IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners :

v. : No. 08-905

RICHARD REYNOLDS, ET AL. :

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Washington, D.C.

Monday, November 30, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

KANNON K. SHANMUGAM, ESQ., Washington, D.C.; on behalf of the Petitioners.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of the Respondents.

MALCOLM L. STEWART, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-905, Merck and Company v. Reynolds.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

The statute of limitations for private securities fraud claims incorporates the equitable principle known as the discovery rule; that is, the principle that the limitations period begins to run from the discovery of the facts constituting the violation. Under the discovery rule, a plaintiff who suspects the possibility that the defendant has engaged in wrongdoing is on inquiry notice and thereafter must exercise reasonable diligence in investigating his potential claim.

The court of appeals in this case erred at the first step --

JUSTICE SOTOMAYOR: Counselor, that presumes that then Congress is using unnecessary words when it differentiates in a statute between discovery of facts

constituting a violation and a different statute, like section 13 or 77m, however you want to call it, when it says "due diligence."

MR. SHANMUGAM: Well, Congress did say that, Justice Sotomayor, in section 77m, section 13 of the 1933 Act, but we don't think --

JUSTICE SOTOMAYOR: So are we supposed to presume that they like using unnecessary words?

MR. SHANMUGAM: Well, we don't think that Congress's inclusion of that express language referring to constructive discovery in that provision was significant, and that's because of the default understanding --

JUSTICE SOTOMAYOR: So you're answering me yes, it's unnecessary.

MR. SHANMUGAM: We don't think it makes any difference in terms of the application of the rule. And, indeed, there are cases applying section 13 of the 1933 Act that interpret it in exactly the same manner that we're suggesting the Court should interpret section 1658(b) in, in this case.

And that's simply because the default understanding has long been that when a statute of limitations is triggered by a discovery rule, that includes both express and -- both actual and

constructive discovery, and with the exception of three sentences in Respondents' brief, the parties before this Court are really in agreement on that proposition.

JUSTICE SCALIA: But you want to go beyond constructive discovery?

MR. SHANMUGAM: Well, no, Justice Scalia. We believe that the concept of constructive discovery itself incorporates the specific principle of inquiry notice, which is --

JUSTICE SCALIA: Well, I think there's a line between constructive discovery -- constructive discovery asks, when should you have known? And the rule you are arguing for is something beyond that.

MR. SHANMUGAM: Well, we are asking the Court to adopt the principle of inquiry notice, but we don't believe that that is a particularly significant additional step. And that is simply because that principle has likewise long been understood as part of the discovery rule with regard to fraud claims specifically, and it was well understood to be part of the application of the discovery rule with regard to securities fraud claims specifically, at the time Congress enacted section 1658(b).

JUSTICE SCALIA: Under your rule, what happens when you are put on inquiry notice? That's the

point at which you should be conducting additional investigation, right?

MR. SHANMUGAM: That's right, and at least where --

JUSTICE SCALIA: And that's where the -- statute begins to run, at the point when you should have conducted additional investigation?

MR. SHANMUGAM: At least where a plaintiff fails to conduct an investigation --

JUSTICE SCALIA: Yes.

MR. SHANMUGAM: -- as is the case here --

JUSTICE SCALIA: Okay.

MR. SHANMUGAM: -- the limitations period --

JUSTICE SCALIA: All right.

CHIEF JUSTICE ROBERTS: What would you -- what would you -- what phrase would you use to describe what happens when inquiry notice culminates in finding out? You have to say, oh, there looks like there might be scienter, I have to look at it. And after a year, you find it; yes, there was scienter. What -- what would you call what happens when they find out there was scienter?

MR. SHANMUGAM: Well, I think it's true that at that point the plaintiff discovers the remaining fact, and so to the extent that the Court embraces our

fallback approach, under which a plaintiff who actually exercises reasonable diligence and conducts an investigation gets the benefit of additional time, one can essentially embrace and codify that understanding of the words of the statute, which is to say a plaintiff at the point of inquiry notice suspects the possibility that the plaintiff has a claim. The plaintiff may not be in possession of information bearing on each and every element of the underlying violation, but if the plaintiff at that point exercises reasonable diligence and uncovers, discovers any remaining information --

JUSTICE GINSBURG: But how could --

MR. SHANMUGAM: -- at that point the plaintiff will have discovered the underlying facts.

JUSTICE GINSBURG: How -- how could that -- let's descend from the abstract to the concrete that is this case. The story that was being put out is, yes, this drug may produce heart attacks, but there's no indication that it does so -- that the other drug that it's comparing with may have an anti-heart attack element. And that's accepted. We could -- it could be one explanation; it could be the other.

How would the most diligent plaintiff have gone about finding out whether Merck really had no good faith belief in this so-called naproxen hypothesis?

MR. SHANMUGAM: Right. Well, just to be clear, as a preliminary matter, as I understand Respondents' position, it is that the alleged misstatement in this case is that Merck made misstatements when it expressed its belief that the naproxen hypothesis was the likely explanation for the disparity in cardiovascular events that was reported in the VIGOR study.

Now, as a first-order response, we believe that there was considerable information in the public domain suggesting the possibility that Petitioners had engaged in securities fraud when they made those statements. At that point, we believe that Respondents were on inquiry notice, and that is a point that is more than 2 years before the limitations period --

JUSTICE SCALIA: Well, excuse me. To --

MR. SHANMUGAM: -- before the plaintiffs filed.

JUSTICE SCALIA: To say that, you must believe that there is substantial evidence of fraud when there is simply substantial evidence of inaccuracy, without --

MR. SHANMUGAM: Well, there was more than that.

JUSTICE SCALIA: -- without any evidence of

scienter. What evidence of scienter was there?

MR. SHANMUGAM: Well, most notably, you had the FDA specifically accusing Merck of deliberate wrongdoing in connection with its public representations concerning the cardiovascular safety of Vioxx.

JUSTICE SCALIA: Well, but deliberate wrongdoing -- as I understood that, it was simply you didn't give adequate weight to the -- to the other -- to the other side of it.

MR. SHANMUGAM: Well, but the FDA did more than that in the warning letter. It accused Merck of misrepresenting the cardiovascular safety profile of Vioxx, and it accused Merck of minimizing the potential of cardiovascular arrests.

JUSTICE SCALIA: That means it's -- that means it's wrong. You can misrepresent something without having scienter to defraud.

MR. SHANMUGAM: But I do think that the fair reading of the FDA warning letter is that the FDA was accusing Merck of intentional misrepresentation.

JUSTICE GINSBURG: But it didn't stop it. Didn't -- didn't Merck submit a curative label, whatever, and the FDA said that was okay? And that -- that submission continued to give the naproxen hypothesis? Not the -- the reason that we are seeing

this heart attack thing showing up is that the other drug has a -- has a clotting inhibitor.

MR. SHANMUGAM: Well, it is true that Merck continued to maintain its belief in the naproxen hypothesis. We don't believe that that is sufficient somehow to toll the running of the limitations period. Such an approach would render the limitations period in section 1658(b) effectively triggered by a continuing violation theory.

But I do want to get back to your question about what more the plaintiffs in this case could have done, because I do think that that is a very critical question here.

We do believe that there was sufficient information in the public domain to cause Respondents to suspect the possibility that Petitioners had engaged in wrongdoing. At that point, there are several things that Respondents could have done. They could have talked to experts to test the validity of Merck’s naproxen hypothesis.

JUSTICE STEVENS: But one of the things they could not have done was file a lawsuit right then. Is that correct? Because they would not have had adequate facts to comply with the rules barring plaintiffs from filing suits based on information and belief?

MR. SHANMUGAM: Well, we don't believe that the Respondents would have had sufficient information to file a complaint then; and, indeed, we have taken the position that they still don't have sufficient facts to satisfy the PSLRA's pleading requirements. And I think it's notable in this case that Respondents really can't point to any facts that came into the public domain between the date of the FDA warning letter and the date in October of 2003 when the plaintiffs first filed suit --

JUSTICE KENNEDY: Well, but if we had that --

MR. SHANMUGAM: -- that somehow provided them additional information.

JUSTICE KENNEDY: If we had that kind of analysis, where the -- where the company has to reserve all of its defenses, then we would never get to the statute of limitations problem. I think we have to assume that the -- that their theory of the case is correct. We have to -- to assume it for statute of limitations purposes. Of course, you deny it.

MR. SHANMUGAM: Right.

JUSTICE KENNEDY: Well, I -- I think you don't get -- get very far. And -- and it seems to me, as Justice Stevens's and Justice Ginsburg's questions

indicate, that the companies can't have it both ways. They can't endorse the Twombly case and then say just an inquiry notice of a general -- of a general nature suffices. You have to have specific evidence of scienter. And there's nothing here to indicate that the plaintiffs had that.

MR. SHANMUGAM: Well, it may very well --

JUSTICE KENNEDY: Even on -- on -- but you have you to say, on their theory of the case.

MR. SHANMUGAM: It may very well be that the plaintiffs have to possess at least some information bearing on scienter. And again, under our fallback approach, where a plaintiff suspects that a defendant has engaged in securities fraud but doesn't, at the point of inquiry notice, possess information bearing on every element of the claim, if the plaintiff then investigates, the plaintiff will have the benefit of additional time until the plaintiff comes into possession of --

JUSTICE SOTOMAYOR: Can you tell me --

MR. SHANMUGAM: -- information relating to scienter.

JUSTICE SOTOMAYOR: Can you tell me what that investigation would entail? Meaning, you started by saying, go talk to experts, but I'm not sure what

talking to experts would have added to the market mix of information. You either pick one expert who said the theory was sound or one who didn't.

Outside of publicly available information, what -- and finding it -- what other inquiry could they have made that would have led them to discover sufficient information to file a lawsuit?

MR. SHANMUGAM: I think, Justice Sotomayor, that there are at least a couple of other things they could have done. One thing that they could have done is talked to former Merck employees and consultants.

Another thing that they could have done is talk to the lawyers who had filed other Vioxx-related lawsuits. There were quite a few as of the inquiry notice date. There were even more by the time they actually filed the securities fraud complaint.

JUSTICE SOTOMAYOR: Assuming they had talked to those lawyers, is there anything to suggest that those lawyers had more information than the ones they included in the publicly available lawsuit?

MR. SHANMUGAM: Well, there's no way to know, of course, because the plaintiffs in this case failed to conduct an investigation at all. One other thing --

JUSTICE SOTOMAYOR: You haven't answered my

question. Is there some information in some publicly filed lawsuit up until the time of the filing of this lawsuit that disclosed more information about scienter than existed?

MR. SHANMUGAM: I would say that the very fact that other lawsuits were filed that accused Merck of making intentional misrepresentations with regard to the very same statements that are at issue here actually itself constitutes additional information that should have put the plaintiffs on inquiry notice in the first place.

JUSTICE GINSBURG: How when -- when there were -- doctors across the country were continuing to write prescriptions for this, when the market apparently accepted this -- it may be one thing, it may be another -- but there were not signals from the market itself, and the medical profession seemed to be going on and writing -- lots of doctors were writing prescriptions for this?

MR. SHANMUGAM: Well, first of all, Justice Ginsburg, the market did respond. We don't think that a market response is dispositive for purposes of --

JUSTICE GINSBURG: Very brief.

MR. SHANMUGAM: -- inquiry notice analysis.

JUSTICE GINSBURG: There was a brief drop,

but it came right back up again.

MR. SHANMUGAM: A brief drop in response to the FDA warning letter, a substantial drop, but the stock price did rebound; and a longer term drop over the course of 2001 when the various other events that are discussed in the briefs were occurring. So I think that there was a --

JUSTICE ALITO: Your arguing that if the -- if the plaintiffs' attorneys made diligent investigation, they would have uncovered facts about the safety of Vioxx that the FDA was unaware of?

MR. SHANMUGAM: Well --

JUSTICE ALITO: Because the FDA never took any action during this period, other than changing the label.

MR. SHANMUGAM: Well, the FDA did issue the warning letter, and the label was changed to incorporate language indicating the cardiovascular disparity from the VIGOR study. That took place in 2002. And I think that it is noteworthy for purposes of the merits of this case that the FDA itself thought that that was sufficient.

But in this case, Respondents seem to be pointing to much later information as the point on which they were on inquiry notice. They seem to suggest in

their brief that they were not on inquiry notice until as late as 2004 when The Wall Street Journal published an article disclosing certain internal e-mails.

Now, leaving aside the sort of fundamental embarrassment to their position, I would submit, that that suggests that they were on inquiry notice after the complaint was actually filed. I --

JUSTICE BREYER: But the -- I take it the point of general principle, as opposed to this case, is I take it you will concede the following: Let's imagine on January 1 some investors look out and there are not only storm clouds, thunder, whatever you want, lots to put them on notice. So then the statute begins to run. But it could be the case that once they start to investigate, there is a key element, say scienter, the only evidence for which would take them an extra six months to find, because it's in the hands of a person who is in jail in Burma. All right?

(Laughter.)

So, you are prepared to say in that situation the statute does not begin to run on January 1; it begins to run on July 1, if they really look into it. But if they don't really look into it, then it’s January 1. That's I think the basic difference, as I gather, between the sides, or one major

difference in this case.

MR. SHANMUGAM: Well, that's correct, Justice Breyer.

JUSTICE BREYER: All right. Now, if that's correct, why? That is to say, it seems to me that, in treating these differently, you have proposed a real morass for courts to get into.

Did they really investigate on January 1? Was it an inadequate investigation? Was it a thorough investigation? Along with the difficulty of drawing a distinction between why it should be that that difference should exist, why not just apply the same rule to the investors whether they really do investigate or whether they don't and in both cases the statute begins to run on July 1, not January 1?

MR. SHANMUGAM: I think there’s no doubt, Justice Breyer, that the easiest rule in some sense for the Court to apply would be a rule that started the clock running from the date of inquiry notice. But when you're comparing our fallback position, a rule that is triggered by an actual investigation by the plaintiff, with Respondents' rule, which looks to what a hypothetical plaintiff could have done, I really do believe that our rule is going to be much easier to administer because Respondents' rule by definition calls

for speculation. And in the context --

JUSTICE GINSBURG: Why not say that because of one -- one element of the claim is scienter, that there's no inquiry notice based on -- there may have been a misrepresentation, whether it was innocent or deliberate, we have no way of knowing. Why not say because scienter is an element of the claim, and you can't get your foot in the door in the court unless you can plead that with particularity, that it's only when you have that indication that you have what you call inquiry notice?

MR. SHANMUGAM: Well, again, Justice Ginsburg, the fundamental inquiry, so to speak, in determining whether a plaintiff is on inquiry notice is simply whether a reasonable investor based on the information in the public domain would at least suspect the possibility that the defendant has engaged in securities fraud. And a plaintiff need not possess information bearing on each and every element of the underlying violation in order to be on inquiry notice. Were the rule otherwise, the concept of inquiry notice would collapse --

JUSTICE GINSBURG: But it's inquiry -- it's notice of what? And -- the law is that one element that must be pleaded with particularity. If you don't

have that, you have no claim.

MR. SHANMUGAM: Well -- well, that's correct. But this Court has never tethered the running of the limitations period to the ability to satisfy any applicable heightened pleading requirements. Indeed, to the contrary, in Rotella, this Court held quite the opposite.

JUSTICE KENNEDY: Well, but if not, then the whole storm warning theory that you have conceded doesn't work.

MR. SHANMUGAM: Well, I -- I'm by no means conceding that the storm warning theory doesn't work. I am simply suggesting that a plaintiff need not possess information specifically relating to scienter in order to be on inquiry notice. And that, we would --

JUSTICE BREYER: Then he would have to file a complaint possibly before he has enough evidence to even bring a case. That is, suppose my guy in Burma is going to be in jail for 3 years; he can't get to him for 3 years. Now, he's going to have to file his complaint before he could have the evidence that there was scienter. Now, that doesn't make sense to me.

MR. SHANMUGAM: Well, there are certainly going to be cases, Justice Breyer, in which a plaintiff frankly can never get to the point where the plaintiff

can satisfy the PSLRA's pleading requirements. And I think it's noteworthy that --

JUSTICE STEVENS: In those cases, of course, the statute would not run. Is that right?

MR. SHANMUGAM: No. We certainly don't believe --

JUSTICE STEVENS: If we go back to the text of the statute, it says 2 years after discovery, and you argue it should mean 2 years after he should have discovered, though -- and that period being measured by a date from inquiry notice, which is not mentioned in the statute at all.

MR. SHANMUGAM: Well, I think that in understanding the term "discovery," Justice Stevens -- that term really can't be meaningfully understood without reference to the common law against which the statute was enacted. And this Court in interpreting discovery rules --

JUSTICE STEVENS: But you do agree that you are reading as though it meant 2 years after he should have discovered?

MR. SHANMUGAM: Well, that's right, and, again, I think that getting to the point of "should have discovered" is a fairly modest step. But this Court has repeatedly made clear in interpreting the discovery rule

that a plaintiff must exercise reasonable diligence in order to invoke the rule's benefits, and that is simply because the discovery rule is an equitable rule, and it effectively incorporates the principle of laches, that is the principle that a plaintiff who sleeps on his rights is not entitled to the benefits of equity. Indeed --

JUSTICE SCALIA: Mr. Shanmugam, in Lampf we -- we had to choose between what statute of limitations provision, Federal one, we thought applied. And we had two choices: One was section 77m, which reads: “After such discovery” -- "after the discovery of the untrue statement or the omission or after such discovery should have been made by the exercise of reasonable diligence." That was one choice.

The other choice was 78i(e), which simply said: "unless brought within one year after the discovery of the facts constituting the violation.” No statement of "or after it should have been made by the exercise," okay? We chose the latter in Lampf.

Now, you are telling me that there was no choice between the two, that -- that "after discovery" always means after discovery was made or after it should have been made? What were we doing in Lampf, spinning our wheels?

MR. SHANMUGAM: Well, no, I don't --

JUSTICE SCALIA: I mean, I read this -- this statute -- and 1658 tracks, not 77m, which says "after discovery should have been made"; it tracks 78i(e), which says "after discovery." Now, to me that means after discovery, period.

MR. SHANMUGAM: Well, Justice Scalia, the Court did choose to essentially incorporate the language from -- it was section 9(e) of the 1934 Act. There were various provisions in the '33 Act and the '34 Act that incorporated discovery rules. And that's one --

JUSTICE SCALIA: Well, just tell me what the difference it was between 77m and 77i(e)?

MR. SHANMUGAM: Well --

JUSTICE SCALIA: What was the difference, unless it was that 77m -- I'm sorry, 78i(e) -- absolutely required knowledge?

MR. SHANMUGAM: Well, I think one potential difference is that section 13, section 77m, refers to discovery of the untrue statement or the omission. But I think more broadly with regard to both section 9(e) and the other provisions of the 1934 Act to which the Court looked, courts had actually construed those provisions as reaching both actual and constructive discovery at the time the Court decided Lampf. So I

really don't think --

JUSTICE SCALIA: So there was no difference between the two --

MR. SHANMUGAM: No, there was really --

JUSTICE SCALIA: -- and we were just wasting our time?

MR. SHANMUGAM: There was no difference between the two, and I think really for the reasons that the government states in its brief as well as the reasons that we state in our opening brief, the default understanding has always been that a reference to discovery includes at least constructive discovery. And a rule that triggers the limitations period from actual discovery would have significant vices because it would give plaintiffs --

JUSTICE SOTOMAYOR: Could you -- could you tell me what the difference is between actual knowledge and constructive knowledge? Because as I read the amici who have submitted briefs arguing that actual discovery should be our standard, they appear to say that actual discovery or actual knowledge includes anything that's in the public domain; that parties are presumed -- and we have plenty of cases that say that -- to know what's out there.

So outside of that, how would constructive

knowledge or constructive discovery be any different?

MR. SHANMUGAM: Well, I think --

JUSTICE SOTOMAYOR: It would require the shareholder to find the guy in Burma? Or to go and attempt in every case to engage employees in dishonorable conduct by talking about their business in private, company business -- as I understood it, we were asking employees to engage in potentially fiduciary breaches?

MR. SHANMUGAM: I think it's an open question, Justice Sotomayor, as to what actual discovery would -- would actually mean, and I think that there would be a pretty good argument that you don't actually discover the underlying facts until the plaintiff himself subjectively actually has them in his possession.

JUSTICE SOTOMAYOR: Well, that's going further than the amici are suggesting. The amici are suggesting -- and assuming we accept their suggestion -- that it should be everything that’s in the public domain, which seems reasonable to me.

MR. SHANMUGAM: Well --

JUSTICE SOTOMAYOR: What, in addition, do you think constructive knowledge would include that the actual knowledge standard doesn't?

MR. SHANMUGAM: Well, I think it does -- constructive knowledge obviously also includes information in the public domain, and we believe that the plaintiffs in this case were on inquiry notice precisely because --

JUSTICE SOTOMAYOR: Putting all of that --

MR. SHANMUGAM: -- of that information.

JUSTICE SOTOMAYOR: -- what in addition to that would it include, in your mind?

MR. SHANMUGAM: Well, for purposes of the inquiry notice analysis, I think that that's all you look to. You look to either information in the plaintiff's possession or information in the public domain. And once there is sufficient information –-

JUSTICE SOTOMAYOR: So -- so you are conceding amici's point that actual -- an actual knowledge standard is the same as a constructive knowledge standard?

MR. SHANMUGAM: Well, I would hope at a minimum that if the Court were to embrace an actual discovery standard, it would look to information in the public domain, precisely because otherwise you really would be rewarding an ostrich plaintiff because a plaintiff who claimed not to read what was in the newspapers could have the benefit of additional time.

But --

JUSTICE ALITO: Well, if actual knowledge means things that the plaintiff doesn't actually know, then I don't know what the difference is between actual knowledge and constructive knowledge. It's a meaningless distinction if that's how actual knowledge is defined.

MR. SHANMUGAM: Well, again, that's not how I would ordinarily understand the phrase "actual knowledge." But I think that it's important to remember that if in essence the standard that this Court were to adopt is a standard that does not start the clock running until there is sufficient information in the public domain for a plaintiff actually to plead a complaint, that would radically extend the limitations period for private securities fraud actions.

JUSTICE ALITO: Well, what is the problem --

MR. SHANMUGAM: No circuit --

JUSTICE ALITO: What is wrong with the -- with the inquiry notice rule that the court of appeals in this case set out on pages 29a to 30a of the joint appendix? This is from a Seventh Circuit -- quoting from a Seventh Circuit decision: "The facts constituting inquiry notice must be sufficiently probative of fraud, sufficiently advanced beyond the

stage of a mere suspicion, sufficiently confirmed or substantiated, not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit."

So that the statute would run upon inquiry notice, provided that within the 2-year period, the plaintiff could, if the plaintiff diligently investigated, find sufficient facts to -- to file a complaint that would satisfy -- satisfy the PLRA?

MR. SHANMUGAM: I think I'll answer that question, and then I would like to reserve the balance of my time.

I think the only problem with that rule is that, at the tail end, it effectively mandates the same hypothetical plaintiff inquiry that Respondents suggest. It requires a court to attempt to assess whether a plaintiff could have discovered the remaining information within a 2-year period. And that has all of the same vices, we would submit, as Respondents' rule and the government's rule.

I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE RESPONDENTS

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

Our position is that Congress intended the word "discovery" in section 1658 to have its normal and well-established meaning.

By contrast, Merck asks the Court to add concepts to section 1658 not found in its text by interpreting the word "discovery" to mean suspicion and for the 2-year limitations period to be triggered when facts cause an investor to suspect the possibility of fraud.

JUSTICE SCALIA: Well, you're adding -- you're adding concepts to it, as well. Nobody arguing before us intends discovery to mean actual discovery. Your -- you say constructive knowledge is enough; don't you?

MR. FREDERICK: Well, we say, at the first part of our submission, that the Court can decide the case on an actual discovery -- actual knowledge standard.

We have gone on to brief constructive discovery because, prior to 1934, in the numerous State statutes that use the phrase "discovery of facts constituting," many courts had adopted a constructive

knowledge standard.

We think we win under either standard. If the Court decides this is an actual knowledge case --

JUSTICE SOTOMAYOR: Can -- can you tell me what you see as the difference between the two? I keep going back to what the amici has argued, which is actual knowledge that includes knowledge of what's in the public domain, under the theory that every shareholder is presumed to know what's in the public domain because that's what they buy with and that's the market theory of securities law.

So, what do you see as a difference between the two?

MR. FREDERICK: In a fraud-on-the-market case, like this one, where an efficient market is pleaded, there's no practical difference. In an individual case, where the securities fraud alleges that an individual investor is harmed by the individual actions of some broker or some other person, there could very well be a difference in terms of what the reasonable investor should have known on the basis of information that would be available.

And the point of the constructive knowledge standard was to have plaintiffs not rest on their -- their ability to hide information, but to be diligent,

reasonably, in ascertaining that information, and the constructive knowledge standard really came to address a case different from the case that we have here, Justice Sotomayor.

JUSTICE SOTOMAYOR: But I -- it sounds right, but give me a practical -- give me a practical example --

MR. FREDERICK: Sure.

JUSTICE SOTOMAYOR: -- of what you are talking about, where -- where an individual investor would have something that's not in the public domain.

MR. FREDERICK: That would be information that the -- the broker, for instance, would have made available to the investor, that the investor simply didn't look at, or that the investor could have asked for, but -- but never followed up in obtaining.

And that kind of constructive knowledge standard, this Court has held in numerous cases, dating back to the 19th century, is an appropriate form of attributing knowledge to a reasonable person.

And the cases that we've cited in our brief -- Kirby, Wood -- those kinds of cases talk about what a reasonable person in those kinds of circumstances would be imputed to know.

JUSTICE SOTOMAYOR: Well -- but actual

knowledge would include anything the investor had in their possession because that's what actual knowledge is; I have it in my possession -- or I have it in the public domain. You start it from there.

MR. FREDERICK: Correct.

JUSTICE SOTOMAYOR: The -- the only difference then would be information the individual would have been able to get that wouldn't have been in the public domain?

MR. FREDERICK: That's correct, through reasonable inquiry, that by following up with questions to the broker or to other persons associated with that entity. It's a different theory, concededly, Justice Sotomayor, in a fraud-on-the-market case, which is what this case is.

JUSTICE SOTOMAYOR: I -- so we are in agreement that on a fraud-on-the-market case, it might have a different -- they would be identical?

MR. FREDERICK: That's correct, and --

JUSTICE SOTOMAYOR: You are suggesting that, in an individual fraud case, the inquiry has to be constructive knowledge because there could be things that --

MR. FREDERICK: It could be actual or constructive, depending on the facts and circumstances,

but the important point to draw away from this is that Congress also wrote in a 5-year period of repose in this statute and followed up on the suggestion of the Lampf dissenters, who believed that the period of repose was too restrictive.

So, in 2002, when Congress amended the statute, they cited the Lampf dissenters and extended the period of repose, which created an absolute bar to claims of fraud being brought against defendants.

The statute of limitations period -- by using a discovery rule -- was intended to preclude persons from resting on their rights and not taking action when they had discovered the facts constituting the violation. It was not intended --

JUSTICE GINSBURG: But when does the –- when does the 5-year -- what is the trigger for the 5-year period?

MR. FREDERICK: From the violation.

JUSTICE GINSBURG: Well, what is the violation?

MR. FREDERICK: The violation would be a material misstatement made with scienter. And, here, what we assert in the class period, Justice Ginsburg, is that the first statements that were made with scienter were those statements after Vioxx was put on the market,

in which Merck touted the naproxen hypothesis as an explanation for what it asserted to be a cardio-neutral effect of Vioxx, which was only subsequently -- there was empirical evidence to -- tending to disprove that thesis.

JUSTICE GINSBURG: But you -- you say that you did -- you did begin this action even before that point was reached because you -- you attribute this to the disclosure of the internal e-mails in the Wall Street Journal article?

So you -- you say, well, we sued even earlier than -- than the point at which we had evidence of scienter.

MR. FREDERICK: That's correct. Under our theory of the case, the period of constructive knowledge of all of the elements of the violation would have occurred in November of 2004 with the publication of The Wall Street Journal article.

JUSTICE SOTOMAYOR: So you are admitting that you filed an improper complaint, that you didn't have a basis -- a good faith basis for the complaint you filed?

MR. FREDERICK: No. I'm saying --

JUSTICE SOTOMAYOR: So, if you had a good faith basis, what was -- what was in your

possession that gave you that good faith basis?

MR. FREDERICK: First, let me say that the first complaint is now a legal nullity. It has been superseded by --

JUSTICE SOTOMAYOR: Counsel, I -- whether it's a legal nullity or not, answer my question which is: You had to have a basis for your complaint. What was in your possession or in the public possession that gave you that basis?

MR. FREDERICK: Shortly before the filing of the first complaint, there were public releases of a study that was done by the Harvard Brigham and Women's study, and that was a large epidemiological study that was the first empirical basis that disproved an aspect of the naproxen hypothesis.

Naproxen was not a drug studied at that time. But what the study showed was that Vioxx and Celebrex users had a higher rate of cardiovascular incidents, and, in fact, Vioxx had higher than Celebrex.

JUSTICE SCALIA: That doesn't prove scienter, though.

MR. FREDERICK: Well, to an investor who was following this information, that very well may have led to a strong inference of scienter because of the vociferous denials that Merck subsequently made to a

study that was publicly reported as being funded by a Merck grant.

Now, whether that would have met a post-Tellabs pleading standard, we will not know because that was not subject to that kind of scrutiny. We're here on a subsequent, superseding complaint that pleads those allegations, and we're here on a statute of limitations argument in which Merck attempts to argue that the suit was filed too late, rather than too early.

Obviously --

JUSTICE GINSBURG: But Judge Sloviter used the so-called Harvard study, it seems, in her opinion. She thought that that was the point at which you had enough to suspect scienter.

MR. FREDERICK: That's correct. But, of course, at that time, Justice Ginsburg, the case wasn't about the pleading standards for scienter of the first complaint.

It had long since gone past that, and the fourth and now the fifth amended complaint, which Merck acceded to its filing in the district court after certiorari was granted in this case is now the operative complaint, and I would submit that the allegations well-established the pleading standards for scienter.

Of course, that's not an issue before the

Court, and the question of whether the first complaint was premature is also not before the Court. But the fact that there is constructive knowledge only on the basis of new information that came to light is relevant because Merck cannot point to a single fact that came out between the FDA warning letter and the file -- and 2 years before the filing of the first complaint, so that narrow window between September 2001 and November 6, 2001.

And, in fact, when the FDA expanded the uses of Vioxx in April 2002, it approved a label that specifically addressed the uncertainty about the naproxen hypothesis.

JUSTICE ALITO: Now, your -- your position is that the statute begins to run at the time when a -- a plaintiff is -- has constructive knowledge, at least, of information that would be sufficient to file a complaint that would satisfy the PLRA?

MR. FREDERICK: That's correct. That was the general rule, prior to 1934, when Congress first wrote those words into the Federal statute.

But, Justice Alito, we have also provided information to the Court of a case in the 19th century called Martin -- this is on page 25 of our brief -- in which the standard was seen to be somewhat lower than

the normal pleading standard, and that is what a reasonable person would have believed that he had been subject to fraud.

JUSTICE ALITO: Well, my question -- why, then, did Congress allow 2 years after that? At that point, the plaintiff has everything that's necessary to file a complaint. So why does the plaintiff need 2 years after that point?

MR. FREDERICK: In the legislative reports that accompany the Act in 2002, what the Senate described in its report was a concern that a 1-year period would be too short for a plaintiff to file an action, survive a motion to dismiss, and then gain discovery about the possibility of other codefendants who had participated in that fraud.

This was the era, Justice Alito, in which Enron and WorldCom exposed to the world the complexity of vast and difficult-to-ascertain frauds, and Congress was seeking to extend that period so that investors would have an opportunity responsibly to bring cases that would ferret out that fraud and to get at all of the people who might have participated in that fraud.

That was the explanation that the -- the Senate gave for that, and that couples with the action by Congress in the PSLRA, which was intended to ensure

that these pleading standards would be well investigated and well ferreted out prior to pleadings. The 2-year period was intended to ensure that that kind of action would -- would take place.

And when you couple that with the 5-year statute of repose, the statute of limitations is simply an -- an insurance that a plaintiff is not resting too far on information within its possession when the statute of repose is going to provide absolute protection.

JUSTICE BREYER: So, is there a difference -- I'm trying to get these terminological differences clear in my mind, and I'm not quite certain of the difference between you and the government.

If you go back to my -- my Burma example, I think both you and the government agree that the statute doesn't begin to run until you find this person in Burma. But now, I'm not sure you disagree about -- whether you agree or disagree about this. So I think -- you find the person in Burma. That’s 6 months after you had all the other indications. Now, both of you say the statute begins to run. You would say, when you find that person in Burma, you have to get, through him, enough information to be able to file your complaint now in respect to scienter.

But the government would say, when you get that person in Burma, he has to be able to give you enough storm clouds, in respect to -- to scienter.

Is that what the -- is there that difference? I think --

MR. FREDERICK: I don't believe so. I believe --

JUSTICE BREYER: Is there no difference, then, between the two of you, or what?

MR. FREDERICK: Well, the difference -- here is the difference: We accept that the pleading standard rule advocated by the government is the brightest line rule and that this Court should adopt it. If it adopts something less than that and adopts a reasonable person's believing that fraud had occurred, that might not quite meet the pleading standards, but would nonetheless encapsulate the laws that existed prior to 1934, and we would prevail under that standard, too.

JUSTICE BREYER: Okay. So do you think -- you think the standard should be -- and I can find out from the government, and I will, I guess -- that it should be -- that you have to -- a reasonable person having talked to the guy in Burma would walk away thinking, Fraud.

That's the standard; you think they're both there --

but both of you agree you have to find the guy in Burma, though it could turn out that other features of the case, 6 months earlier, would put a reasonable person on notice to begin looking for somebody in Burma?

MR. FREDERICK: That's correct.

JUSTICE BREYER: So you both agree about that?

MR. FREDERICK: We do agree on that. And the difference is that if you talk to the person in Burma, Justice Breyer, you may not get enough facts to get a PSLRA-compliant pleading on file, but you might have the belief that a fraud had occurred.

JUSTICE BREYER: So -- so you want to say, you ought to get enough information from that or in all the other things the same, so that you have -- are able to file the complaint. They want to say you have to get enough so a reasonable person would believe a fraud had occurred. Is that right?

MR. FREDERICK: No. Our position is that the pleading standard is correct, and that if you don't adopt a pleading standard, something a little bit less than a pleading standard -- their standard -- is that --

JUSTICE BREYER: No, I'm not saying -- I'm not so worried about that. I know there's a lot less, but -- or more, whatever -- but I am --

MR. FREDERICK: The difference -- the space between our the position and the government is really quite small, and it rests on pre-1934 interpretations of "discovery of the facts constituting" that did not seem to tie specifically to pleading standards, but nonetheless adopted a reasonable person standard based on what a reasonable person would have believed that fraud had occurred.

JUSTICE GINSBURG: Mr. Frederick, before you -- you've finished, there's something puzzling about the Third Circuit decision, and it's that Judge Sloviter says at the end, in summary, "We conclude that the district court acted prematurely." She doesn't seem to close off a statute of limitations defense.

It's -- and the same thing on page 48a, footnote 17. She says, this -- her conclusion is, "At this stage of the evidence" -- she doesn't say that the district court was wrong in saying that the limitation period -- in its judgment about the limitation period having expired. She just said it was premature.

What -- what did she mean by that?

MR. FREDERICK: Well, this was brought as a motion to dismiss, Justice Ginsburg. Most times, a statute of limitations defense, which is an affirmative defense that the defendants have the burden to show --

most often they are brought as motions for summary judgment, in which there are undisputed facts that the defendant attempts to argue.

Here, I think what the Third Circuit was holding was that, this is not proper as a motion to dismiss and deny it as a motion to dismiss. But there -- it is routine in the law that where there are motions to dismiss, there subsequently are facts developed and subsequent pleadings brought. I don't think that the court was saying anything other than, this is the normal course in which motions to dismiss which should not have been granted would be allowed for further percolation by the case --

JUSTICE KENNEDY: Well, it does seem to me that even if we adopt your theory of the case, there is some problem with the allegation that there was fraud, because Vioxx did not -- because Merck did not disclose that the hypothesis was only hypothetical, and the FDA August letter made that clear. So it seems to me you may have a problem as to that aspect of the case.

MR. FREDERICK: I don’t think so --

JUSTICE KENNEDY: But, again, I'm not sure we would parse that out up here.

MR. FREDERICK: Well, you can in these ways, because the market had no reaction. The analyst who

looked at the FDA warning letter said that this was not changing their information. The FDA has said --

JUSTICE KENNEDY: Oh, well, you mean we have to look to see how the analysts react?

MR. FREDERICK: Well, that was part of the factual inquiry that Merck itself submitted as part of its motion to dismiss. Whether the Court treats that as relevant for ascertaining at this time whether to affirm the Third Circuit, I don't think the Court needs to reach, but I would point out that our brief goes into this in quite some detail, that the publicly available information made clear there was absolutely no market reaction that would have led any person reasonably to suspect that Merck did not honestly believe the naproxen hypothesis that it were positing at the time.

JUSTICE SOTOMAYOR: Well, you think there was, because you filed suit a month after that study in 2003.

MR. FREDERICK: To be sure, subsequently information came to light that brought Merck's very serious fraud to public attention. And on the basis of that very serious fraud that had significant adverse consequences to investors, we have brought suit.

But it would be the height of irony that for Merck's success in concealing its fraud through the

scientific uncertainty that was occurring with the naproxen hypothesis, that it would have this suit thrown out on statute of limitations grounds and never face the day in court that the investors here expect and deserve.

If there are no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART,
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

By its terms, section 1658(b)(1) provides that the 2-year period of limitations will commence to run upon discovery of the facts constituting the violation. In isolation, the word "discovery" could refer either to actual or constructive discovery. Between the period of the time of this Court's decision in Lampf and the enactment of the new limitations period in 2002, all of the courts of appeals had concluded that constructive discovery would suffice, and we believe that Congress's enactment of the statute tracking that language constitutes acquiescence in that view.

Nevertheless, it's noteworthy that the

statute refers to facts constituting the violation, and it's absolutely essential to this Court's section 10(b) jurisprudence that can there be no 10(b) violation without scienter. Scienter is an essential element of the offense, and the coverage of section 10(b) would be dramatically expanded if it were read to cover innocent mistakes.

JUSTICE ALITO: Was there also a substantial support in the lower court case law prior to the enactment of this provision for the existence of inquiry notice? And is that therefore also incorporated into this?

MR. STEWART: There were certainly frequent references to the concept of inquiry notice. There was not uniformity among the courts of appeals as to precisely what role inquiry notice would play in the analysis.

The majority of the courts of appeals believed as we believe that inquiry notice is a subsidiary step along the way to determining when a reasonable plaintiff would have actually discovered the facts constituting the violation. And so you look first to see when would a reasonable person have become suspicious, and then you ask: Once the reasonable person's suspicions were aroused, how long would it take

to complete the investigation and have actual knowledge? And that's consistent with our view.

There certainly were courts that adopted Petitioners' view that the statute began to run at the time of inquiry notice, at the time suspicions were aroused.

JUSTICE ALITO: But, under your position, as -- the concept of inquiry notice becomes essentially very unimportant, if not completely meaningless. You just ask at what point would a reasonably diligent investor have obtained knowledge of the necessary facts. And so, what difference does it make when a person was put on inquiry notice?

MR. STEWART: Well, I think it is -- I think you are right that that is the ultimate question for the Court: When would a reasonably diligent person have obtained actual knowledge? The concept of inquiry notice can be a useful subsidiary step, because even once it has been established -- for instance, there are many cases of this Court in which the plaintiff's failure to exercise reasonable diligence consisted of the failure to look at documents that were available in public records offices or corporate records that were open for inspection.

And in that situation, once you identify the

point at which a reasonably diligent plaintiff would have commenced to look, there won't be a very long gap in time before the reasonably diligent plaintiff would have found what he was looking for. And in that situation, it's really integral to identify the point of inquiry notice, the point at which the plaintiff would have started looking.

Now, the fact that inquiry notice is not the be-all and end-all shouldn't be surprising, because it's a term that doesn't appear in the statute. And so the fact that it ultimately plays a subsidiary role in undertaking the ultimate --

JUSTICE BREYER: So how -- how -- what's the right phrasing? Because I -- I understood that inquiry notice has somehow made an appearance, and it seems to confuse me. So you say the statute begins to run when a reasonable person would have found facts sufficient to show a violation or sufficient to permit him to file a complaint that alleges a violation? How -- does that come in any way?

MR. STEWART: Yes, we -- under our --

JUSTICE BREYER: How do I say that here?

MR. STEWART: Under our standard, the -- the individual would have knowledge of facts constituting the violation once he had facts sufficient that if -- if

alleged in a complaint, they would survive a motion to dismiss for failure to state a claim.

JUSTICE BREYER: Okay.

MR. STEWART: They would establish --

JUSTICE BREYER: So you are basically in agreement. And then the way that the -- the -- then the way that this inquiry thing comes in is that sometimes, perhaps quite often, a reasonable person, given certain facts, would begin to inquire.

MR. STEWART: That's correct. And --

JUSTICE BREYER: And if it happened to be a case where inquiry played no role, then it wouldn't. It's all a question of what a reasonable person would do.

MR. STEWART: That's correct. There certainly would be --

CHIEF JUSTICE ROBERTS: I don't understand -- I don't understand that. I mean, if there are facts that would cause a reasonable person to inquire, you say that those only come to fruition for purposes of the statute of limitations when they discover it, when they have constructive discovery, right?

MR. STEWART: Yes.

CHIEF JUSTICE ROBERTS: So inquiry notice

has nothing to do with anything.

MR. STEWART: Well, inquiry notice is -- in many instances, identifying the point of inquiry notice is often essential to identifying the point at which a reasonable person would have discovered the facts that would support a well-pleaded complaint.

CHIEF JUSTICE ROBERTS: I don't understand that.

MR. STEWART: For instance, suppose it was common ground that there were records available in an admittedly obscure public records office, and that a plaintiff, once he started to conduct an investigation, would find those records within a week. We still wouldn't know the point at which a reasonably diligent plaintiff should have found those records until we could first determine when would a reasonably diligent plaintiff have started looking, and that would be the point of inquiry notice. And so, it might be that at a certain point, the plaintiff had --

CHIEF JUSTICE ROBERTS: Well, and maybe –- and maybe it turns out that you could find them within a week and maybe it turns out you could find them within 3 months or when the fellow from Burma is released, but in either case, it’s when they discover it or should have discovered it.

MR. STEWART: That's correct, but we -- again, knowing only that the records would have taken a week to be discovered once the plaintiff started looking, wouldn't tell you when a reasonably diligent plaintiff would have found those records, unless you also knew the date on which the reasonably diligent plaintiff would have begun his investigation.

JUSTICE STEVENS: Mr. Stewart, you are talking about a hypothetical case here, right?

MR. STEWART: Yes.

JUSTICE STEVENS: Some -- we are talking about this particular case. Does the inquiry notice contribute anything to answering the question when this plaintiff or the -- the class of plaintiffs should have discovered this violation?

MR. STEWART: I think typically in a fraud--on-the-market case, inquiry notice will really tell us nothing meaningful --

JUSTICE STEVENS: Right.

MR. STEWART: -- because the whole premise of the case is the market as a whole was defrauded. Certainly, a reasonably diligent investigation –-

JUSTICE STEVENS: So, in this particular case, we should ignore inquiry notice entirely?

MR. STEWART: I think we should ask: When

would a reasonably diligent investor have discovered sufficient facts to file a well-pleaded complaint?

Now, constructive discovery does still play a role, because if there was information in the public domain, but a particular investor simply didn't read news reports, didn't follow even public information about the -- the nature of what was going on with Vioxx, that person wouldn't be shielded from the running of the limitations period simply because he didn't have actual knowledge.

JUSTICE ALITO: Why does the --

JUSTICE GINSBURG: And, Mr. Stewart, the -- you said -- the phrase that you used were "facts constituting the alleged violation," and the other side says, well, look at the Court's Tellabs opinion: That described as discrete (1) facts constituting an alleged violation -- which you say is the test -- and (2) facts evidencing scienter.

MR. STEWART: And I think if you read Tellabs as a construction of this statute, it would be inconsistent with our view. But the Tellabs Court was talking about something else. It was construing the heightened pleading requirements of the PSLRA.

Now, the PSLRA pleading requirements do distinguish, in adjacent subsections, between the

requirement that a plaintiff plead with particularity the specific statements that are alleged to be false or misleading and the reason that they are false and misleading, on the one hand -- that's in subsection (1) -- and then, in subsection (2), it requires also to be pleaded with particularity the facts that establish strong inference of scienter.

And the Court in Tellabs used the term "facts constituting the violation" as a shorthand reference to that subsection (1); namely, you have to plead with particularity facts about the alleged misstatement and why it's misleading.

The statute itself, the PSLRA, does not use the term "facts constituting the violation" to describe the first category. And the word "violation" as applied to 10(b) naturally encompasses both what the defendant did and what his state of mind was.

The other thing we would say -- two other things we would say in that regard are, first, as the introductory language of section 1658(b) points out, this limitations period only applies to suits in which the plaintiff alleges misconduct involving fraud, deceit, manipulation, or contrivance.

And so, the limitations period is limited to violations that have scienter as an element. And,

therefore, it would be particularly peculiar to think of a violation as not encompassing the fact of scienter.

The other thing we would say -- and Justice Scalia was asking earlier about the differences between 78i(e) and 77m -- and there are really too salient differences. The first is that 77m is explicit in providing that constructive as well as actual discovery will suffice. And we think that 1658(b)(1) is properly read to encompass constructive discovery, even though it doesn't say so in so many words.

But the other salient difference is that the period in 77m doesn't commence to run by its terms upon discovery of the violation or the facts constituting the violation. The statute says discovery of the false or misleading statement or omission. That's natural in 77m, because 77m deals with violations that don't have scienter as an element. But if this Court had incorporated that language, it would have given the impression that knowledge of scienter was not sufficient -- was not required.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Shanmugam, you have 4 minutes.

REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you,

Mr. Chief Justice.

A narrow issue before the Court in this case is whether a plaintiff must possess information specifically relating to scienter in order to be on inquiry notice. And really under any standard for inquiry notice, there was abundant information in the public domain as of 2001 at least suggesting the possibility that Petitioners in this case had engaged in securities fraud.

Now, my brothers don't really dispute that proposition. Instead, they really advance two other options for interpreting section 1658(b), under which the concept of inquiry notice, the well-established concept of inquiry notice, really has no role.

My friend Mr. Frederick suggested, at least in cases involving alleged fraud on the market, that the standard really should be an actual discovery standard. But no court of appeals has adopted that interpretation of section 1658(b), and as a practical matter that would dramatically lengthen the limitations period for private securities fraud actions.

And it is no answer to say that Congress's inclusion of a statute of repose makes everything okay. We would respectfully submit that the inclusion of the statute of repose suggests that Congress was simply

particularly concerned with the inclusion -- with the fact that plaintiffs could bring stale claims, and that Congress in no way intended to modify the traditional operation of the discovery rule.

With regard to the suggestion that the Court should simply adopt a constructive discovery rule that pays no heed to inquiry notice, which is the standard that the government seems to be advancing, I think, first of all, Respondents' difficulty in coming up with a date on which constructive discovery occurs in this case simply illustrates the problem that would be multiplied a hundredfold if that standard is applied nationwide.

And where a statute of limitations is concerned, one needs to have clear rules and rules that courts can easily apply without inconsistency. I do think that that rule would also lead to abuse. It would lead to the abuse of the ostrich plaintiff who simply lies in wait and waits to see how a company's stock performs before bringing suit.

And make no mistake about it: That is what precisely happened in this case. By counsel for Respondents' own admission in the district court, the filing of the lawsuit in 2003, before the withdrawal of Vioxx from the market, was triggered by a disappointing

earnings report that led to a decline in the stock price. And one can expect that that phenomenon will be multiplied if such a hypothetical plaintiff inquiry is adopted.

In this case, there was abundant information in the public domain by virtue of the FDA warning letter and other sources as of 2001. The plaintiffs in this case conducted no investigation at that point. And this Court's cases --

JUSTICE GINSBURG: As long as the stock price was holding, how was the plaintiff injured?

MR. SHANMUGAM: The plaintiff may not have suffered an injury by that point, but it is clear that section 1658(b) refers to the facts constituting a violation of section 10(b), not all of the elements of a private cause of action. So Congress itself contemplated the possibility that the limitations period could begin to run before the loss occurred.

And if I can just say one thing about this Court's cases concerning the discovery rule, I respectfully disagree with my friend Mr. Frederick. This Court's cases make clear that a plaintiff must exercise reasonable diligence in order to take advantage of the discovery rule. Indeed, recently in Klehr in the context of civil RICO, this Court held that a plaintiff

must exercise reasonable diligence even to invoke the doctrine of fraudulent concealment.

JUSTICE GINSBURG: If it's true that everything was locked up internally at Merck, all the reasonable diligence in the world would not have uncovered what eventually came out.

MR. SHANMUGAM: And under our approach, if a plaintiff comes forward and shows that the plaintiff exercised reasonable diligence but was unable to discover any remaining information, the plaintiff will have the benefit of additional time.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:05 p.m., the case in the above-entitled matter was submitted.)