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 OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS IN SUPPORT OF RESPONDENTS

KEVIN P. RODDY
Chair, NASCAT Amicus Committee
WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Woodbridge, NJ 07095
(732) 636-8000

FREDERIC S. FOX
Counsel of Record
DONALD R. HALL
AVIAH COHEN PIERSON
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
(212) 687-1980

Counsel for Amicus Curiae

225988

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Shareholder and Consumer Attorneys ("NASCAT") is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent investors (both institutions as well as individuals) in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are dedicated to representing victims of fraudulent schemes, and so-called "white collar" criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and providing compensation and access to justice for the wrongs inflicted upon victims. NASCAT advocates the principled interpretation and application of the federal securities laws – including the Securities Exchange Act of 1934 ("Exchange Act"), the Securities Act of 1933 ("Securities Act"), and the Private Securities Litigation Reform Act of 1995 ("PSLRA") – in order to protect investors from manipulative, deceptive and fraudulent practices, and to ensure that this nation's capital markets operate fairly and efficiently. Together with other public interest groups, NASCAT has previously filed *amicus curiae* briefs in this Court in cases involving

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents with respect to the filing of this brief.

the construction and application of the federal securities laws.[2]

INTRODUCTION

This action concerns the correct construction and interpretation of 28 U.S.C. § 1658(b), the statute of limitations provision that applies to securities fraud actions brought under the Exchange Act. This provision states that "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement . . . may be brought not later than the earlier of . . . 2 years after the discovery of the facts constituting the violation; or . . . 5 years after such violation." Congress adopted 28 U.S.C. §1658(b) as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 801 ("Sarbanes-Oxley"), in response to this Court's decision in *Lampf*, *Pleva*, *Lipkind*, *Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991). In *Lampf*, the Court held that securities fraud claims were governed by a uniform federal limitations period and must be brought within the earlier of one year "after discovery of the facts constituting the violation" or three years after such

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2. *See Tellabs*, *Inc. v. Makor Issues & Rights*, *Ltd.*, 551 U.S. 308 (2007) (NCPERS-NASCAT); *Merrill Lynch*, *Pierce*, *Fenner & Smith*, *Inc. v. Dabit*, 547 U.S. 71 (2006) (NASCAT-AARP); *Dura Pharmaceuticals*, *Inc. v. Broudo*, 544 U.S. 336 (2005) (AARP-NASCAT-Consumer Federation of America); *S.E.C. v. Zandford*, 535 U.S. 813 (2002) (AARP-NASCAT); *Central Bank of Denver*, *N.A. v. First Interstate Bank of Denver*, *N.A.*, 511 U.S. 164 (1994) (NASCAT); *Musick*, *Peeler & Garrett v. Employers Inc. of Wausau*, 508 U.S. 286 (1993) (NASCAT).

violation. *Id.* at 363. While Congress, in 2002, extended the relevant periods of limitation and repose to two years and five years respectively, it retained *Lampf's* trigger for the limitations period to begin running upon "discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). Securities fraud claims may be based on material misstatements of facts or misstatements of "reasons, opinion, or belief." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 (1991).

Securities fraud is often difficult to uncover and securities fraud cases are typically complex. Justice Kennedy highlighted this issue in *Lampf*:

> The real burden on most investors, however, is the initial matter of discovering whether a violation of the securities laws occurred at all. This is particularly the case for victims of the classic fraudlike case that often arises under § 10(b). . . The most extensive and corrupt schemes may not be discovered within the time allowed for bringing an express cause of action under the 1934 Act.

Lampf, 501 U.S. at 377 (Kennedy, J., dissenting); *see also* S. Rep. No. 104-98, at 42 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 726 (discussing the statute of limitations provision of the Exchange Act and stating "[e]vents only come to light years after the original distribution of securities and the Lampf cases could well mean that by the time investors discover they have a case, they are already barred from the courthouse").

Nonetheless, Petitioners and their *amici* suggest that the statute of limitations contained in 28 U.S.C. § 1658(b) – which Congress enacted to give plaintiffs ***more*** time to bring suit – should now be interpreted so as to provide ***less*** time for plaintiffs to bring viable securities fraud suits.

ARGUMENT

I. The Statute Of Limitations Provision Should Be Interpreted With An Understanding Of The Critical Role Played By Private Securities Litigation To Combating Securities Fraud

This Court has acknowledged on numerous occasions the importance of the private right of action for securities fraud as a supplement to government enforcement. *See*, *e.g.*, *Tellabs*, 551 U.S. at 313 (private actions are an "essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission"); *Dura*, 544 U.S. at 345 ("the availability of private securities fraud actions" acts to deter fraud and thereby helps maintain "public confidence in the [securities] marketplace"); *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (private right of action "constitutes an essential tool for enforcement of the 1934 Act's requirements") (citations omitted); *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986) (noting "the deterrent value of private rights of action" under the securities laws); *Bateman Eichler, Hill Richards*, *Inc. v. Berner*, 472 U.S. 299, 310 (1985) ("implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and

are 'a necessary supplement to [SEC] action'") (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) ("the interests of plaintiffs in [private securities fraud cases] are significant [and since] [d]efrauded investors are among the very individuals Congress sought to protect in the securities laws[,] [i]f they prove that it is more likely than not that they were defrauded, they should recover.")

The SEC has also acknowledged the importance of private securities litigation. In Congressional testimony, former SEC Chairman Arthur Levitt stated, "Private actions are crucial to the integrity of our disclosure system because they provide a direct incentive for issuers and other market participants to meet their obligations under the securities laws." S. Rep. No. 104-98, at 38 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 716. Similarly, in 1991 then Chairman Richard Breeden testified before the Banking Committee that private securities actions were an "essential tool in the enforcement of the federal securities laws. Because the Commission does not have adequate resources to detect and prosecute all violations of the federal securities laws, private actions perform a critical role in preserving the integrity of our securities markets." *Id.* at 37; 1995 U.S.C.C.A.N. at 716.

Private securities actions are also necessary to ensure that meaningful recovery is provided to victims of securities fraud. Private actions routinely recover significantly more money for distribution to shareholders than comparable SEC settlements. For example, the securities class action against Enron Corp., which settled

in 2007 for an aggregate amount of more than $7.2 billion, was the largest securities class action settlement since the passage of the PSLRA; in fact, it represented the largest settlement in class action history. *See* Coughlin Stoia Geller Rudman & Robbins LLP, *Securities Fraud* (2009), http://www.csgrr.com/csgrr-cgi-bin/mil?templ=firm/practice-areas-sec.html. By contrast, the SEC's Enron-related settlement fund held only approximately $440 million as of February 2007. *See* U.S. Securities and Exchange Commission, *Enron* (May 14, 2007), http://www.sec.gov/divisions/enforce/claims/enron.htm. Likewise, in the *WorldCom* litigation, the SEC obtained $750 million for investors, while the related securities class action obtained approximately $6.1 billion for investors. *Compare* U.S. Securities and Exchange Commission, *The Honorable Jed Rakoff Approves Settlement of SEC's Claim for a Civil Penalty Against Worldcom* (July 7, 2003), http://www.sec.gov/news/press/2003-81.htm (SEC press release discussing approval of the WorldCom settlement for $750 million in cash and stock), *with* Barrack, Rodos & Bacine, *Case Study: Worldcom* (2009), http://www.barrack.com/Case-Study-Worldcom-3910.html (discussing private settlement in WorldCom securities class action for more than $6.13 billion). The *Dynegy* case provides another example. The private securities class action recovered in excess of $474 million for shareholders while the SEC settled its related Dynegy case for only $3 million. *Compare* University of California, *Federal Court Approves Dynegy Securities Fraud Settlement* (July 8, 2005), http://www.universityofcalifornia.edu/news/article/10110, *with* U.S. Securities and Exchange Commission, *Dynegy Settles Securities Fraud Charges Involving SPEs, Round-Trip Energy Trades* (Sept. 24, 2002), http://www.sec.gov/news/press/2002-140.htm.

Nonetheless, certain of Petitioners' *amici* assert that securities class actions are meritless, abusive and encourage forced settlements which ultimately reduce shareholder value. *See* Brief for Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioners at 30-32, *Merck & Co., Inc., et al., v. Richard Reynolds, et al.*, No. 08-905; Brief for The Pharmaceutical and Research Manufacturers of America as Amicus Curiae Supporting Petitioners, at 5-6, *Merck & Co., Inc., et al., v. Richard Reynolds, et al.*, No. 08-905. Not only are these assertions belied by the oft-repeated statements of this Court and the SEC, such massive and infamous securities frauds as those perpetrated by Bernard Madoff, Alan Stanford, and numerous other companies and individuals show that the need for private enforcement of the securities laws is as great as ever.

II. A Restrictive Interpretation Of The Statute Of Limitations Is Inconsistent With Congressional Intent

Petitioners also ignore the fact that Congress has already enacted legislative measures to protect companies from abusive, frivolous actions. Congress (via the PSLRA) has heightened the pleading standards applicable to securities fraud actions, prohibited abusive practices, including the payment of bounties to named plaintiffs, encourages defendants to fight abusive claims, and sought to increase participation by large institutional investors. *See, e.g.*, 15 U.S.C. § 78u-4(a)(2)(A)(vi); 15 U.S.C. § 78u-4(b)(1)(B); 15 U.S.C. § 78u-4(b)(2).[3] The PSLRA also imposed a mandatory

3. The heightened pleading standard requires a complainant to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

discovery stay until the complaint survives a motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B). The discovery stay is intended to prevent perceived pre-PSLRA abusive discovery tactics by directing district courts to first determine the legal sufficiency of the claims in securities fraud class actions before permitting any discovery to be served. *See Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107 (2d Cir. 2001). Thus, this provision of the PSLRA creates a powerful incentive not to file flimsy complaints in an effort to force settlements by defendants.[4]

The PSLRA is achieving its goal of eliminating frivolous litigation.[5] For example, dismissal rates of securities class actions have risen measurably since the passage of the PSLRA. Between 1991 and 1995, dismissals accounted for just under 20% of dispositions

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4. Nevertheless, interpreting the statute of limitations in the way Petitioners and their *amici* suggest would frustrate the goal of the PSLRA to eliminate frivolous lawsuits by actually encouraging plaintiffs to file complaints early in an attempt to avoid the running of the statute of limitations.

5. It is recognized that while the PSLRA was intended to eliminate frivolous litigation, it was not intended to eliminate meritorious securities fraud complaints. *See, e.g.*, *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1235 (9th Cir. 2004) ("The PSLRA was designed to eliminate frivolous actions, but not actions of substance."); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002) ("[The PSLRA] was not enacted to raise the pleading burdens under Rule 9(b) and section 78u-4(b)(1) to such a level that facially valid claims must be routinely dismissed on Rule 9(b) and 12(b)(6) motions . . . [T]he PSLRA may have changed federal securities law; it did not eliminate it") (citations omitted).

of securities fraud class actions. *See* Todd Foster, Ronald I. Miller, Ph.D. and Stephanie Plancich, Ph.D., *Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar*, NERA Economic Consulting Study (Jan. 2007), at 4 (available at www.nera.com/publication.asp?P_ID=3028). However, between 2000 and 2004, that rate increased to 38.2%. *See id*; *see also* Stephen J. Choi and Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes After the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1501 (2006) (citing a report indicating that the PSLRA has discouraged filing frivolous actions but not meritorious ones against companies with highly volatile stocks).[6] The PSLRA's goal of increased participation by institutional investors has also been accomplished. *See* Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U.L.Q. 869, 879 (2005) (discussing the fact that public pension funds

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6. The Brief for the Chamber of Commerce notes that despite these efforts by Congress to reign in abusive securities litigation, the number of securities class action filings is actually rising. *See* Brief for Chamber of Commerce of the U.S. as Amicus Curiae Supporting Petitioners at 32, *Merck & Co.*, *Inc.*, *et al.*, *v. Richard Reynolds*, *et al.*, No. 08-905. However, what this brief fails to take into consideration is that the driver for the increased filings, particularly in 2008, has been the recent number of frauds related to the collapse of numerous financial institutions which accumulated undisclosed billions in ultra-risky securities including subprime debt. *See* Stephanie Plancich & Svetlana Starykh, *2008 Trends in Securities Class Actions*, NERA Economic Consulting (Dec. 2008), at 1 (available at www.nera.com/publication.asp?P_ID=3674). Thus, this increase in filings should be viewed as an unusual event.

in particular have become more active in securities class action litigation as a result of the PSLRA).

One action that Congress did ***not*** take in trying to cut down on abusive Section 10(b) litigation was to truncate the statute of limitations applicable to such actions. That is because the statute of limitations does not go to the merits of such actions, but rather addresses only their timeliness. Congress was presumably well aware that defendants have frequently moved to dismiss on the grounds of statute of limitations, including in cases involving some of the most egregious of frauds. *See*, *e.g.*, *In re Tyco Int'l Ltd.*, No. MDL 02-1335-B, 02-266-B, 2004 WL 2348315, at *18 (D.N.H. Oct. 14, 2004); *In re AOL Time Warner*, *Inc.*, *Sec. & ERISA Litig.*, 381 F. Supp. 2d 192, 210 (S.D.N.Y. 2004); *In re Enron Corp. Sec. Litig.*, No. MDL-1446, 2004 WL 764664, at *1 (S.D. Tex. Mar. 31, 2004).

Indeed, not only did Congress not truncate the statute of limitations for securities actions, it ***expanded*** the statute of limitations for such actions. In so doing, it appears that Congress was specifically aware of the additional and unprecedented pleading burdens that it had imposed on securities fraud plaintiffs when it passed the PSLRA seven years earlier in 1995, and decided to lengthen the statute of limitations to give plaintiffs – who had already discovered a violation – additional time to develop the particularized facts needed to plead a strong inference of scienter as to each possible defendant. *See* S. Rep. 107-146, at 9 (2002) (discussing one year statute of limitations being unfair "when considered in light of the significant obstacles that current law places between a victim and the courthouse

in securities fraud cases."). Petitioners' proposed rule is therefore irreconcilable not only with the plain text of the statute, but with the statute's legislative history. Congress surely did not intend for its expansion of the limitations period to benefit the Bernard Madoffs of the world at the expense of victims of such fraud – particularly when Congress had the opportunity to adopt a more traditional "accrual rule" and instead expressly enacted a "discovery rule."

Moreover, Courts have expressly recognized that a restrictive interpretation of the statute of limitations would frustrate Congress' intent in enacting the PSLRA by leading to more "premature and groundless suits." *Law v. Medco Research, Inc.*, 113 F.3d 781, 786 (7th Cir. 1997); *see also Mathews v. Kidder Peabody & Co., Inc.*, 260 F.3d 239, 253 (3d Cir. 2001) (stating that too broad an interpretation of the statute of limitations would lead to a "flood of untimely litigation"); *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (stating that the statute of limitations provision "must not be construed so broadly that the statute of limitations starts running too soon for the victim of the fraud to be able to bring suit."). Instead, before the statute of limitations begins to run, "[t]he facts . . . must be sufficiently probative of fraud — sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated." *Fujisawa Pharm. Co.*, 115 F.3d at 1335.

III. In Most Instances, Statute Of Limitations Questions Based On A Retrospective Constructive Discovery Analysis Should Be Reserved For Juries

As courts have recognized, the question of whether constructive discovery of the facts constituting the violation should be imputed to a plaintiff is a fact-intensive inquiry that typically is for a jury to decide. *See e.g.*, *Tello v. Dean Witter Reynolds*, *Inc.*, 410 F.3d 1275, 1284 (11th Cir. 2005) ("The determination of ***when*** inquiry notice occurred . . . [is] necessarily fact-specific to each case. Accordingly . . . [this issue is] particularly suited for a jury's consideration.") (internal citations and quotations omitted); *Young v. Lepone*, 305 F.3d 1, 9 (1st Cir. 2002) ("The multifaceted question of whether storm warnings were apparent involves issues of fact. In the archetypical case, therefore, it is for the factfinder to determine whether a particular collection of data was sufficiently aposematic to place an investor on inquiry notice."); *Marks v. CDW Computer Centers*, *Inc.*, 122 F.3d 363, 368-69 (7th Cir. 1997) (trier of fact should typically determine when the statute of limitations should begin to run).

Although there may doubtless be cases where the facts are sufficiently clear for a Court to state with confidence what a reasonable investor knew or should have known, this case assuredly is not one of them. Indeed, Petitioners' brief nowhere identified what "facts" could and should have been discovered prior to November 6, 2001 that would have caused reasonable investors to conclude that they had been defrauded. In the absence of such a showing, there is no basis whatever for this Court to conclude that Merck, as a matter of law, has established its affirmative statute of limitations defense.

CONCLUSION

NASCAT submits that for the foregoing reasons, Merck's proposed interpretation of the statute of limitations should be rejected and the judgment of the Third Circuit affirmed. Any interpretation of the statute of limitations provision should take into account the importance of private securities litigation as a supplement to government enforcement as well as the massive corporate scandals that continue to infect this nation's capital markets.

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Respectfully submitted,

Frederic S. Fox
Counsel of Record
Donald R. Hall
Aviah Cohen Pierson
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, 14th Floor
New York, NY 10022
(212) 687-1980

Kevin P. Roddy
Chair, NASCAT
Amicus Committee
Wilentz, Goldman & Spitzer, P.A.
90 Woodbridge Center Drive
Woodbridge, NJ 07095
(732) 636-8000

Counsel for Amicus Curiae