitations period by employing a "possibility standard," as opposed to a "probability standard," when evaluating "the likelihood of wrongdoing sufficient to constitute storm warnings." *Merck*, 543 F.3d at 164. Thus, while "a probability, in the sense of a nearly certain likelihood, of wrongdoing is not necessary to trigger storm warnings," the facts constituting inquiry notice, including scienter, must be "sufficiently advanced beyond the stage of a mere suspicion . . . to enable [a plaintiff] to tie up any loose ends and complete the investigation in time to file a timely suit." *Id.* at 164 (citing *Fujisawa*, 115 F.3d at 1335). The Third Circuit's inquiry notice standard therefore achieves the proper balance.

B. CONGRESS SPECIFICALLY INTENDED TO LENGTHEN THE LIMITATIONS PERIOD IN ACTIONS BROUGHT UNDER SECTION 10(B) AND RULE 10b-5 SO AS TO ALLOW INVESTORS ADEQUATE TIME TO PREPARE WELL-PLED COMPLAINTS ALLEGING VIOLATIONS OF THE SECURITIES LAWS

According to Petitioners, the "storm" commences for purposes of inquiry notice when the first cloud

appears on the horizon. Under Petitioners' standard, as soon as investors suspect any misstatement, whether innocent (without scienter), immaterial, or inconsequential (no damages), investors must race against the clock to determine whether a violation of the securities laws has actually occurred. Not only does this standard conflict with the statutory language in Section 1658(b) that the two-year limitations period commences upon "discovery" (rather than upon "suspicion of") *facts* constituting the violation, it would stand Congress's intent to avoid unsubstantiated lawsuits on its head. Indeed, under Petitioners' proposed rule, to guard against losing their claims, investors will no doubt file before there is evidence showing that a violation has occurred. By attempting to put plaintiffs on a "stop watch" at an earlier point in time based on a mere suspicion that the defendant made a misstatement, the extended limitations period established by the Sarbanes-Oxley Act would be rendered meaningless. *See* 148 Cong. Rec. S.7418 (July 26, 2002) ("[Section 1658(b)] [was] intended to lengthen any statute of limitations period under federal securities law, and to shorten none.").

Congress enacted the Corporate and Criminal Fraud Accountability Act, Pub. L. No. 107-204, 116 Stat. 800 ("Sarbanes-Oxley Act") following the revelation of several corporate accounting scandals in 2001 and 2002, which shook the financial markets and resulted in billions of dollars in investor losses as the share price of companies, such as Enron, Tyco and WorldCom, imploded amidst allegations of fraud. The Sarbanes-Oxley Act was intended to impose stricter accounting standards and tougher disclosure requirements on corporations in order to make them more accountable to shareholders. *See*

Pub. L. No. 107-204 (preamble) (stating that Sarbanes-Oxley was enacted "to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.")

As part of these sweeping reforms, Congress explicitly addressed the one-year/three-year statute of limitations periods applicable to Section 10(b) claims, which this Court transposed from Section 9(e) of the Exchange Act of 1934.[9] The fallout from *Enron* and other similar cases had made clear that these limitations periods unfairly restricted the ability of defrauded investors to recover, and in some instances, forced investors to forego claims altogether. *See* Senate Rep. No. 146, 107th Cong., 2d Sess. (2002) (noting that "innocent, defrauded investors attempting to recoup their losses face unfair time limitations under current law," and noting that "[i]n Washington state alone, the short statute of limitations may cost hard-working state employees, firefighters and police officers nearly $50 million in lost Enron investments, which they will never recover.").

Moreover, acknowledging Justices O'Connor's and Kennedy's admonition in *Lampf* that the "one and three" limitations period makes securities fraud actions "all but a dead letter for injured investors who by no conceivable standard of fairness or practicality can be expected to file suit within three

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[9] *See Lampf, Pleva, Lipkind, Prupis A. Petigrew v. Gilbertson*, 501 U.S. 350, 364, n. 9 (1991). Notably, the only reform to private rights of action passed as part of the Sarbanes-Oxley Act was the extension of the limitations period. *See* 148 Cong. Rec. S1787 (Daily Ed. Mar. 12, 2002) (Statement of Sen. Leahy) (arguing "[i]t is time that the law be changed to give victims the time they need to prove their fraud cases.").

years after the violation occurred,"[10] Congress recognized that the complexities of securities fraud cases warranted a longer limitations period to allow investors sufficient time to investigate and adequately plead violations of the securities laws. *See* 148 Cong. Rec. S. 7420 (July 26, 2002) ("extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward the perpetrator of a fraud, who successfully conceals its existence for more than three years . . . the short limitations period under current law is an invitation to take sophisticated steps to conceal the deceit.").

Significantly, Congress also noted that a one year statute of limitations running from the date the fraud is discovered is "particularly harsh on innocent defrauded investors":

> This short limitations period has the effect of placing true fraud victims on a "stop watch," from the moment they know that they have been cheated. As most prosecutors and victims will confirm, however, the best cons are designed so that even after victims are cheated, they will not know who cheated them, or how. Especially in securities fraud cases, the complexities of how the fraud was executed often take well over a year to unravel, even after the fraud is discovered. Even with use of the full resources of the FBI, a Special Task Force of Justice Department Attorneys, and the power of a federal grand jury, complex fraud cases such as Enron are difficult to unravel and rarely can be charged within a year.

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[10] *See Lampf*, 501 U.S. at 378 (Kennedy, J., dissenting).

See S. Rep. No. 146, 107th Cong., 2d Sess. (2002); *see also* 148 Cong. Rec. S. 7420 (citing the Enron scandal as an impetus for extending the statute of limitations and explaining, "As recent experience shows, it only takes a few seconds to warm up the shredder, but unfortunately, it will take years for victims to put this complex case back together again."). The inquiry notice standard advocated by Petitioners starts the "stop watch" too early, is inconsistent with the language in Section 1658(b), and undermines the purpose of the extended limitations period established by Congress.

The idea that the statute of limitations begins to run as soon as an investor has a mere *suspicion* that a misstatement exists also conflicts with this Court's recent decision in *Tellabs*, 551 U.S. at 308, where this Court held that a complaint must "state with particularity facts giving rise to a strong inference" that a defendant acted with scienter (*i.e.*, knowingly or recklessly). It would be anomalous to elevate the standards for pleading scienter in a securities fraud case while at the same time requiring investors to suspect fraud in every error, and then bring those claims before they had, or should in the exercise of reasonable diligence have acquired, the "facts constituting the violation," *i.e.*, the kind of information needed to meet the *Tellabs* pleading standard.

C. PETITIONERS' PROPOSED STANDARD UNDERMINES THE POLICIES AND OBJECTIVES OF THE PSLRA

With the enactment of the PSLRA in 1995, Congress sought to address certain perceived "abusive practices" and reduce the number of purportedly "frivolous" lawsuits that survive motions to

dismiss.[11] To further these goals, the PSLRA imposed heightened pleading requirements for alleging false and misleading statements and scienter. *See*, *e.g.*, 15 U.S.C. § 78u-4(b)(1) (complaint alleging misleading statements or omissions must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed"); 15 U.S.C. § 78u-4(b)(2) (requiring plaintiffs to plead with particularity facts "giving rise to a strong inference that the defendant acted with the required state of mind"). Thus, in order to survive a motion to dismiss, plaintiffs must state with particularity "both the facts constituting the alleged violation, and the facts evidencing scienter, *i.e.*, the defendant's intention to deceive, manipulate, or defraud." *Tellabs*, 551 U.S. at 308 (quotation omitted) (citing 15 U.S.C. § 78u-4(b)(1), (2)). Petitioners' proposed inquiry notice standard does not comport with the purposes and intent of the PSLRA or the recent amendment to Section 1658(b).

One of the main objectives of the PSLRA was to decrease the filing of premature and unnecessary securities lawsuits. *See Alaska*, 554 F.3d at 351 ("A rule that would place investors on inquiry notice of fraud the moment that the FDA questions the seemingly good faith scientific analysis of a pharmaceutical company would encourage putative plaintiffs to

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[11] *See* H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.), reprinted in 1995 U.S.C.C.A.N. 730; *see also Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003) (discussing enactment of the PSLRA in response to an increase in securities fraud lawsuits perceived as frivolous).

file premature securities suits. In imposing heightened pleading requirements, Congress evinced an intent to discourage such suits."); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 171 (2d Cir. 2005), ("[T]he level of particularity in pleading required by the PSLRA is such that inquiry notice can be established only where the triggering data 'relates directly to the misrepresentations and omissions' alleged."), *quoting Newman*, 335 F.3d at 193 (emphasis omitted). The correct standard of inquiry notice must not "require specific factual allegations . . . and then . . . punish the pleader for waiting until the appropriate factual information can be gathered by dismissing the complaint as time barred." *Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 104 (2d Cir. 2003); *see also* S. Rep. No. 146, 107th Cong., 2d Sess. (2002) (noting "perverse incentive for victims to race into court," while "[p]laintiffs who wish to spend more time investigating . . . are punished under the [then-] current law."). Under Petitioners' standard, investors will be forced to file suit upon mere notice of a possible misrepresentation, even where such suits may never be ripe as information is never developed or discovered supporting key elements of the claim.[12]

[12] Under Petitioners' standard, not only will investors be compelled to bring lawsuits before there is information sufficient to support the initiation of a claim, investors risk Rule 11 sanctions based on their failure to file an adequately pled complaint. *See*, *e.g.*, *ATSI Commc'ns*, *Inc. v. Shaar Fund*, *Ltd.*, 579 F.3d 143 (2d Cir. 2009) (affirming sanctions against plaintiff's lawyers for bringing frivolous Section 10(b) action that failed to meet the requirements of Fed. R. Civ. P. Rule 9(b)). *See also* PSLRA, 15 U.S.C. § 78u-4(c)(3)(A)(ii) (sanction for frivolous Section 10(b) claim "is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.").

Additionally, Petitioners' standard encourages defendants to manipulate their disclosures so as to trigger the statute of limitations, but then to use the PSLRA as a shield to prevent innocent, defrauded investors from bringing and maintaining meritorious lawsuits. *See* S. Rep. No. 146, 107th Cong. 2d Sess. (2002) ("In many securities fraud cases the short [one-year] limitations period under current law is an invitation to take sophisticated steps to conceal the deceit.") For example, a company may disclose that its prior statements were false, but not disclose (or wait two years to disclose) that insiders intended to misrepresent facts in the first place.

Finding that the statute of limitations commences when circumstances "place the potential plaintiff in possession of, or with ready access to, the essential facts he needs in order to be able to sue," *Fujisawa*, 115 F.3d at 1337, strikes the proper balance between the ability of class members to bring claims under the stringent pleading requirements of Fed. R. Civ. P. Rule 9(b) and the PSLRA, and the rights of defendants to have peace two years after claims against them have been, or should have been, discovered. *See Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 (7th Cir. 1997) ("[I]nquiry notice does not begin to run unless and until the investor is able, with the exercise of reasonable diligence (whether or not actually exercised), to ascertain the information needed to file suit."), *cited with approval in NAHC*, 360 F.3d at 1325 n.4; *Benak* 435 F.3d at 401 ("Undergirding the inquiry notice analysis is the assumption that a plaintiff either was or should have been able, in the exercise of reasonable diligence, to file an adequately pled securities fraud complaint as of an earlier date."); *Lentell*, 396 F.3d at 168 ("So no claim should be filed unless and until it can be supported

by specific factual allegations" sufficient to meet the requirements of the PSLRA). Thus, Petitioners' arguments should be rejected.

D. INVESTORS SHOULD NOT BE DEEMED ON INQUIRY NOTICE WHERE MANAGEMENT REASSURANCES THROUGH "WORDS OF COMFORT" ALLAY INVESTOR CONCERNS AND DISCOURAGE INQUIRY INTO POTENTIAL VIOLATIONS

It is undisputed that "[t]here are occasions when, despite the presence of some ominous indicators, investors may not be considered to have been placed on inquiry notice because the warning signs are accompanied by reliable words of comfort from management." *LC Capital Partners, LP v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 155 (2d Cir. 2003). *See also DeBenedictis*, 492 F.3d at 218 (quoting *LC Capital*); *In re Alstom S.A.*, 406 F. Supp. 2d 402, 421 (S.D.N.Y. 2005) (same); *In re Pronetlink Sec. Litig.*, 403 F. Supp. 2d 330, 334-35 (S.D.N.Y. 2005) (rejecting defendants' argument that inquiry notice was triggered by defendants' downward revision of its subscriber numbers long before filing of complaint; "these disclosures were contravened by several allegedly false and misleading statements that could have caused a reasonable shareholder to think all was well;" for example, a defendant later stated at a shareholders' meeting that company had "very strong revenue-producing possibilities"). *Accord Sedona Corp. v. Ladenburg Thalmann & Co*, No. 03 Civ. 3120, 2005 WL 1902780, at *8 (S.D.N.Y. Aug. 9, 2005) (duty of inquiry not triggered when storm

warnings were tempered by defendant's specific denial of wrongdoing).[13]

Where the lulling statements, words of comfort or reassurances from management involve a scientific or technical issue, courts are especially ready to extend the date on which the statute of limitations begins to run. For example, in *Alaska*, 554 F.3d at 342, the Third Circuit held that investors were not put on inquiry notice of securities fraud based on a pharmaceutical company's materially false statements about a clinical study of Celebrex when an apparently legitimate scientific dispute arose between the FDA and Pharmacia. The Third Circuit reasoned that the thirteen months duration of the clinical study and a technical dispute between scientists about whether to use the full data or only a

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[13] *See also Siebert v. Nives*,, 871 F. Supp. 110 (D. Conn. 1994) (management's words of comfort were enough to dispel storm warnings caused by an ongoing FDIC investigation); *Lapin v. Goldman Sachs*, 506 F. Supp. 2d 221 (S.D.N.Y. 2006) (alarming newspaper reports and filing of an action for breach of fiduciary duty against brokers were insufficient to trigger commencement of limitations period where management reassurances "could persuade a reasonable investor into thinking that" storm warnings were innocuous); *Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) (reversing statute of limitations-based dismissal and holding that auditor's letters to management did not amount to storm warnings and plaintiff was not on inquiry notice where auditor gave company a clean bill of financial health and made specific reassurances that certain reportable conditions "did not represent material weaknesses in the company's reporting systems"); *Newman*, 335 F.3d at 187 ("It was reasonable for plaintiffs not to inquire into [defendant's] statements because [defendant] had provided a seemingly benign explanation"); *In re Charles Schwab Corp. Sec. Lit.*, 257 F.R.D. 534 (N.D. Cal. 2009) (comfort words effective to dispel storm warning that investments were actually high risk despite a drop in net asset value and declining account balances).

portion of the data did not provide storm warnings of fraud to reasonable investors, and Pharmacia's reassuring statements operated as a sort of antidote to any storm warnings that may have existed. Similarly, in *Nathel v. Siegal*, 592 F. Supp. 2d 452 (S.D.N.Y. 2008), the defendants argued that certain conversations between themselves and plaintiffs put the plaintiffs on notice of the suspicious nature of the investments. The court rejected the defendants' arguments based on the technical nature of the fraud (involving tax rules applicable to oil and gas investments and the expertise of the defendants issuing the comfort words). *See also Seippel v. Sidley, Austin, Brown and Wood, LLP*, 399 F. Supp. 2d 283 (S.D.N.Y 2005) (IRS public guidance notices insufficient to put plaintiffs on inquiry notice because an assessment of accuracy of law firm's and financial services firm's comfort words "required more legal expertise than can be demanded of ordinary taxpayers.").

The inquiry notice standard advocated by Petitioners—effectively requiring investors to disbelieve or disregard all words of comfort from management —places an undue burden on investors and fosters distrust between companies and their investors that will be destructive to the financial markets. Contrary to Petitioners' contention, investors should not be required to suspect that every disclosure is fraudulent. *See Shapiro* v. *UJB Finan. Corp.*, 964 F.2d 272, 282 (3rd Cir. 1992) (construing *Virginia Bankshares*, 501 U.S. 1083, 1090-96 (1991)) (investors had no reason to doubt defendants' expressed beliefs, as it is well-settled that "a reasonable investor need not take a manager's statement of belief at anything less than face value."). Such a "guilty until proven innocent" standard is expensive, time consuming and

inefficient, and imposes on investors a heavy burden to inquire into every potential misstatement or else risk losing the ability to prosecute meritorious claims based on untimeliness.[14]

Petitioners' approach is also at odds with the presumption in open-market federal securities fraud actions that investors are entitled to rely on the market's investigation of a company's business and prospects as reflected in the company's stock price. *See Basic Inc. v. Levinson*, 485 U.S. 224, 244 (1988) ("With the presence of a market, the market is interposed between seller and buyer and, ideally, transmits information to the investor in the processed form of a market price. . . . The market is acting as the unpaid agent of the investor, informing him that given all the information available to it, the value of the stock is worth the market price.") (citation omitted). The standard advanced by Petitioners would foster a destructive environment in which investors could no longer rely on statements by management.

II. THE THIRD CIRCUIT CORRECTLY HELD THAT RESPONDENTS' CLAIMS WERE TIMELY

Petitioners cannot point to any fact suggesting that Respondents were aware, on or before November 6, 2001 (two years prior to November 6, 2003, when the first securities fraud complaint was filed), that Petitioners had fraudulently misrepresented their belief in the so-called "naproxen hypothesis."[15]

[14] *See*, *e.g.*, Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 Econ. J. 295, 298 (2001).

[15] The case involves claims that Merck misrepresented to investors information about increased risks of adverse cardiovascular events resulting from use of its blockbuster drug Vioxx.

Petitioners argue, and the District Court below held, that a September 21, 2001 FDA letter criticizing Merck's promotion of Vioxx provided inquiry notice of possible claims against Merck concerning Vioxx and effectively constituted rejection of the naproxen hypothesis. That letter does no such thing, as it did not specifically address any alleged false statements by Merck regarding its belief in the naproxen hypothesis. Rather, the FDA focused on Merck's promotional campaign for Vioxx—not on the scientific basis for the naproxen hypothesis or the increased risks of Vioxx. In the letter, the FDA stated that Merck's "promotional activities and materials" for the marketing of Vioxx were "false, lacking in fair balance, or otherwise misleading in violation of the Federal Food, Drug, and Cosmetic Act (the Act) and applicable regulations." 543 F.3d at 156-157. The letter explained:

> Although the exact reason for the increased rate of MIs observed in the Vioxx treatment group is unknown, your promotional campaign selectively presents the following hypothetical explanation for the observed increase in MIs. You assert that Vioxx does not increase the risk of MIs and that the VIGOR finding is consistent with naproxen's ability to block platelet aggregation like aspirin. ***That is a possible explanation***, but you fail to disclose that your explanation is hypothetical, has not been demonstrated by substantial evidence, and that there is

Such risks potentially were evident from a clinical trial known as VIGOR, but Merck argued that the results were caused by the cardio-protective effects of the comparator drug used in the trial — naproxen. This latter claim is the "naproxen hypothesis."

> another reasonable explanation, that Vioxx may have pro-thrombotic properties.

Id. As the Third Circuit correctly decided, the FDA letter did not provide storm warnings of securities fraud to investors because it did not address any purported misrepresentations.[16] The FDA merely was enforcing regulations that provide that advertisements must not be "lacking in fair balance," 21 C.F.R. § 202.1(e)(6), and prohibit advertisements that " '[c]ontain[ ] a representation or suggestion that a drug is safer than it has been demonstrated to be by substantial evidence or substantial clinical experience . . . or otherwise selects information from any source in a way that makes a drug appear to be safer than has been demonstrated.' " *Id.*

Second, as noted by the Third Circuit, "the FDA did not charge that the naproxen hypothesis was wrong or that Merck did not believe in the validity of its hypothesis; rather, the agency simply directed Merck to be more clear about the widely known

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[16] *See Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406 (2d Cir. 2008) (reversing district court dismissal of complaint as barred by securities fraud statute of limitations because, *inter alia*, negative industry newsletters and state lawsuits against defendant relied on in defendant's motion to dismiss did not clearly demonstrate plaintiff should have discovered the fraudulent conduct); *Alaska*, 554 F.3d at 342 (inquiry notice, in securities fraud suits, ***requires storm warnings indicating that defendants acted with scienter***); *Sudo*, 503 F.3d at 371 (plaintiff did not have inquiry notice of securities fraud where plaintiff had no information that defendant had deliberately misstated projections or that defendant was dishonest, disreputable, or otherwise acting inappropriately); *Law*, 113 F.3d at 786 (inquiry notice not triggered until plaintiffs knew or should have known that defendants "made a representation that was knowingly false"); *Betz*, 519 F.3d at 863 (plaintiff is not on inquiry notice until there exists suspicion of fraud).

alternative hypothesis in its dealings with health care professionals and, presumably, consumers." *Merck* 543 F.3d at 170-71.

The FDA letter also could not be a storm warning because it had no effect on Merck's stock price, which dipped slightly following the disclosure of the FDA warning letter before closing higher than it did before that disclosure just a week and a half later. The Third Circuit held that "[a]lthough the lack of significant movement in Merck's stock price following the FDA letter is not conclusive, it supports a conclusion that the letter did not constitute a sufficient suggestion of securities fraud to trigger a storm warning of culpable activity under the securities laws." *Id.* (asserting that the "negligible impact" of an alleged storm warning on defendant's stock price bolstered conclusion that inquiry notice was not triggered).

Further dispelling any possibility that the FDA letter could constitute a storm warning were the repeated public reassurances by Merck that the company stood behind the naproxen hypothesis. For example, in an April 2002 conference call discussing Vioxx labeling changes, a Merck spokesperson reiterated the company's "belief that the effect seen in VIGOR were [sic] the results of the anti-platelet effect of naproxen. . . . So, I think that's a position Merck has always had and now its [sic] quite clearly laid out in the labeling."). *Merck*, 543 F.3d at 159 (Merck continued to reassure the investing public by use of the naproxen hypothesis).[17] At this time,

[17] The first lulling statement was issued on March 27, 2000, to the effect that in VIGOR, "significantly fewer thromboembolic events were observed in patients taking naproxen in the GI outcomes study, which "***is consistent with naproxen's ability to block platelet aggregation***." *Id.* at 168, 171 (emphasis added).

Respondents had no actual or constructive knowledge that there was a possibility that Vioxx significantly increased adverse cardiovascular events and was not commercially viable or that Merck did not believe the naproxen hypothesis. As the Third Circuit held, "reassurances can dissipate apparent storm warnings if an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns." *Merck*, 543 F.3d at 168 n.14.[18]

There was no reason to suspect that Merck did not believe the naproxen hypothesis until a study at Harvard in 2003 revealed an increased risk of heart attack in patients taking Vioxx compared with patients taking Celebrex and placebo. The study by the Harvard-affiliated Brigham and Women's Hospital found an increased risk of heart attack in patients taking Vioxx compared with patients taking a comparator drug and placebo. The Third Circuit correctly held that the Harvard study "for the first time belied Merck's repeated assurances that naproxen

[18] *See also In re Ashanti Goldfields Sec. Litig.*, No. CV 00-0717 (DGT), 2004 WL 626810 (E.D.N.Y. Mar. 30, 2004) (denying defendant's motion to dismiss on statute of limitations grounds and holding that defendant's repeated statements of reassurance "allayed any concerns to the average investor"); *Lapin*, 506 F. Supp. 2d at 236 (where "investors were. . .being fed reassuring statements by Goldman" and where these announcements were "made both contemporaneously with and post-dating the news articles and the filing of the *Stefansky* complaint" and "reiterated the independence and objectively of Goldman's equity research . . . without qualification" the court found that "a reasonable investor's understanding of the extent of the alleged conflicts at Goldman during the Class Period did not, as a matter of law, give rise to a duty of inquiry"); *In re eSpeed, Inc. Sec. Litig.*, 457 F. Supp. 2d at 285 (S.D.N.Y. 2006) (duty to inquire not triggered where lulling statements were "reinforced" by defendants).

was responsible for the disparity in CV events in VIGOR and that Vioxx did not have a higher incidence of CVs compared to placebo . . . ." *Id.* at 172. Moreover, after the publication of the Harvard study, Merck's stock price dropped below the S & P 500 Index, and did not rise above that index during the remainder of the class period. *Id.*, at 159.

Prior to the publication of the Harvard Study and the Wall Street Journal article of October 30, 2003 entitled "VIOXX Study Sees Heart-Attack Risk," there was conflicting information regarding the cardiovascular safety profile of Vioxx. Moreover, whenever Merck did release safety data concerning Vioxx (such as the VIGOR study) Merck claimed that any adverse cardiovascular effect shown when Vioxx was compared to naproxen could be explained by "naproxen's ability to block platelet aggregation." *See id.* at 154. Thus, the VIGOR study did not establish that Petitioners committed fraud. It merely showed that Petitioners may have been wrong on the science, but provided no information to Respondents that they could use to allege that Petitioners had knowingly withheld pertinent information about Vioxx from the public. *See*, *e.g.*, *Lentell*, 396 F.3d at 171 ("The articles cited by the district court described the conflicted situation of Wall Street's research analysts; but evidence of the outright falsity of Merrill Lynch's investment recommendations is stray and indiscriminate at best, and is insufficient to put plaintiffs on inquiry notice of the specific frauds alleged."); *Alaska*, 554 F.3d at 351 (inquiry notice of fraud not triggered by mere FDA questioning of the seemingly good faith scientific analysis of a pharmaceutical company).

As a result, the Third Circuit held, the statute of limitations did not begin to run until the Harvard study, only weeks prior to the filing of the first class-action securities complaint. *In re Merck*, 543 F.3d at 160. Accordingly, the Third Circuit's decision below is correct and should not be reversed.

Investors should not be required to file a securities fraud action as soon as management makes any statement that could *possibly* be false unless there are other facts that suggest that the misleading statement by company management was made with scienter. Nor should the mere questioning by third parties of statements by a company's management be sufficient to trigger the running of the limitations period for investors to bring a Section 10(b) claim. *See*, *e.g.*, *Lentell*, 396 F.3d at 171; *In re DaimlerChrysler*, 269 F. Supp. 2d at 511 (holding that 35 newspaper articles and press releases, "in which analysts and 'persons close to the negotiations' questioned whether the merger was really a merger of equals" failed to trigger limitations period for claims that defendants' statements that merger would be "merger of equals" were false) (citation omitted). *See also In re Alcatel Sec. Litig.*, 382 F. Supp. 2d 513, 527 (S.D.N.Y. 2005) (although public sources discussed the need to improve the company's inventory control processes and reduce inventory, "none of these events, although indicative of a potential inventory problem, were sufficient storm warnings to indicate to Plaintiffs the probability of a fraudulent failure to write down inventory in a timely fashion"); *Benak*, 435 F.3d at 402 ("[s]peculation should not be given the same weight as reports of objective wrongdoing."); *Berry*, 175 F.3d at 705 ("A press article's general skepticism about a company's future prospects is not sufficient

to excite inquiry into the specific possibility of fraud.”).

CONCLUSION

As set forth above, consistent with Congress’ policies to prevent premature and unnecessary litigation and foster an environment in which investors can place their trust in management, while also providing investors redress for securities fraud, this Court should find that investors are on inquiry notice of a possible Section 10(b) claim only when they have some indication that false statements were made with knowledge of their falsity. Accordingly, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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