No. 07-1489

IN THE
SUPREME COURT OF THE UNITED STATES

TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and ROBERT VILE,
Petitioners,

v.

HEIDE BETZ,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Heide Betz charged Petitioners Trainer Wortham & Company, Inc., David P. Como, First Republic Bank and Robert Vile (collectively, the "defendants") with federal securities fraud. The defendants promised Betz a generous rate of return without touching principal. (ER 300, 677.) The defendants then invested $2.2 million of Betz's life savings in unsuitable stocks, mostly in the volatile technology and telecommunications industries. (ER 44, 46.) When periodic statements showed a decline in Betz's account balance, the defendants initially gave her false reassurances that the losses were temporary and that her stocks would recover. (ER 693-94, 696-99.) Later, the defendants gave Betz more specific assurances that the president of Trainer Wortham would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." (ER 707.) Betz filed suit just over one year after learning that the defendants' promises were false. (ER 1.) The questions presented are:

1. Did the Court of Appeals err in following the majority of circuits in concluding that the statute of limitations began to run, not the moment the decline in Betz's account balance created a mere possibility of fraud (as one circuit has suggested), but when Betz became aware of facts sufficiently probative of fraud to put her on inquiry notice, and then, only when Betz, in the exercise of reasonable diligence, should have discovered the facts constituting the fraud?

2. In evaluating the second prong of its inquiry notice plus reasonable diligence test, did the Court of Appeals err in holding Betz created a genuine issue of material fact sufficient to defeat summary judgment by showing the defendants made specific assurances that could have delayed a reasonable investor in Betz's position from discovering the fraud?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The defendants, like Chief Judge Kozinski in his dissent, misstate the law in describing the Ninth Circuit decision as "in left field." (Pet. 3, citing App. 28a.) And the defendants exaggerate when they call the Courts of Appeals "fractured" on the inquiry notice issue. (Pet. 15.)

Almost all the circuits now follow some form of inquiry notice. This Court left it to the lower courts to sort out the inquiry notice question in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Congress showed its approval of prevailing case law on this point when it enacted 28 U.S.C. §1658(b). Congress extended the limitations period for §10(b) claims, but made no substantive change in the "discovery" language previously in effect under 15 U.S.C. §78i(e).

The defendants identify only two approaches to inquiry notice that arguably could make a difference here: (1) the Eleventh Circuit approach suggesting that inquiry notice could have been triggered the moment Betz learned facts raising the mere possibility of fraud; and (2) the consensus of most other circuits that would give Betz the chance to conduct some reasonable inquiry to discover the fraud. The Ninth Circuit cannot be faulted for following the consensus of most courts on this issue. The defendants, like Judge Kozinski, wrongly accuse the Ninth Circuit of standing alone in imposing an inquiry notice standard that would require Betz to be aware of facts sufficiently probative of fraud, including scienter. (See, Pet. 20; App. 33a.) The

defendants ignore an emerging body of federal appellate and district courts sharing this view.

The record here shows that Betz made inquiries about the decline of her account balance, but was thwarted in her ability to discover the fraud by the defendants' specific assurances. (ER 693-94, 696-99, 707-09.) The defendants bear a considerable burden, at the summary judgment stage, of showing that Betz's claim is time-barred. The Ninth Circuit found a genuine issue sufficient to defeat summary judgment when the defendants made specific assurances that could have delayed a reasonable investor in Betz's position from discovering the fraud. (App. 22a.) Because the Ninth Circuit applied prevailing inquiry notice standards in reaching its conclusion, this appeal presents no need for Supreme Court intervention.

STATEMENT OF THE CASE

Facts

The defendants misstate the facts in describing Betz as "a 25-year veteran of the business world." (Pet. 5.) Because this is an appeal of summary judgment, this Court is obligated to view the evidence in the light most favorable to Betz as the non-moving party and to draw all justifiable inferences in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Judged by this standard, this Court must accept Betz's claim that she is a retired art dealer, but she knew nothing about stocks and bonds and she only understood the "bottom line," or total balance of her account. (ER 666, 691, 706.) Betz could not explain what a "stock" is, nor what a "bond" is. (ER

691, 299-300.) Because of her naiveté on these kinds of issues, Betz testified that she relied solely on the defendants for advice. (ER 298.) The Ninth Circuit did not focus on Betz's naiveté in its final decision.[1] But by shifting emphasis, the Ninth Circuit gave the defendants no license to misstate the facts.

In 1999, Betz sold her house for $2.2 million. (ER 705.) Betz was seeking a real estate loan to buy a co-op, and met with Carmen Castro of First Republic Bank for this purpose. (ER 705.) Castro introduced Betz to David Como of Trainer Wortham, a subsidiary of First Republic. (ER 705.) Como and Castro recommended that Betz invest the proceeds from the sale of her house with Trainer Wortham. (ER 671.) Betz told Como and Castro that the $2.2 million was all the cash she had and that she sold her home to generate income for her living expenses. (ER 670, 705.) Como and Castro assured Betz that, if she invested her $2.2 million with Trainer Wortham, she could withdraw $15,000 per month from her portfolio without touching principal. (ER 300.) Betz was to use at least half of this monthly income to pay off a First Republic real estate loan that Betz obtained through Castro. (ER 40.) Como also produced charts to suggest that the principal would grow to $2.7 in one year and $4 million in five years. (ER 668.)

In June, 1999, Betz entered into an oral agreement with Como, giving the defendants control over the $2.2 million. (ER 705.) Betz and Como agreed that Como would invest Betz's money "in such a fashion that [Betz] would receive $15,000 a month

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[1] In applying its objective inquiry notice plus reasonable diligence test, the Ninth Circuit amended its prior opinions by removing all references to Betz's lack of sophistication. (*See*, e.g., App 57a, at n.4; 84a-85a.)

from the profit of the investment and that he would not touch principal." (ER 677.)

At the time of the oral agreement, Betz also signed a written "Letter of Understanding for Portfolio Management and Administrative Services" and "Investment Management Agreement." (App. 4a.) The defendants correctly state that these written agreements contained boilerplate disclosures about the risk of investment and the potential loss of principal. (Pet. 6-7; ER 380-84.) But the defendants fail to mention that the agreements contained no "integration" or "merger" clauses and made no reference to Como's oral promises. (App. 4a-5a; ER 380-84.)

After Betz opened her account with the defendants, she began receiving monthly account statements. (ER 691.) Betz experienced growth in her account over the first six months. (App. 91a.) But by February 2000, Betz received her first statement showing an account value below $2.2 million. (App. 5a.) Betz continued to receive periodic account statements showing that the account value had dropped below the amount of her initial investment. The defendants admit that Betz raised inquiries when the account balance dropped to $1.8 million, and later, to $1.3 million. (Pet. 7-8, citing ER 317-18, 328-33, 373.) Throughout this period, Como and Robert Vile, another Trainer Wortham investment advisor, assured Betz that the losses were temporary and that the stocks would recover. (ER 693, 697-99, 707.) By March 2001, Betz's account balance had dropped to $848,000. (App. 5a.)

When she received her March account statement, Betz spoke with Vile to express her dismay that the value of her portfolio had dropped to $848,000. (ER 706-07.) Vile told Betz that the

declining balance was attributable to her monthly $15,000 withdrawals that the defendants originally promised. (ER 681.) But Vile assured Betz that "we know what we are doing. This is temporary. We're going to—we're watching your account. And it's temporary. We're taking care of everything. Don't worry about it." (ER 696.) Vile gave Betz specific assurance that "within a year or less the market would recover and [her] account would be back to $2.2 million." (ER 707.) Como also assured Betz that "there was nothing wrong with the portfolio and that the value would be back up very soon." (ER 693, 707.) Castro made similar assurances that Vile and Como "knew what they were doing" and that Betz "should not worry about [her] portfolio." (ER 707.)

When the account balance failed to recover, Betz met with Castro later in the spring of 2001. For the first time, Castro acknowledged "a serious problem" with the way Betz's portfolio had been managed. (ER 707.) But Castro assured Betz that the president of Trainer Wortham, Charles Moore, would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." (ER 707.) Despite acknowledging a problem with the account, Castro never suggested that Como or Vile had deliberately lied to Betz.

The defendants strung Betz along for another year with reassurances until Moore met personally with Betz in May 2002. Shortly after this meeting, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be patient with them and not take any legal action." (App 5a; ER 707.) But the next month, in June 2002, Castro told Betz that Trainer Wortham was "not

going to do anything at all" to remedy the declining value of her account. (ER 707.)

Moore later testified that a portfolio of about $2 million invested in equities would earn about two percent in 1999—about $40,000 per year. (ER 717.) Moore admitted there was no way $2 million could earn $15,000 per month: "This doesn't make sense." (ER 717.) Como made a similar admission in his testimony. (ER 719, 723.)

Just over one year after Betz discovered the fraud, that is, on July 11, 2003, Betz filed her lawsuit. (ER 1.) Betz charged the defendants with securities fraud in violation of §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. §240.10b-5. (App. 6a.) Betz also raised supplemental state law claims for breach of contract, negligent misrepresentation, breach of fiduciary duty, and violation of the Cal. Bus. & Prof. Code §17200.[2] (See, ER 53-59.)

The District Court grants summary judgment.

The defendants moved for summary judgment based on the two-year statute of limitations in 28 U.S.C. §1658(b). The District Court granted summary judgment, holding that Betz's federal securities claim was time-barred. (App. 103a.) The District Court concluded that the decline in Betz's

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[2] The District Court granted summary judgment to the defendants on Betz's state law claims. But in an unpublished Memorandum Opinion, the Ninth Circuit reversed. *See, Betz v. Trainer Wortham & Company, Inc.,* 2007 WL 1494018, 236 Fed.Appx. 253 (9th Cir. May 11, 2007) (unpublished). The defendants are not challenging this aspect of the Ninth Circuit decision.

account balance was sufficient to put Betz on inquiry notice by no later than March 2001. (App. 101a.) And the District Court rejected Betz's argument that the defendants' reassurances created a genuine issue of material fact. (App. 103.)

The Ninth Circuit reverses.

After making some amendments to its opinion, the Ninth Circuit issued its final decision reversing the judgment of the District Court. (App. 23a.) The Ninth Circuit joined ten of the other circuits in holding that inquiry notice could start the running of the limitations period for securities fraud. (App. 11a.) The Ninth Circuit then adopted the inquiry notice plus reasonable diligence test used by the Tenth Circuit. (App. 15a.) Under the first prong of this test, the court must determine if the plaintiff is aware of facts sufficiently probative of fraud--that is, sufficiently advanced beyond the stage of mere suspicion--to put the plaintiff on inquiry notice. (App. 16a.) Once the plaintiff is on inquiry notice, the Ninth Circuit asks "when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud." (App. 16a.) The Ninth Circuit holds that the answer to the second question "tells us when the statute of limitations began to run." (App. 16a.)

Applying its two-part test, the Ninth Circuit could not say, as a matter of law, that a reasonable investor in Betz's position should have discovered the facts giving rise to her claim before July 11, 2001. In reaching this conclusion, the Ninth Circuit considered the "express assurances made by the [d]efendants that they would remedy the problems in the account, which may have lulled a reasonable

investor into inaction." (App. 23a.) The court held that a jury must determine "whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her account and all would be made right." (App. 23a.)

After making a few amendments in its final opinion, the Ninth Circuit panel voted to deny the defendants' petition for panel rehearing. (App. 27a.) Because a majority of the active judges did not vote in favor of en banc consideration, the Ninth Circuit denied the defendants' petition for rehearing en banc. (App. 28a.)

In a strongly worded dissent, Chief Judge Kozinski (joined by Judges O'Scannlain and Bea) accused the court of being at odds with ten other circuits. (App. 28a.) The defendants rely heavily on Judge Kozinski's dissent as the basis for their Petition.

REASONS FOR DENYING THE WRIT

I. THE DEFENDANTS, LIKE THE DISSENTING CHIEF JUDGE, MISSTATE THE LAW BY DESCRIBING THE NINTH CIRCUIT DECISION AS "IN LEFT FIELD."

The defendants paint a false picture of the Ninth Circuit staking out a radically different position on inquiry notice that is at odds with the other hopelessly fractured circuits. To support this picture, the defendants employ Judge Kozinski's rhetorical excess in describing the Ninth Circuit decision as "in left field," or at odds with any other court "in the known universe." (Pet. 3, citing 28a, 31a.) But on closer examination, the defendants'

argument collapses. Most of the circuits have now reached a general consensus on inquiry notice issues. And the Ninth Circuit decision in the Betz appeal is consistent with the prevailing view.

A. The Ninth Circuit followed the majority of circuits in adopting its inquiry notice plus reasonable diligence test.

The defendants and Judge Kozinski are wrong when they accuse the Ninth Circuit of being at odds with all other circuits. The Ninth Circuit has joined ten of those circuits in holding that inquiry notice can start the running of the limitations period for federal securities fraud under §10(b). (App. 11a-13a.) The defendants admit that a majority of circuits follow some form of the Ninth Circuit's inquiry notice plus reasonable diligence test. (Pet. 16-17.) Like the majority, the Ninth Circuit holds that the clock does not start to run until (1) the plaintiff is on inquiry notice; and (2) the plaintiff, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.[3] (App. 16a; Pet. 17.)

This Court left it to the lower courts to sort out the inquiry notice question in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). The defendants argue that *Lampf* underscores the

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[3] The defendants refer to the following cases for this majority view: *Sterlin v. Biomune Sys.,* 154 F.3d 1191, 1201 (10th Cir. 1998), *New England Health Care Employees Pension Fund v. Ernst & Young, LLP,* 336 F.3d 495, 501 (6th Cir. 2003); *Young v. Lepone,* 305 F.3d 1, 8 (1st Cir. 2002); *Great Rivers Coop. v. Farmland Indus., Inc.,* 120 F.3d 893, 896 (8th Cir. 1997); *Caviness v. Derand Res. Corp.,* 983 F.2d 1295, 1303 (4th Cir. 1993); *Jensen v. Snellings,* 841 F.2d 600, 606-07 (5th Cir. 1988).

critical need for nationwide uniformity. (Pet. 4, citing *Lampf*, 501 U.S. at 357.) The defendants' argument is misleading. This Court only was expressing its preference in *Lampf* for a uniform federal statute of limitations over multiple state statutes. *Id.* The Court selected the 1-year period after discovery and the 3-year period of repose contained in §9(e) of the 1934 Act, 15 U.S.C. 78i(e). *Id.* at 364, n. 9. The Court also determined that equitable tolling was inconsistent with the 1-year and 3-year structure of the federal statute. *Id.* at 363. Beyond that, this Court saw no need to dictate to the lower courts on how the 1-year discovery period under the federal statute was to be construed.

Congress showed its approval of prevailing case law on inquiry notice when it extended the statute of limitations in the Sarbanes-Oxley Act of 2002. Congress extended the limitations period to "2 years after discovery of the facts constituting the violation; or…5 years after such violation." 28 U.S.C.§1658(b). In adopting its inquiry notice standard, the Ninth Circuit observed that Congress opted for identical "discovery" language previously in effect under §9(e) of the 1934 Act. (App. 13a.) This Court has instructed that it should assume that Congress is aware of prevailing case law and legislates in its light. (App. 13a, citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982).) By 2002, a growing majority of the lower federal courts were adopting an inquiry notice standard with some kind of reasonable diligence component. By choosing "discovery" language identical to §9(e), Congress implicitly approved this developing case law.

Both this Court and Congress have left it to the lower courts to develop inquiry notice standards. With the *Betz* decision, the Ninth Circuit has now joined ten of its sister circuits in recognizing inquiry notice. (11a-13a.) The Ninth Circuit has sided with the majority in adopting its inquiry notice plus reasonable diligence test. (App. 16a; Pet. 17.) Because the Ninth Circuit decision is consistent with the prevailing case law, the defendants have failed to show a compelling need for Supreme Court intervention.

1. The defendants exaggerate when they call the circuits "fractured" over inquiry notice.

The defendants misstate the law when they call the Courts of Appeals "fractured" in determining when the statute of limitations starts to run. (Pet. 15.) The defendants run through four different circuit court approaches—and then, they characterize the Ninth Circuit decision as a fifth approach that "departs radically" from the others. (Pet. 16-19.) The defendants exaggerate the significance of this purported split among the circuits. Most of the nuanced distinctions drawn by the defendants would make little difference in how the circuits would approach Betz's particular circumstances.

The defendants identify only two approaches to inquiry notice that arguably could make a difference here:

(1) the Eleventh Circuit approach suggesting that inquiry notice could have been triggered the moment Betz learned facts raising the mere possibility of fraud, *Theodarous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001) (clock runs when plaintiff

learns facts "that would lead reasonable person to begin to investigate possibility of fraud"); accord: *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002); and

(2) the consensus of most other circuits that would give Betz the chance to conduct some reasonable inquiry to discover the fraud. See, e.g, *Sterlin v. Biomune Sys.*, 154 F.3d at 1201 (securities case remanded to consider second prong of Tenth Circuit's inquiry notice plus reasonable diligence test); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d at 501 (Sixth Circuit rejected *Theodarous* in favor of inquiry notice plus reasonable diligence test); *Young v. Lepone*, 305 F.3d at 8 (First Circuit reversed dismissal because question of reasonable diligence was a jury question); *Ritchey v. Horner*, 244 F.3d 635, 639 (8th Cir. 2001) (Eighth Circuit deemed inquiry notice issues too fact intensive to resolve by summary judgment); *Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 101 (2nd Cir. 2003) (Second Circuit reversed dismissal because of factual disputes over scope of plaintiffs' inquiry and whether reasonable inquiry would have revealed enough information to satisfy PSLRA pleading requirements); *Marks v. CDW Computer Centers, Inc.*, 122 F.3d 363, 370 (7th Cir. 1997) (Seventh Circuit reversed dismissal because defendants failed to show that reasonably prudent investor would have discovered fraud and brought suit within limitations period).

The defendants argue that the Second and Third Circuits have taken a different "hybrid" approach that depends on whether the plaintiff actually conducts an investigation. (Pet. 18, citing *LC Capital Partners LP v. Frontier Ins. Group*, 318 F.3d 148, 154 (2nd Cir. 2003); *Mathews v. Kidder,*

Peabody & Co., 260 F.3d 239, 252-55 (3rd Cir. 2001).) This is not a distinction that would make any difference in this appeal. The defendants admit that Betz made inquiries about the decline in her account balance. (Pet. 7-8, citing ER 317-18, 328-33, 373.)

The Ninth Circuit cannot be faulted here for giving Betz a reasonable opportunity to discover the fraud. This approach is consistent with consensus of practically all but one of the circuits. This Court might have had some justification for granting a writ if Betz's appeal had arisen in the Eleventh Circuit and summary judgment were affirmed. But this appeal is not the proper vehicle for challenging the lone minority view of a different circuit.

2. The Ninth Circuit did not depart from existing law in concluding that the decline in Betz's account balance was insufficient to trigger inquiry notice.

The defendants incorrectly argue that the Ninth Circuit has defined inquiry notice differently from all other circuits. The defendants express outrage with the Ninth Circuit's holding that inquiry notice was not triggered here until Betz discovered "evidence that the defendants had intentionally or deliberately and recklessly misled [her]." (Pet. 20, citing 20a.) The defendants quote Judge Kozinski's description of this need for evidence of scienter as an "oxymoronic rule." (Pet. 20, citing App. 31a.) And paraphrasing Judge Kozinski, the defendants charge that "[t]he rule everywhere in the known universe—or at least everywhere else in the nation—is…that a plaintiff is obliged to inquire upon learning facts that raise the 'possibility of a fraud.'" (Pet. 21, citing

Sterlin, 154 F.3d at 1203.) By making this hyperbolic declaration, the defendants expose themselves to the risk being proven wrong.

The defendants ignore a growing body of federal appellate and district court decisions that support the Ninth Circuit's scienter holding. The defendants disparage the Ninth Circuit's reliance on *Fujisawa Pharm. Co. v. Kapoor, Witter, Reynolds, Inc.*, 115 F.3d 1332, 1335 (7th Cir. 1997). But the Seventh Circuit held unequivocally in Fujisawa that the facts constituting notice "must be sufficiently probative of fraud—sufficiently advanced beyond the state of 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." *Id.* The Seventh Circuit later reaffirmed this rule in *Marks v. CDW Computer Centers, Inc.*, 122 F.3d at 368. The Second Circuit agrees with the Seventh Circuit in holding that the fraud must be probable, not just possible. See, *Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 193 (2nd Cir. 2003) (storm warnings must show probability of fraud).

Because the inquiry notice standard focuses on the probability and not just the possibility of fraud, the Second and Seventh Circuits have held that the statute of limitations will not run unless the plaintiff knew or should have known of a knowing violation. *Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 101 (2nd Cir. 2003) (question is whether reasonable inquiry would have revealed enough information to satisfy PSLRA pleading requirements); *Law v. Medco Research, Inc.*, 113 F.3d 781, 786 (7th Cir. 1997)(statute of limitations does not run until plaintiffs knew or should have known that

defendants "made a representation that was knowingly false").

Federal district courts have followed the lead of the Second, Seventh, and now the Ninth Circuit, in holding that inquiry notice does not trigger the running of the statute of limitations before the plaintiff has notice that the defendants acted with the requisite scienter. *In re Micron Technologies, Inc. Securities Litigation*, 2007 WL 576468 (D.Idaho Feb. 21, 2007)*6; *DaimlerChrysler Ag Securities Litigation*, 269 F. Supp.2d 508, 517, n. 5 (D.Del. 2003); *DeMarco v. Lehman Brothers, Inc.*, 309 F.Supp.2d 631, 637 (S.D.N.Y. 2004); *In re Motorola Securities Litigation*, 505 F. Supp.2d 501, 526 (N.D.Ill. 2007). These district courts are certainly "within the known universe."

The defendants attack the Ninth Circuit's scienter holding because it undermines their theory that Betz was on inquiry notice the moment she lost money. (Pet. 22-23, quoting Judge Kozinski, at pp. 31a-32a.) Here, the Ninth Circuit found that a rational jury could conclude the declining account statements would not have spurred a reasonable investor in Betz's situation to inquire further about probable fraud. The account statements indicated, at most, that the defendants failed to fulfill their oral promise to provide the specified monthly withdrawals without depleting principal. (App. 20a-21a.) But the declining account balance did not give Betz reason to believe the defendants intentionally lied in making the prior promise. See, *DeMarco*, 309 F.Supp.2d at 637.

The Ninth Circuit applied its own established precedent in holding that the declining account balance, by itself, would not necessarily spur a reasonable investor to inquire further about whether

she had been defrauded. (App. 21a, citing *Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996) (poor financial performance, standing alone, does not necessarily suggest securities fraud); *Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005) (financial problems alone generally are insufficient to suggest fraud).) Even the Eleventh Circuit has balked at adopting a *per se* rule of inquiry notice based on a certain drop in stock price. *La Grasta v. First Union Securities*, 358 F.3d 840, 849 (11th Cir. 2004).

The defendants insist that the Ninth Circuit decision clashes with cases from other circuits. These other circuit court decisions purport to hold that inquiry notice is triggered the moment the plaintiff learns facts that either contradict a promise or contain "subtler clues" to cast doubt on its truthfulness. (See, Pet. 21-23.) But the decisions impose no *per se* rule. Indeed, the *Ritchey* decision cited by the defendants reveals that such factual disputes may be inappropriate for disposition by summary judgment. See, *Ritchey v. Horner*, 244 F.3d at 641 (summary judgment reversed).

The defendants' reliance on the *Whirlpool* decision may be the most questionable. See, *Whirlpool Fin. Corp. v. GN Holdings*, 67 F.3d 605, 610 (7th Cir. 1995) (dramatic discrepancy between precise projections and actual results raised fraud as "possible explanation"). *Whirpool* is no longer the controlling law in the Seventh Circuit because of the "probability" standard established in *Fujisawa* and *Marks*. *In re Motorolla Securities Litigation*, 505 F.Supp.2d at 534.

The defendants cannot rely on other distinguishable decisions where inquiry notice was established from the detailed risk disclosures in a

written prospectus or subscription agreement. See, e.g., *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351 (2d Cir. 1993); *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162-63 (4th Cir. 1993); *Topalian v. Ehrman*, 954 F.2d 1125, 1132-34 (5th Cir. 1992). The defendants argue that their written "Letter of Understanding" is comparable to such documents because of its boilerplate disclosures about the risk of investment and the potential loss of principal. (Pet. 23; ER 380-84.) But the defendants' own *Cooperativa* decision discounted the significance of such boilerplate disclosures. See, *Cooperativa De Ahorro Y. Credito Aquada v. Kidder, Peabody & Company*, 129 F.3d 222, 225 (1st Cir. 1997) (little weight given to boilerplate disclosures not specifically directed to securities at issue). More importantly, the Letter of Understanding here contained no "integration" or "merger" clause and made no reference to Como's oral promises. (App. 4a-5a; ER 380-84.)

Nor can the defendants rely on decisions where storm warnings were established from more substantial evidence than a declining account balance. See, e.g., *DeBenedictis v. Merrill Lynch & Co., Inc.*, 492 F.3d 209, 216-17 (3rd Cir. 2007) (registration statement, press releases and numerous news reports disclosed specific risk that brokers received higher commissions from the sale of more than $100,000 of Class B shares); *Wyser-Pratte Management Co., Inc. v. Telxon Corporation*, 413 F.3d 553, 563-64 (6th 2005) (financial restatements based on "review of certain judgmental accounting matters" that wiped out $16.7 million in earnings, collapse of transaction following review of corporate records, shareholder class actions and SEC's commencement of formal investigation of accounting practices); *New England Health Care Employees Pension Fund v.*

Ernst & Young, 336 F.3d 495, 502 (6th Cir. 2003) (plaintiff knew that auditor's financial statements did not adhere to GAAP when it filed earlier complaint raising same issue against corporation).

In the end, the defendants fail to show any irreconcilable clash among the circuits that would require Supreme Court intervention. And the Ninth Circuit did not depart from existing law in concluding that the decline in Betz's account balance was insufficient to trigger inquiry notice.

B. The Ninth Circuit properly applied the second prong of its inquiry notice plus reasonable diligence test in considering the defendants' specific assurances.

Even if the Ninth Circuit arguably erred in assessing when suspicious circumstances arose, this Court still should deny the writ because the Ninth Circuit reached the correct result in the second prong of its inquiry. At this second stage, the Ninth Circuit held that it could consider the "express assurances made by the [d]efendants that they would remedy the problems in [Betz's] account, which may have lulled a reasonable investor into inaction." (App. 23a.) Finding a genuine factual dispute over when Betz should have discovered the fraud, the Ninth Circuit concluded that a jury must determine "whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her account and all would be made right." (App. 23a.)

In attacking the Ninth Circuit decision, the defendants discount their express promises from the highest level of the securities firm as no more than a

"vague assurance." (Pet. 29; Cf., ER 707.) Instead, the defendants place greater emphasis on other more general assurances from Vile and Como that Betz's account would recover. (Pet. 29.) With this shift of emphasis, the defendants ignore the summary judgment rule that the evidence must be viewed in the light most favorable to Betz as the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255.

By mischaracterizing the facts, the defendants create the illusion that "the Ninth Circuit stands alone, and dramatically so, against the tide of all other circuits." (Pet. 30.) To support this illusion, the defendants employ Judge Kozinski's disparaging reference to the Ninth Circuit panel's "loosey-goosey standard." (Pet. 30, citing App. 38a.) And once again, the defendants try to justify Supreme Court intervention by exaggerating a purported "persistent and intractable split" among the circuits. (Pet. 30.) But on closer analysis, the Ninth Circuit applied prevailing case law in the second prong of its inquiry.

1. At the second stage of its inquiry, the Ninth Circuit could consider whether the defendants gave specific assurances to Betz which would have delayed discovery of the fraud by a reasonable investor in her position.

The defendants attack the Ninth Circuit's holding that, at the second stage of its inquiry, it could consider "whether the plaintiff was given assurances by the defendant after beginning to investigate the suspicious circumstances that would have delayed discovery of the fraud by a reasonable

person in the plaintiff's position." (App. 17a.) In holding it could consider assurances, the Ninth Circuit relied on its established precedent in *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1310 (9th Cir. 1982) (where investor met with representatives of defendant company about possible fraud and was assured there "had been no improprieties," question of what reasonable investor should have done was for trier of fact).

In arguing that the Ninth Circuit holding on assurances stands alone, the defendants present a fictitious rift among the circuits between a "categorical" and "not quite so categorical" rule against an investor relying on assurances. (Pet. 25-28.) But the case law reveals no such intractable conflict among the circuits.

Confusing the Eighth Circuit for the First, the defendants argue that the Third and Eighth Circuits impose a categorical rule against consideration of assurances. (Pet. 25, citing *Cooperativa De Ahorro Y Credito Aguada v. Kidder, Peabody & Company*, 129 F.3d 222, 225 (1st Cir. 1997) and *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 255 (3rd Cir. 2001).) Neither *Cooperativa* nor *Mathews* imposes such a categorical rule. Under the particular facts at issue, the courts simply rejected the significance of "bland generalities" and vague assurances that "everything was all right." *Cooperativa*, 129 F.3d at 225; *Mathews*, 260 F.3d at 255, n. 22. And contrary to the defendants' arguments, the Eighth Circuit has held that repeated assurances can create a genuine issue of material fact. *Ritchey v. Horner*, 244 F.3d at 641 (court could not say, as matter of law, that principal's repeated assurances about tax returns were unconvincing and that plaintiffs should have been led to investigate).

The defendants admit that the Second and Seventh Circuits do not impose a categorical rule against consideration of assurances. (Petition, p. 26, citing *LC Capital Partners v. Frontier Insurance Group, Inc.*, 318 F.3d 148, 155-56 (2nd Cir. 2003) (recognizing that reassuring statements will prevent emergence of a duty to inquire or dissipate such duty in certain cases), and *Whirlpool Fin. Corp.v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) (recognizing that equitable estoppel may apply where defendant took active steps to conceal evidence that plaintiff needed to assess claim).

The Ninth Circuit did not depart from prevailing case law in concluding that the defendants' specific assurances to Betz here created a genuine issue of material fact. Interestingly, two of the defendants' own cited decisions recognize that an investor may not be considered on inquiry notice if "warning signs are accompanied by reliable words of comfort from management" such that "an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns." *In re Exxon Mobil Corp. Securities Litigation*, 387 F. Supp.2d 407, 418 (D.N.J. 2005); *LC Capital Partners, LP v. Frontier Insurance Group, Inc.*, 318 F.3d at 155. The reassuring statements given in such circumstances operate to dissipate apparent storm warnings. *In re Daimler Chrysler AG Securities Litigation*, 269 F. Supp.2d 508, 515 (D.Del. 2003).

The question of whether assuring statements justify reasonable reliance that storm warnings have dissipated will depend on such factors as (1) how significant the company's disclosed problems are; (2) how likely they are of recurring; and (3) how substantial are the "reassuring" steps to avoid their recurrence. *LC Capital Partners, LP*, 318 F.3d at

155; See, *Milman v. Box Hill Systems Corp.*, 72 F.Supp. 2d 220, 229 (S.D.N.Y. 1999) (pricing disclosure did not create "storm warnings" when tempered with positive statement). Courts are more likely to reject generalized assurances of hope, devoid of specific steps, *LC Capital Partners, LP*, 318 F.3d at 156; or assurances given when the investor has concrete evidence of the fraud. *DaimlerChrysler*, 269 F. Supp.2d at 515-16. But an investor like Betz may rely on more specific assurances that are meant to supplant rather than supplement written reports. *McCoy v. Goldberg*, 748 F. Supp. 146, 158-59 (S.D.N.Y. 1990).

Because the Ninth Circuit followed prevailing case law on assurances, the defendants cannot justify Supreme Court intervention on the theory either of (1) an imagined split among the circuits or (2) its erroneous charge that the Ninth Circuit decision stands alone. Even if the decline in Betz's account balance were deemed an apparent storm warning, the Ninth Circuit concluded that a jury question was raised over whether the warning was dissipated by "active assurances from the highest levels of the securities firm that there was no problem with [Betz's] account and all would be made right." (App. 23a; ER 707.) The defendants' assurances that the head of the securities firm personally would take care of Betz's account were far more specific than a generalized hope that the market would recover. (ER 707.) And the assurances were not made when Betz had concrete evidence that the defendants had intentionally lied in promising her $15,000 per month without touching principal. (20a-21a; ER 707.) The Ninth Circuit did not "obliterate" the statute of limitations by concluding that the defendants'

assurances created a genuine issue of material fact. (See, Pet. 30.)

2. The jury is better suited to determine what a reasonable investor should have known in Betz's particular circumstances.

The Ninth Circuit observed that the defendants bear a considerable burden in demonstrating, at the summary judgment stage, that the plaintiff's claim is time-barred. (App. 18a, citing *Seaboard Corp*., 677 F.2d at 1309-10.) "Summary Judgment is appropriate only when the uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." (App. 18a, quoting *Gray*, 82 F.3d at 881.) And the Ninth Circuit was hesitant to approve summary judgment where, as here, the plaintiff alleges that the defendants' reassurances convinced the plaintiff to postpone his or her legal action. (App. 19a-20a, citing *Vucinich v Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984).)

Viewing the factual record in the light most favorable to Betz, this Court must credit Betz's testimony that she was not a sophisticated investor, but she did make inquiries about the drop in the bottom line of her account. (ER 666, 691, 706.) (Pet. 7-8, citing ER 317-18, 328-33, 373.) When Betz made such inquiries, Como and Vile assured her that the losses were temporary and the stock would recover. (ER 693, 697-99, 707.) And this Court must credit Betz's testimony that she was assured later by Castro, by spring 2001, that the president of Trainer Wortham would "take care of the account because it

was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships…" (ER 707.) And that in May 2002, after Betz met with Moore, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be patient with them and not take any legal action." (App 5a; ER 707.)

For summary judgment purposes, the Ninth Circuit could draw the reasonable inference from this record that the defendants strung Betz along with specific assurances until they assumed, albeit incorrectly, that they had beaten the statute of limitations. It was only then that Castro told Betz that Trainer Wortham was "not going to do anything at all" to remedy the declining value of her account. (ER 707.) The Ninth Circuit did not err in seeing through this subterfuge. The Ninth Circuit properly held that the jury is better suited to determine what a reasonably prudent investor should have known in these circumstances. (App. 23a.)

II. BECAUSE THE NINTH CIRCUIT DECISION IS CONSISTENT WITH THE INQUIRY NOTICE RULES APPLIED BY MOST COURTS, THIS APPEAL PRESENTS NO ISSUE OF PROFOUND NATIONAL IMPORTANCE.

The defendants argue that this appeal presents issues of "profound national importance." (Pet. 31.). To justify this erroneous conclusion, the defendants rely on this Court's holdings about (1) its preference for uniform federal statutes of limitations and (2) the cost of groundless securities fraud claims. (Pet. 31-34.) But this appeal does not address either concern. Because the Ninth Circuit followed prevailing inquiry

notice rules, this appeal presents no issue of profound national importance that requires Supreme Court intervention.

This appeal does not present an issue that would invoke this Court's preference for a uniform federal statute of limitations over multiple state statutes. This Court resolved that issue for §10(b) cases in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). The defendants cannot elevate the issues here to prime importance just because this Court has expressed a similar preference for a uniform federal statute of limitations in other contexts. See, e.g, *Jones v. R.R. Donnelley & Sons Company*, 541 U.S. 369, 379 (2004) (applied federal 4-year statute of limitations to §1981 claims made possible by post-1990 enactment); *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987) (applied 4-year statute of limitations in Clayton Act to RICO claims).

Nor does this appeal invoke the Court's concern over the cost of frivolous securities fraud claims. The issue here in not whether Betz has a frivolous claim—but whether she raised a genuine factual dispute over when she should have discovered the defendants' fraud. In contending that the statute of limitations issue is of profound importance, the defendants cannot rely on this Court's interpretation of other securities law provisions. See, e.g., *Stoneridge Investments Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S.Ct. 761, 772 (2008) (private action under §10(b) did not cover aiding and abetting liability); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2504 (2007) (interpreted scienter pleading standards under PSLRA); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (SLUSA pre-empted state class action lawsuits

for securities fraud); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (rejected "inflated purchase price" approach to loss causation under §10(b)). These cases have no bearing on the inquiry notice standards under 28 U.S.C. §1658(b).

"This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. at 2504. Congress enacted the PSLRA in 1995 as a check against abusive litigation by private parties. *Id.* But in the wake of the Enron debacle, Congress sought to protect investors by extending the limitations period for §10(b) actions. See, Sarbanes-Oxley Act of 2002, Pub.L.No. 107-204, §804, 116 Stat. 745, 801 (2002). In their Petition, the defendants raise inquiry notice issues under the extended statute of limitations in Sarbanes-Oxley—not under the heightened pleading standards in the PSLRA.

This appeal presents no issue of profound national importance. Indeed, in the present era of risky hedge fund investments in subprime loans, now is hardly the time for this Court to impose a restrictive interpretation of the limitations period for §10(b) actions. If this Court were to grant the writ, it would only delay consideration of Betz's state law claims that will continue to go forward. The defendants go to great lengths to pit the Ninth Circuit against the other hopelessly "fractured" circuits. But Betz has shown that this picture is false. The Courts of Appeals are not fractured. And the Ninth Circuit decision is consistent with prevailing case law on the inquiry notice issues.

CONCLUSION

For the foregoing reasons, Betz requests that this Court deny the defendants' Petition for Writ of Certiorari.

Respectfully submitted,

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