No. 08-905

In the Supreme Court of the United States

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

v.

RICHARD REYNOLDS, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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SUPPLEMENT TO CORPORATE DISCLOSURE STATEMENT

Since the filing of petitioners' opening brief, petitioner Merck & Co., Inc., has completed its merger with Schering-Plough Corporation. The combined entity now operates under the name of Merck & Co., Inc.; the entity formerly known as Merck & Co., Inc., is now known as Merck Sharpe & Dohme Corp., a wholly owned subsidiary.

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The Court granted review in this case on the question whether, in order to be on inquiry notice of his claim, a securities-fraud plaintiff must possess information that the defendant acted with scienter—a question on which the circuits are in clear conflict. As explained in petitioners' opening brief, the answer to that question is no. To be on inquiry notice, a plaintiff need not possess information specifically bearing on every element of the underlying violation. Under any standard, moreover, respondents were on inquiry notice of their claim more than two years before the initial complaint was filed, because they possessed considerable information suggesting the possibility that petitioners had committed securities fraud—including information specifically suggesting that petitioners acted with scienter.

Confronted with the question on which this Court granted review, respondents simply ignore it. Having urged the court of appeals to hold that a securities-fraud plaintiff must possess information specifically relating to scienter in order to be on inquiry notice, respondents skirt the question presented and instead present two different questions of their own, neither of which even mentions inquiry notice. And they essentially ask the Court to affirm on an alternative ground: *viz.*, that, even assuming respondents were on inquiry notice, petitioners have not shown that respondents possessed the means of completing an investigation and obtaining any necessary remaining information concerning the alleged violation. There is no valid justification for such a requirement. If adopted, it would threaten to eviscerate the limitations defense in private securities-fraud actions. And it would be particularly inequitable where, as here, the plaintiffs conducted no investigation at all, but rather waited until their claim was sufficiently lucrative before filing suit.

More broadly, however, the Court should not countenance respondents' refusal to join issue. In order to dispose of this case, the Court need only address the question presented, and hold that a securities-fraud plaintiff may be on inquiry notice without possessing information specifically relating to scienter.

A. Respondents Were On Inquiry Notice Of Their Securities-Fraud Claim More Than Two Years Before The Initial Complaint Was Filed

1. To Be On Inquiry Notice, A Plaintiff Need Not Possess Information Specifically Relating To Scienter

a. At the outset, respondents do not seriously dispute (Br. 25-27) that the limitations period in Section 1658(b) is triggered by constructive, as well as actual,

discovery of the "facts constituting the violation." Nor could they, because it is well established that, when a statute of limitations incorporates the discovery rule, the limitations period begins to run from the date of either actual or constructive discovery. See U.S. Br. 15-16.

Citing the language of Section 1658(b), however, respondents suggest (Br. 16-17, 27, 28, 32) that, in applying that provision, a court should simply determine when a hypothetical plaintiff should have discovered the facts constituting the violation. Although the statutory language is, as always, the starting point of the analysis, that language cannot meaningfully be understood without reference to the considerable body of preexisting common law concerning the discovery rule—and, specifically, concerning the doctrine of inquiry notice. This Court has long recognized the applicability of that doctrine to fraud claims more generally. See, *e.g.*, *Burke* v. *Smith*, 83 U.S. (16 Wall.) 390, 401 (1873). And by the time Section 1658(b) was enacted, all but one of the regional circuits had done the same for securities-fraud claims specifically (and the remaining circuit, the Ninth, subsequently followed suit). See U.S. Br. 16 n.3 (citing cases). It is therefore clear that, in enacting Section 1658(b), Congress understood that the principle of inquiry notice was integral to the discovery rule that it was codifying.

b. Facing a solid wall of authority supporting the proposition that the discovery rule in Section 1658(b) incorporates the doctrine of inquiry notice, respondents acknowledge (Br. 28) that inquiry notice may be relevant to the analysis, if only "occasionally." But respondents then proceed to define inquiry notice in an untenably narrow manner. Specifically, respondents contend that, to be on inquiry notice, a plaintiff must possess not only "information suggesting possible fraud," but also "the

means of * * * obtaining" any necessary remaining information concerning the alleged violation. *Ibid.*

Properly understood, however, "inquiry notice" refers only to the first component of respondents' definition. Both before and after the enactment of Section 1658(b), the prevailing view in the lower courts was that, as the name suggests, a plaintiff is on inquiry notice when he possesses information sufficient to trigger a duty to inquire further: *i.e.*, when there is enough information in the plaintiff's possession, or in the public domain, to cause a reasonable investor to suspect the possibility that the defendant has engaged in securities fraud. See Pet. Br. 21 (citing cases).[1] That is how respondents' amici, including the government, understand the concept of inquiry notice. See, *e.g.*, U.S. Br. 16-17. And at earlier stages of this case, that is how *respondents* understood it as well. See Br. in Opp. 15; J.A. 996-997 (statement of Melvyn Weiss).

c. Respondents seemingly recognize that, for purposes of establishing when a plaintiff is on inquiry notice, a court must first establish the point at which the plaintiff "obtain[s] information suggesting possible fraud." Br. 28. Respondents avoid taking a position, however, on *how much* information a securities-fraud plaintiff must possess in order to be on inquiry notice—and, specifically, on whether a plaintiff must possess information that the defendant acted with scienter.[2]

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[1] Respondents concede (Br. 28 n.11) that information in the public domain "usually provides the predicate for asking whether an investor should * * * have inquired further."

[2] The closest that respondents come is the coy assertion (made without reference to inquiry notice) that "actual or constructive knowledge of scienter is essential to trigger the running of the statute." Br. 43.

Instead, respondents contend (Br. 19, 43), as they did at the certiorari stage, that the court of appeals did not hold that a plaintiff must possess information specifically relating to scienter in order to be on inquiry notice. To the extent the Court has not already rejected that contention in granting review, it is refuted not only by the court of appeals' opinion, see Pet. App. 33a, but also by a subsequent opinion in which the court of appeals reaffirmed that "inquiry notice, in securities fraud suits, requires storm warnings indicating that defendants acted with scienter," *Alaska Elec. Pension Fund* v. *Pharmacia Corp.*, 554 F.3d 342, 348 (3d Cir. 2009), petition for cert. pending, No. 08-1315 (filed Apr. 22, 2009). Several of respondents' amici, including the government, agree that the court of appeals so held. See, *e.g.*, U.S. Br. 27. And it is ironic that respondents are now arguing that the court of appeals did not adopt that holding when *they* encouraged the court to adopt it in the first place. See Resp. C.A. Br. 31.

For the reasons stated in petitioners' opening brief (at 19-28), there is no valid justification for the court of appeals' rule. In order to suspect that the defendant has engaged in wrongdoing, a plaintiff need not possess information specifically bearing on each and every element of the underlying violation. This Court has recognized that principle implicitly in the specific context of inquiry notice, see *TRW Inc.* v. *Andrews*, 534 U.S. 19, 30 (2001), and explicitly in the broader context of the discovery rule, see *Rotella* v. *Wood*, 528 U.S. 549, 556-561 (2000); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 186-191 (1997); *United States* v. *Kubrick*, 444 U.S. 111, 118-125 (1979). From the innumerable cases applying the discovery rule to ordinary fraud claims, moreover, respondents fail to identify a single case adopting the rule that a plaintiff

cannot be on inquiry notice until he possesses information specifically relating to scienter.

While the government at least engages the question presented, it too does not defend the court of appeals' bright-line rule, recognizing that there are cases in which "information giving rise to a suspicion of falsehood will itself give rise to a suspicion of fraud." Br. 29. This Court should therefore hold that the court of appeals erred by requiring a securities-fraud plaintiff to possess information specifically relating to scienter in order to be on inquiry notice.[3]

2. Under Any Standard, Respondents Were On Inquiry Notice More Than Two Years Before The Initial Complaint Was Filed

Although respondents do not take a definite position on the question presented, they nevertheless contend (Br. 46-53) that the court of appeals correctly held that they were not on inquiry notice of their claim more than two years before the initial complaint was filed. By that date, however, there was considerable information in the public domain suggesting the possibility that petitioners had engaged in securities fraud—including information specifically suggesting that petitioners had made misstatements with scienter. Respondents thus were on inquiry notice under any standard.

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[3] The government renews its contention (Br. 13) that, for discovery to occur under Section 1658(b), a plaintiff must possess sufficient information to file a complaint that would survive a motion to dismiss under the Private Securities Litigation Reform Act of 1995 (PSLRA). That contention lacks merit for the reasons stated in petitioners' opening brief (at 28-33). Unlike the government, respondents do not attempt to connect the running of the statute of limitations to the applicable pleading standards; indeed, respondents do not even mention the PSLRA.

a. Respondents assert (Br. 46-47) that the "gravamen" of their securities-fraud claim is that Merck engaged in misrepresentations when it expressed its *opinion* that the "likely" explanation for the disparity in cardiovascular events reported in the VIGOR study was that naproxen prevented blood clots. As a threshold matter, respondents' recent recharacterization of the alleged misstatements as statements of opinion does not materially affect the analysis. For a statement of opinion to be actionable, a securities-fraud plaintiff must show both that the statement lacked a reasonable basis in fact and that the expressed opinion was not genuinely held. See *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1091-1096 (1991). Those requirements roughly correspond to the requirements of falsity and scienter for statements of fact. Assuming, *arguendo*, that respondents correctly characterize the alleged misstatements as statements of opinion, the critical question is therefore whether respondents were required to possess information specifically suggesting that Merck's opinion was not genuinely held, as the court of appeals concluded—and, even assuming they were, whether they did in fact possess such information.[4]

[4] Respondents' recharacterization of the alleged misstatements as statements of opinion, moreover, casts serious doubt on whether those misstatements would even be actionable. Where, as here, the statements at issue merely involve an expressed belief in a *medical hypothesis* (and that belief was reasonably based on data available at the time), the statements do not lack a reasonable basis in fact and are therefore not actionable. See, *e.g.*, *Oran* v. *Stafford*, 226 F.3d 275, 282-283 (3d Cir. 2000). The government hints that it agrees. See Br. 31 (stating that "[a]n issuer of securities * * * does not engage in fraud or deceit by failing to give equal attention to a competing theory in all its public utterances simply because the issuer's explanation ultimately turns out to be wrong").

b. Respondents' efforts to minimize the significance of the three primary sources of information in the public domain—the warning letter from the Food and Drug Administration (FDA), the pending lawsuits concerning the safety of Vioxx, and the articles and analyst reports on the same subject—are unavailing.

As to the FDA warning letter, respondents contend that the letter "primarily focused" on "certain marketing statements made by a Merck consultant and Merck personnel manning a convention sales booth" and alleged only that those statements were incomplete. Br. 7, 49. That contention substantially understates the significance of the warning letter for purposes of the inquiry-notice analysis.[5] In that letter, FDA also focused on a May 22, 2001, press release in which Merck referred to the "favorable cardiovascular safety profile of Vioxx," see J.A. 339, 351—a statement that is one of the alleged misstatements most prominently featured in respondents' complaint, see J.A. 113-114. Citing the press release, FDA charged that, while the naproxen hypothesis was a "*possible*" explanation for the cardiovascular disparity, Merck had "engaged in a promotional campaign for Vioxx that minimizes the potentially serious cardiovascular findings that were observed in the [VIGOR] study, and thus, *misrepresents* the safety profile for Vioxx." J.A. 340 (emphases added). And specifically referring to the press release, FDA further charged—in statements highlighted in respondents' complaint, see J.A. 122-123—that Merck's claim that Vioxx had a "fa-

[5] Respondents suggest (Br. 8) that FDA warning letters are routine in the pharmaceutical industry. In their complaint, however, respondents contended that FDA warnings were "sent only to address serious circumstances." J.A. 71.

vorable cardiovascular safety profile" was "simply incomprehensible," and that the implication that Vioxx was safer than other anti-inflammatory medicines was "misleading." J.A. 351.

In the warning letter, therefore, FDA accused Merck of *deliberate* wrongdoing in connection with those representations. In light of FDA's allegations, respondents plainly possessed information casting doubt on the genuineness of Merck's belief in its opinion, as reflected in the press release and in other statements, that the naproxen hypothesis was the likely explanation for the cardiovascular disparity in the VIGOR study. And respondents cannot credibly dispute that understanding of the FDA warning letter, because, in prior versions of their complaint, they themselves cited it as evidence of scienter. See J.A. 265, 266. Respondents simply ignore their earlier characterization—and therefore fail to offer any reason why they should not be held to it.

As to the pending Vioxx-related lawsuits, respondents contend that those lawsuits were "personal-injury suits" alleging that "Merck had failed directly to warn Vioxx users on an individual basis of the drug's potential risks." Br. 8-9. Respondents understate the significance of those lawsuits as well. The suits alleged that Merck had, *inter alia*, "*purposefully* downplayed and/or understated the serious nature of the risks associated with Vioxx." J.A. 893 (emphasis added). Moreover, the suits included not just negligence-based failure-to-warn claims, but also consumer-fraud claims, which, like securities-fraud claims, are premised on the making of misstatements or omissions with scienter. See J.A. 893-897, 943-947. Even if they are based on different legal theories, moreover, the existence of other lawsuits based on the same underlying *allegations* is powerful evidence that a securities-fraud plaintiff was on inquiry notice.

See, *e.g.*, *Masters* v. *GlaxoSmithKline*, 271 Fed. Appx. 46, 49 (2d Cir. 2008).[6]

As to the articles and analyst reports, respondents emphasize (Br. 48) that those articles recognized that the naproxen hypothesis was a *possible* explanation for the cardiovascular disparity. Many of those articles, however, also cast substantial doubt on the validity of the naproxen hypothesis—and therefore on the validity of Merck's belief that the hypothesis was the *likely* explanation for the disparity. For example, the August 22, 2001, article in the Journal of the American Medical Association (JAMA), while recognizing that "[t]he results of the VIGOR study can be explained by * * * an [anticlotting] effect from naproxen," J.A. 326, ultimately concluded that "[t]he available data raise a cautionary flag about the risk of cardiovascular events with COX-2 inhibitors." J.A. 332. Those articles, when considered together with the FDA warning letter and the pending lawsuits, were sufficient to put respondents on inquiry notice under any standard.[7]

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[6] Respondents suggest that "[p]ersonal injury lawsuits against a drug manufacturer by users of the drug are unremarkable." Br. 52. It cannot be said, however, that the filing of *more than two hundred lawsuits* concerning the same drug is unremarkable. Yet that was the state of affairs concerning Vioxx when the initial securities-fraud complaint was filed.

[7] In an amicus brief, two doctors contend that, "[a]s of November 6, 2001, a reasonable medical professional would have concluded that the naproxen hypothesis was likely correct." Krumholz Br. 22. That contention is suspect. Both doctors acknowledge that they have worked as experts for plaintiffs in Vioxx-related product-liability litigation against Merck, see *id.* at 3, and one of the doctors testified in that litigation that he believed the naproxen hypothesis to be "a stretch" and that he "never found it plausible," see Tr. at 2620-2621,

c. Notably, it can no longer be disputed that respondents were on inquiry notice under the government's proposed standard, pursuant to which a plaintiff need not possess information specifically relating to scienter if the alleged misstatements involved information that is within the "knowledge" or "control" of the defendant. Br. 29-30.[8] Respondents repeatedly concede—as they must, given their characterization of the alleged misstatements as statements of opinion—that those statements involved information "under Merck's exclusive control." Br. 21; see Br. 32, 54, 55. For that reason, the government's tepid suggestion (Br. 30-31) that respondents were not on inquiry notice cannot be squared with its proposed standard. Under that or any other standard, respondents were on inquiry notice more than two years before the initial complaint was filed, and the court of appeals' contrary conclusion was erroneous.[9]

Hermans v. *Merck & Co.*, No. ATL-L-5520-05MT (N.J. Super. Ct. Feb. 5, 2007) (testimony of Dr. Krumholz).

[8] In a delphic footnote, the government suggests (Br. 30 n.8) that, under its proposed standard, a plaintiff may still need to possess information specifically relating to scienter in some circumstances where the alleged misstatements involved information that is within the defendant's control. The government, however, does not elaborate on that suggestion.

[9] Respondents contend that, even if they would otherwise have been on inquiry notice based on information in the public domain, any notice was "extinguished" by "reassurances" given by Merck. Br. 48-49. Far from providing "reassurances" in response to any investigation by respondents, however, Merck merely made subsequent statements that were similar in content to its prior statements. Respondents' contention would permit a plaintiff effectively to extend the limitations period by asserting a "continuing violation" from the date of the first alleged misstatement—in contravention of the principle that each alleged misstatement constitutes a separate

3. Respondents Offer No Alternative Explanation For When They Were On Inquiry Notice

Although respondents contend that the court of appeals correctly held that they were not on inquiry notice of their claim more than two years before the initial complaint was filed, they conspicuously fail to take a position on when, if ever, they were on inquiry notice. Neither of the potential alternative dates is plausible, and the problems with those dates reflect broader difficulties with respondents' approach.

a. The court of appeals held that respondents were not on inquiry notice until October 30, 2003, when the Wall Street Journal reported on a study by the Brigham and Women's Hospital in Boston suggesting that the available data indicated that patients taking Vioxx faced a greater risk of cardiovascular events. See Pet. App. 18a, 47a. Respondents, however, stop short of affirmatively arguing that they were on inquiry notice as of that date, see Br. 53, and for good reason. For purposes of the inquiry-notice analysis, the Wall Street Journal ar-

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"violation" for purposes of Section 1658(b). See, *e.g.*, *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007).

Inconsistently with the foregoing contention, respondents also contend that "Merck continued to make independently actionable false statements after November 2001," which would constitute separate violations that are not time-barred even if respondents were on inquiry notice as of that date. Br. 55 n.33. As a preliminary matter, the operative version of respondents' complaint primarily focuses on a series of statements made *before* November 2001. See J.A. 82-127. In any event, any alleged misstatements made after the inquiry-notice date would not be actionable, because plaintiffs could not reasonably rely on such statements when they had reason to suspect that similar prior statements were false. See, *e.g.*, *Alaska Electrical Pension Fund*, 554 F.3d at 351; *Shah* v. *Meeker*, 435 F.3d 244, 252 (2d Cir. 2006).

ticle added little, if anything, to the information already in the public domain. Like the study reported in the 2001 JAMA article, the Brigham and Women's study was a retrospective analysis of publicly available data, and, when the results of that study were published, they in fact showed no statistically significant increase in the risk of cardiovascular events for patients taking Vioxx when compared to patients taking other types of anti-inflammatory medicines (or none at all). See Daniel H. Solomon et al., *Relationship Between Selective Cyclooxygenase-2 Inhibitors and Acute Myocardial Infarction in Older Adults*, 109 Circulation 2068, 2071 (2004). Tellingly, the Wall Street Journal article scarcely merited a mention in prior versions of the complaint: unlike the FDA warning letter and the pending lawsuits, it was not cited at all in the section of the complaint entitled "Additional Scienter Allegations," see J.A. 265-269, and, in the initial complaint, it was described as merely "*further* acknowledg[ing] and report[ing]" "[t]he seriousness of th[e] risks" associated with Vioxx, C.A. App. 1224 (emphasis added).

Respondents identify no other information that came into the plaintiffs' possession after November 6, 2001, that triggered the filing of the initial securities-fraud complaint on November 6, 2003. The inescapable conclusion is that the plaintiffs brought suit on that date not because they had only recently been placed on inquiry notice, but rather because a securities-fraud action had only recently become worth their while—due to a considerable drop in Merck's stock price attributable not to the Wall Street Journal article, but rather to a disappointing earnings report issued shortly earlier. See J.A. 999 (statement of Melvyn Weiss).

b. Respondents repeatedly suggest that it was not until the publication of a subsequent Wall Street Journal

article on November 1, 2004, that they learned of "Merck's longstanding belief that Vioxx caused adverse cardiovascular events." Br. 2; see Br. 10, 54 n.32. As a logical matter, however, it cannot be that respondents were not on inquiry notice until that date. That would imply that the plaintiffs in this case brought suit nearly a year before a reasonable investor would have even *suspected the possibility* that petitioners had engaged in securities fraud—and therefore before the limitations period had even *begun* to run.

Respondents' suggestion also illustrates two broader conceptual problems with their approach. First, if the limitations period began to run only as of November 1, 2004, the plaintiffs would not have needed to file the first securities-fraud complaint until two years later—or November 1, 2006. That approach would render the statute of limitations effectively irrelevant in this case—as, presumably, in many if not most others—leaving the statute of repose as the only source of protection for defendants. Such a result would contravene not only Congress's evident intention that the limitations period have independent meaning, see S. Rep. No. 146, 107th Cong., 2d Sess. 8-10 (2002), but also the broader principle that statutes of limitations, no less than statutes of repose, are designed to afford protection against stale claims, even if they operate in different ways, see 1 Calvin W. Corman, *Limitation of Actions* § 1.1, at 4-5 (1991).[10]

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[10] Contrary to respondents' repeated suggestions (Br. 17, 33), in his dissent in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), Justice Kennedy merely expressed concern that, because it was not subject to any equitable exception, the Court's three-year *repose* period would terminate the claims of "injured investors who by no conceivable standard of fairness or practicality c[ould] be expected to file suit" in a timely manner. *Id.*

Second, if the limitations period began to run only as of November 1, 2004, it would seemingly conflate inquiry notice with actual discovery in this case, because respondents concede that *all* of the relevant information concerning the alleged violation was in the public domain by that date. See Br. 2; J.A. 197. Indeed, respondents appear to suggest that, by virtue of the "efficient market" hypothesis, in *any* case involving alleged fraud on the market by a publicly traded company, a plaintiff cannot be said to have discovered the underlying violation until all of the relevant information becomes publicly available. See Br. 51, 53 n.31. Insofar as that suggestion would effectively require actual discovery, however, it cannot be reconciled with respondents' implicit concession (Br. 25-27) that *constructive* discovery of the "facts constituting the violation" also triggers the running of the limitations period in Section 1658(b). In sum, respondents cannot justify the selection of any later date as the date of inquiry notice—and the court of appeals' holding that respondents were not on inquiry notice more than two years before the initial complaint was filed therefore cannot be sustained.

B. Under Section 1658(b), Respondents' Claim Is Untimely

To dispose of this case, the Court need only determine that the court of appeals erred by holding that a securities-fraud plaintiff is not on inquiry notice until he possesses information that the defendant acted with scienter. Should the Court reach the broader issue of

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at 377. Justice Kennedy agreed that a one-year *limitations* period was appropriate, *id.* at 374—and, of course, Congress subsequently lengthened both periods.

how the date on which a plaintiff is on inquiry notice affects the running of the statute of limitations, however, it should hold that, at least where, as here, the plaintiff fails to conduct a reasonably diligent investigation, the limitations period begins to run from the date of inquiry notice.

1. To begin with, there is strong support for the proposition that the date on which a plaintiff is on inquiry notice should *always* trigger the running of the limitations period. See Pet. Br. 39-43. Such a categorical approach would be the easiest of the potential approaches to administer, because there will often be a particular event that unambiguously places the plaintiff on inquiry notice. And it is consistent with the text of Section 1658(b), because the phrase "facts constituting the violation" in Section 1658(b) is properly understood not to encompass the fact of scienter in the first place.

Respondents fail to offer a valid response to the contention that the phrase "facts constituting the violation" in Section 1658(b) reaches only the core nucleus of facts concerning the defendant's *conduct*, separate and apart from the fact of the defendant's *state of mind*. They do not dispute that, under the discovery rule, the default principle is that "[a]ccrual of the plaintiff's cause of action does not depend on his or her acquisition of information in proof of scienter." 2 Corman § 11.5.7, at 202. Nor do they dispute that this Court recently drew the *identical* distinction in discussing the pleading rules specifically applicable to securities-fraud claims, see *Tellabs Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), or that the Federal Rules of Civil Procedure draw a similar distinction in setting the pleading rule for fraud claims more generally, see Fed. R. Civ. P. 9(b).

Instead, respondents merely contend (Br. 23-25) that scienter is an element of the cause of action under Sec-

tion 10(b) and that plaintiffs have long been required to allege scienter in pleading a claim for fraud. Both of those contentions are correct, but beside the point. Section 1658(b) does not require the plaintiff to discover the "facts constituting all of the elements of the cause of action" (or even the "facts constituting the cause of action," as the Field Code required). Instead, it merely requires the plaintiff to discover the "facts constituting the *violation*," and that phrase is readily understood to reach only the facts relevant to the defendant's *conduct*. The text of Section 1658(b) therefore supports a categorical approach, under which a plaintiff need not possess information specifically relating to scienter in order to trigger the limitations period.

2. In this case, however, the Court need not definitively resolve whether the date on which a plaintiff is on inquiry notice should *always* trigger the running of the limitations period. Instead, should the Court reach the issue, it need only hold, as the Second and Third Circuits have done, that, where a plaintiff is on inquiry notice but fails actually to conduct a reasonably diligent investigation, the limitations period begins to run from that date.

a. Respondents (Br. 38) primarily contend that the Second and Third Circuits' approach would be inconsistent with the language of Section 1658(b). Respondents fundamentally err, however, because they operate as if the discovery rule codified in Section 1658(b) should be interpreted in a vacuum, without reference to the considerable body of common law concerning the discovery rule that preceded its enactment. That body of common law decisively supports the Second and Third Circuits' approach, because it makes clear that consideration of a plaintiff's actual investigation is embedded in the application of the discovery rule. See U.S. Br. at 28, *United States* v. *Beggerly*, 524 U.S. 38 (1998) (No. 97-731) (not-

ing that the discovery rule "incorporates equitable considerations").

i. The discovery rule originated in equity, and "[o]ne of the familiar maxims of equity is that equity aids those who have been vigilant or diligent, not those who sleep or slumber on their rights." 27A Am. Jur. 2d *Equity* § 93, at 631 (2008). Accordingly, as respondents freely concede, this Court has repeatedly stated that "a plaintiff must be diligent (or at least free of negligence or laches) to take advantage of the discovery rule as a matter of equity." Br. 39. In *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342 (1875), the Court explained that the discovery rule was applicable only where "there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit." *Id.* at 349. In *United States* v. *Diamond Coal & Coke Co.*, 255 U.S. 323 (1921), the Court reasoned that, where there has been "laches resulting from failure to make inquiry," such laches would "take the case out of the equitable principle" that is the discovery rule, because laches is "the fundamental principle upon which the equitable doctrine * * * rest[s]." *Id.* at 333, 334. And in *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), the Court noted that a plaintiff could not invoke the discovery rule where there was "any fault or want of diligence or care on his part." *Id.* at 397 (citation omitted). Respondents' sole basis for distinguishing those cases is that they "appl[ied] nonstatutory equitable doctrines to differently worded statutes." Br. 38. The "equitable doctrine" those cases apply, however, is the same one codified in Section 1658(b)—and those cases establish the

principle that a plaintiff who sleeps on his rights is not entitled to the benefit of the discovery rule.[11]

Respondents cite (Br. 35-41) numerous of this Court's cases, but none is to the contrary. In three of those cases, the Court actually *reaffirmed* the principle that the plaintiff must exercise "reasonable" or "due" diligence to invoke the discovery rule (or avoid laches); at most, the Court also noted, in concluding that the plaintiff had made no effort to investigate, that he could readily have discovered the fraud if he had tried. See *Foster* v. *Mansfield, Coldwater & Lake Mich. R.R. Co.*, 146 U.S. 88, 99-100 (1892); *Kirby* v. *Lake Shore & Mich. S. R.R. Co.*, 120 U.S. 130, 136-137 (1887); *Wood* v. *Carpenter*, 101 U.S. 135, 139-140, 141, 143 (1879). In a fourth, the Court similarly explained, after holding that the plaintiffs' claim was meritless, that the claim would have been time-barred in any event because the plaintiffs were on inquiry notice well before filing suit (and had made no effort to investigate). See *Burke*, 83 U.S. (16 Wall.) at 401. And in the other two, the Court did not address any issue concerning the discovery rule, but rather the entirely distinct issue of when an individual qualified as a bona fide purchaser of property. See *Indiana & Ill. Cent. Ry. Co.* v. *Sprague*, 103 U.S. 756, 762 (1881); *Oliver* v. *Piatt*, 44 U.S. (3 How.) 333, 409-410 (1845).

ii. Among this Court's more recent decisions, *Klehr* conclusively supports the proposition that a plaintiff must act with reasonable diligence in order to receive the

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[11] The government entirely ignores those cases, instead asserting in passing that "[l]aches within the term of the statute of limitations is no defense at law." Br. 21 (citation omitted). That is true in the case of a traditional injury-based limitations period, but, as the foregoing cases illustrate, not in the case of an equitable discovery-based period.

benefits of the discovery rule. There, the Court held that a plaintiff must act with reasonable diligence to invoke the doctrine of fraudulent concealment. See 521 U.S. at 193-196.[12] Although *Klehr* involved the Racketeer Influenced and Corrupt Organizations Act (RICO), its reasoning is equally applicable here, because private securities-fraud actions, like civil RICO actions, are designed not only to "compensate victims," but also to "encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity." *Id.* at 195.[13] Indeed, *Klehr*'s reasoning applies *a fortiori* here in an important respect: respondents do not invoke the "fraudulent concealment" doctrine (by alleging that petitioners engaged in any affirmative act of concealment), but instead contend only that they would have been unable to discover any additional information if they had con-

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[12] Respondents suggest (Br. 39) that *Klehr* does not support petitioners' position because the Court understood that a plaintiff could exercise "reasonable diligence" by doing nothing where the plaintiff would have been unable to discover the relevant facts. That suggestion makes no sense. If respondents are correct, the Court would not have needed to address the interplay between a plaintiff's diligence and the doctrine of fraudulent concealment: where a defendant engaged in fraudulent concealment, the plaintiff would by definition be reasonably diligent.

[13] In *TRW*, the Court, in refusing to read a discovery rule into the Fair Credit Reporting Act, reasoned that a discovery rule would render an express statutory exception for cases involving misrepresentations superfluous *in cases involving fraudulent concealment*. See 534 U.S. at 31. To the extent the Court's opinion is read more broadly to suggest that a plaintiff need not act with reasonable diligence in order to invoke the doctrine of fraudulent concealment, that suggestion cannot be reconciled with the more extended discussion in *Klehr*.

ducted an investigation (because that information was "under Merck's exclusive control"). Br. 21.[14]

b. Contrary to respondents' contention (Br. 40-41), when Congress enacted Section 1658(b), the principle that the limitations period begins to run from the date of inquiry notice where the plaintiff fails to conduct a reasonably diligent investigation was already well established in the Second Circuit—the Nation's most experienced circuit in dealing with securities-fraud claims. See, *e.g.*, *Dodds* v. *Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993) (noting that, "when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded, a duty of inquiry arises, and knowledge will be imputed to the investor *who does not make such an inquiry*") (emphasis added), cert. denied, 511 U.S. 1019 (1994).[15] In the legislative history, moreover, several Senators cited that principle with approval, specifically quoting the foregoing language from *Dodds*. See S. Rep. No. 146, *supra*, at 29 (additional views of eight Senators).[16] Because Section

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[14] See, *e.g.*, *Benak* v. *Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 (3d Cir. 2006) (noting that "[p]laintiffs cannot, *post hoc,* excuse a failure to inquire by demonstrating the difficulty they would have had attaining relevant information"); cf. *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (suggesting, before *Klehr*, that diligence was required where a fraud was "self-concealing," even if it was not required where the fraud was affirmatively concealed).

[15] District courts in the Second Circuit also routinely applied that principle. See, *e.g.*, *Addeo* v. *Braver*, 956 F. Supp. 443, 449 (S.D.N.Y. 1997) (Sotomayor, J.).

[16] Respondents contend that the views of those Senators are unreliable because they "voted *against* § 1658(b)." Br. 46. In committee, seven of the eight Senators did support an unsuccessful amendment that would have restored the preexisting one-year limitations period, see S. Rep. No. 146, *supra*, at 22—although all eight ultimately

1658(b) merely altered the duration of the limitations period, there is no reason to believe that Congress intended to abrogate the Second Circuit's approach, and good reason to believe that Congress intended to sanction it.[17]

In sum, the Second and Third Circuits' approach can readily be reconciled with the language of Section 1658(b) and is the most consistent with the common-law backdrop against which Section 1658(b) was enacted. Should the Court reach the issue, therefore, it should adopt that approach here. And, under that approach, because respondents again concede (Br. 53 n.31) that they failed to undertake *any* further investigation in the wake of the events that placed them on inquiry notice, their claim is untimely.

3. The government contends (Br. 16-18) that, when a securities-fraud plaintiff is on inquiry notice of his claim, the plaintiff should be entitled to the additional period of time that it would take a hypothetical plaintiff to complete an investigation, regardless whether he actually conducted an investigation himself. For their part, res-

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voted for Section 1658(b) on the Senate floor, see 148 Cong. Rec. 12,508 (2002). More to the point, however, petitioners are relying on the views of those Senators solely concerning the *trigger* for the limitations period—an issue as to which there was no apparent disagreement.

[17] The government contends (Br. 18-19, 22) that, in interpreting Section 1658(b), the Court should look to Section 13 of the Securities Act of 1933, 15 U.S.C. 77m. Courts applying Section 13, however, have taken a similar approach to that of the Second and Third Circuits under Section 1658(b), first considering whether the plaintiff was on inquiry notice and then whether the plaintiff actually conducted a reasonably diligent investigation. See, *e.g.*, *Cook* v. *Avien, Inc.*, 573 F.2d 685, 696, 698 (1st Cir. 1978).

pondents contend (Br. 30-32) that, when a plaintiff is on inquiry notice, the limitations period begins to run only if the plaintiff possesses the "means" of completing an investigation, again regardless of whether he actually conducted an investigation himself.[18] Whatever the differences between respondents' and the government's proposed "hypothetical plaintiff" approaches, those approaches should be rejected for three principal reasons.

a. To begin with, any "hypothetical plaintiff" approach would by definition give a plaintiff the benefit of the additional time it would take to complete an investigation even if the plaintiff did not attempt to conduct one himself—and would therefore effectively excuse an "ostrich" plaintiff's failure to do so. The government contends (Br. 23) that even an "ostrich" plaintiff will eventually have an incentive to investigate, because he will need to acquire facts sufficient to file suit. Under the government's approach, however, a plaintiff need not take any action until the point at which a hypothetical plaintiff would be able to file a complaint *sufficient to survive a motion to dismiss*—and then will have an additional *two years* simply to draft his complaint and file it. That approach would therefore permit the very abuse this case illustrates, by allowing a plaintiff who is already on inquiry notice to lie in the weeds until a company's stock price drops sufficiently and then pounce when the

[18] Under respondents' approach, it is unclear whether, when a plaintiff does possess the means of completing an investigation, the limitations period would begin to run from the date of inquiry notice or the date on which a hypothetical investigation would have been completed.

value of the claim makes filing suit too tempting to resist.[19]

Conversely, an approach that creates incentives for plaintiffs to conduct a prompt investigation at the point of inquiry notice would impose minimal burdens on plaintiffs, because a plaintiff need only show that he made *reasonable* efforts to investigate—and, where those efforts are unsuccessful, will be entitled to additional time until the remaining information concerning the violation becomes available. While some of respondents' amici suggest that such a requirement will still impose excessive burdens on "retired school teacher[s] in Boca Raton," CtW Br. 24, others correctly recognize "the reality of class action securities litigation": *viz.*, that the lead plaintiffs are usually large institutional investors that possess ample resources to conduct investigations themselves. Faculty Br. 32. And to the extent they do not, there are plenty of plaintiffs' lawyers eager to conduct investigations on their behalf, in return for a healthy share of any ultimate verdict (or, more likely, settlement). See SIFMA Br. 13-18; DRI Br. 25-28.

b. A "hypothetical plaintiff" approach would also leave no meaningful role for the principle of inquiry notice—a principle deeply rooted in the application of the discovery rule both to fraud claims more generally and

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[19] As explained in petitioners' opening brief (at 49-50), this case epitomizes that phenomenon. Although respondents have never specified the exact amount they are seeking in damages, they do not dispute that it runs into the *billions* of dollars—largely because their delay in filing suit allowed them to expand the size of their class. See, *e.g.*, Resp. C.A. Reply Br. 24 (noting that Merck's market capitalization declined by approximately $10 billion in October 2003 and by another $37.2 billion between September 30 and November 1, 2004).

to securities-fraud claims specifically. See p. 3, *supra*. The government contends (Br. 24) that the principle of inquiry notice would still play a role, because a court would have to determine the point at which the plaintiff was on inquiry notice before determining when a hypothetical plaintiff would have discovered facts sufficient to file a complaint. It is hard to see why that is so. A court could simply skip to the latter inquiry, because it in no way depends on what the actual plaintiff knew and when he knew it. A "hypothetical plaintiff" approach would therefore effectively strip the concept of inquiry notice out of the discovery rule in Section 1658(b)—and, indeed, would further threaten to require *actual* discovery to trigger the limitations period. See p. 15, *supra*.

c. Finally, and perhaps most importantly, a "hypothetical plaintiff" approach would lead to potentially grave difficulties in application, because it would mandate open-ended speculation about what a reasonably diligent investigation would have entailed. Even the government acknowledges that such an approach would "often involve some approximation." Br. 23. In fact, it would generate collateral litigation and disserve the need, on the part of plaintiffs and defendants alike, for clarity and consistency in the determination of the applicable limitations period.

Respondents recognize (Br. 29) that, under the "hypothetical plaintiff" approach, the availability of a limitations defense will usually need to be determined by a jury, rather than by the court on a motion to dismiss or motion for summary judgment—with the burden on the defendant to prove that an investigation would have been successful. As a preliminary matter, it is hard to imagine that a defendant that is contesting a claim of securities fraud would want to argue to the same jury that a hypothetical plaintiff would surely have discovered the al-

leged fraud. But that is an academic point, because, as respondents are doubtless aware, securities-fraud cases hardly ever go to trial: even where the underlying claims are meritless, they almost invariably settle if the plaintiffs are able to survive dispositive motions. And if courts could no longer readily resolve the limitations defense on those motions (as they now routinely do, see, *e.g.*, *Dodds*, 12 F.3d at 352 n.3), the practical consequence would be to take that defense off the table altogether. That, we respectfully submit, is respondents' real objective here, and that is what respondents will achieve if their proposed rule is adopted.[20]

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In the end, respondents are left accusing Merck of "concocting" the naproxen hypothesis or possessing some unidentified "internal data" demonstrating Vioxx's risks. Those accusations are unfounded. But they should not obscure the fact that the Court is deciding how the limitations period should operate for *all* private securities-fraud claims, regardless of their merit—a type of claim, it bears remembering, for which Congress has never expressly provided. A ruling in petitioners' favor, whether on the question presented or the broader question on which respondents focus, would preserve an appropriate balance between defendants' interest in repose

[20] Because the court of appeals held that respondents were not on inquiry notice, it did not reach the issue of when a hypothetical plaintiff would have completed an investigation (or whether respondents possessed the means of doing so). That issue, moreover, has not been litigated at any stage of this case. Should the Court choose to reach the issue and adopt either the government's or respondents' approach, therefore, it should remand for the lower courts to consider that issue in the first instance.

and plaintiffs' interest in remediation. And it would in no way restrict the ability of reasonably diligent investors to bring suit. The court of appeals' specific holding on inquiry notice cannot be defended. This Court should correct the court of appeals' error and reverse the judgment below.

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For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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