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 a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The most striking aspect of Betz's Opposition is that it does not deny the existence of a circuit split on the question of when the statute of limitations begins to run on a federal securities fraud claim. To be sure, Betz's version of the split is different, with the Eleventh Circuit starting the clock upon discovery of facts "raising the mere possibility of fraud," the Second, Seventh and Ninth Circuits requiring substantial evidence of defendants' scienter, and the other circuits somewhere in between. But it is still a split and one that Betz concedes would cause different outcomes in the same case in different parts of the country. This concession and Betz's failure to explain away the additional circuit split created by the Ninth Circuit on the issue of what constitutes a reasonable inquiry confirm that cert should be granted. Contrary to Betz's suggestion, neither Congress nor this Court have signaled their acceptance of the current, confused state of affairs.

I. BETZ ACKNOWLEDGES ONE CIRCUIT SPLIT AND FAILS TO EXPLAIN AWAY THE OTHER.

Petitioners demonstrated that the circuits are in conflict over two issues related to the statute of limitations for securities fraud cases.

The first relates to the proper standard for determining when the limitations period begins to run (Pet. § I(A)), and the second relates to what constitutes the "reasonable inquiry" that an investor must undertake once he is put on inquiry notice (Pet. § I(B)). Betz does not dispute that there is a split on the first issue. She merely argues that Petitioners have "exaggerated" the split and that the Ninth Circuit's opinion in this case does nothing to deepen it. Betz is wrong. But, even if she were correct, all parties agree that there is a circuit split that only this Court can resolve. As to the second issue, Betz tries to paper over the split by arguing that the Ninth Circuit has followed "prevailing law," but she fails to show that any circuit has adopted the same standard.

A. Betz Concedes that the Circuits Are Split Over When the Statute of Limitations for Securities Fraud Begins to Run.

1. Betz explicitly acknowledges that the circuits were split even before the Ninth Circuit weighed in on this case.

Betz does not dispute that before the Ninth Circuit's opinion in this case, the circuits followed four approaches to implementing Section 10(b)'s statute of limitations, 28 U.S.C. § 1658(b). *See* Pet. 15-18. Nor does she suggest that the Petition inaccurately portrays those four formulations. To the contrary, Betz makes

concessions that confirm the need for this Court's intervention.

First and foremost, Betz admits that there was (and remains) a clear split between the Eleventh Circuit's formulation (Approach 1) and the formulation of the other circuits (Approaches 2, 3, and 4). In the Eleventh Circuit, as Betz concedes, the statute of limitations would have begun to run "the moment Betz" was put on "inquiry notice." Opp. 12. "[O]ther circuits," in stark contrast, "would give Betz the chance to conduct some reasonable inquiry" before beginning to run the statute of limitations. *Id.*

This concession confirms that this case presents a conflict worthy of this Court's attention because the split is, on its face, dramatic and outcome determinative. Depending on the circumstances, the statute of limitations on a claim could begin to run months or even years earlier in the Eleventh Circuit than in any other circuit. Some circuits have rejected the Eleventh Circuit's position (the most favorable to defendants) on the ground that it encourages investors to file claims prematurely for fear of losing their rights. *Sterlin v. Biomune Sys. Inc.*, 154 F.3d 1191, 1202 (10th Cir. 1998) ("the applicable statute of limitations should not precipitate groundless or premature suits by requiring plaintiffs to file suit before they can discover with the exercise of reasonable diligence the necessary facts to support their claims"). The split is as stark, and as squarely presented, as any imaginable.

Betz does not suggest that the Eleventh Circuit appears likely to abandon its position, or that there is some way, short of this Court's intervention, to resolve the conflict. Indeed, Betz even concedes that "[t]his Court might have some justification for granting a writ" on this very issue, on these very facts, if only "Betz's appeal had arisen in the Eleventh Circuit." Opp. 13. Betz argues that the Court should ignore a clear, acknowledged, and intractable circuit split until a case arises applying the "minority view;" any other case, she contends, is "not the proper vehicle" for resolving the conflict. Opp. 13. This position seems to flow from Betz's mistaken (and repeated) view that what matters most at the cert. stage is whether "[t]he Ninth Circuit can[] be faulted" for taking a particular position—in other words, whether the Ninth Circuit's position is correct. Opp. 13; *see also* Opp. 14-16.

Unsurprisingly, Betz cites no authority for this novel proposition. As Rule 10(a) indicates, cert-worthiness depends upon whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), not on whether that decision represents the "minority view" or a view the Court thinks will prevail.

And while Betz does not explicitly acknowledge the conflict among the groupings of the remaining circuits (*i.e.*, Approaches 2, 3, and 4), she does not deny that the conflict exists. Specifically, Betz concedes that there are "distinctions" in how the various courts of

appeals define the standard, Opp. 11, and that some circuits "have taken a different 'hybrid' approach," Opp. 13. Indeed, the most Betz can bring herself to say is that Petitioners "exaggerate when they call the circuits 'fractured' over inquiry notice," and that the differences among the circuits are "nuanced." Opp. 11. This is hardly a denial that a conflict exists or that it could make a difference in particular cases. And it does not refute the obvious point that anything the Court says in this case will almost certainly affect the standards that are applied in all circuits, thereby affecting numerous cases that fall along the spectrum of existing standards.

2. Betz concedes that other circuits do not follow the Ninth Circuit's scienter-based inquiry notice standard and would have decided this case differently.

The Petition argues that the Ninth Circuit worsened the already-existing circuit conflict discussed above – and created a fifth approach – by holding that direct evidence of a falsehood is insufficient to place a plaintiff on inquiry notice and that inquiry notice is postponed until the plaintiff also learns of specific evidence of defendants' intent to defraud. *See* Pet. 19-20. This conflicts with other circuits, which have uniformly held that a plaintiff is on inquiry notice, as a matter of law, when he learns the defendant's statement was false. *See* Pet. 21-24.

Betz effectively concedes that this conflict exists, acknowledging that the Ninth Circuit adopted a "scienter holding," *see* Opp. 14, while "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," Opp. 16. Betz also recognizes that the conflict is significant to this case, arguing that the case was correctly decided under the Ninth Circuit's scienter holding but conceding that application of a possibility-of-fraud standard "arguably could make a difference here." Opp. 12. That should settle the matter.

Oblivious to the significance of these concessions, Betz expends much energy defending the Ninth Circuit's honor and disputing Judge Kozinski's assertion that the Ninth Circuit's approach is at odds with "the rule everywhere in the known universe." Opp. 14 (internal quotation marks and alterations omitted). But Betz's effort to argue that the Ninth Circuit's conclusion is consistent with "a growing body of federal appellate and district court decisions" consisting of a handful of opinions from the Second Circuit and the Seventh Circuit (plus a smattering of district courts purportedly "follow[ing] the lead of the Second, Seventh, and now the Ninth Circuits") are wasted because, of course, the cert-worthiness of this case depends upon whether the Ninth Circuit stands in conflict with *some* circuits, not on whether the Ninth Circuit stands

completely alone. Opp. 14-16. Even if Betz had accurately characterized the opinions of these courts (which, as we demonstrate below, she has not), Betz would have succeeded only in demonstrating that "the Second, Seventh, and now the Ninth Circuits" are at odds with the First, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, whose contrary opinions are discussed at length in the Petition. *See* Pet. 21-24. In other words, Betz's argument transforms what Chief Judge Kozinski describes as a 9-1 circuit split, *see* App. 35a-36a, into a 7-3 circuit split.

In any event, Betz fails to find support elsewhere in the country for the Ninth Circuit's holding. To support the Ninth Circuit's holding, Betz would have to point to a court of appeals case that has held, as the Ninth Circuit did here, that the plaintiff was on notice that a statement was false, but nevertheless had no obligation even to begin inquiring because she had not yet stumbled across evidence demonstrating that the defendants had intended to deceive her. Betz does not point to a single case that comes close.

Instead, Betz relies mainly on what she describes as a shift in the positions of the Second and the Seventh Circuits "that the fraud must be *probable*, not just possible." Opp. 14. That is nowhere near the same. And neither circuit so much as suggested that they were overruling or disagreeing with prior cases holding that the plaintiff was on notice the moment he learned of a misstatement.

For example, the Second Circuit has used the "probability" standard for 15 years, *see Dodds v. Cigna Sec., Inc.,* 12 F.3d 346, 350 (2d. Cir. 1993), yet holds that facts directly contradicting the defendants' representations *are* sufficient to trigger inquiry notice, *see id.* at 351. The Second Circuit cases Betz invokes, Opp. 14-15, do not suggest that anything more is required, much less specific evidence of scienter. *Levitt v. Bear Stearns & Co.,* 340 F.3d 94 (2d Cir. 2003), does not even address the question of what facts trigger inquiry notice. *Id.* at 102 ("the issue of when Plaintiffs' duty of inquiry arose does not appear to be in dispute."). And *Newman v. Warnaco Group, Inc.,* 335 F.3d 187, 194-95 (2d Cir. 2003), simply held that the lack of a significant stock price reaction to write downs disclosed in a 10-K and a lack of clarity concerning the cause of the write downs indicated the write downs were not storm warnings triggering inquiry notice.

Similarly unhelpful is the language Betz selectively quotes from two Seventh Circuit cases. Opp. 14-15. In *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), as Chief Judge Kozinski pointed out, the Seventh Circuit *rejected* the position taken by the Ninth Circuit because it would allow plaintiffs to sit on their rights and wait to see how their investment turned out. App. 33a-34a. And in *Law v. Medco Research,* 113 F.3d 781 (7th Cir. 1997), the Seventh Circuit's statement that the statute of limitations did not run until the plaintiff knew or should have known that the defendants "made

a representation that was knowingly false" addressed what an investor's reasonable investigation must be able to find, not what triggers the duty to inquire in the first place. *Id.* at 786 (finding claims were not time-barred as a matter of law where defendants failed to demonstrate that plaintiff could have discovered the facts to support a claim). Thus, contrary to Betz's suggestion, *Law* did not hold, as the Ninth Circuit has, that inquiry notice is not triggered until the plaintiff obtains specific evidence of the defendant's intention to deceive.

Finally, Betz gains no ground by trying to distinguish all the contrary cases based on factual differences. Opp. 17-18. Whatever the facts, each of those circuits held that inquiry notice was triggered as a matter of law when the investor received information directly contradicting representations from the defendant, and several required less. Pet. 21-24. The difference between the Ninth Circuit's result and the results in those cases is attributable to a difference in the legal rule being applied. As Betz acknowledges, the Ninth Circuit has applied a "scienter holding," whereas the other courts did not. Consequently, the Ninth Circuit would have decided each of the cited cases differently.

Thus, it does not matter that those other courts "impose no *per se* rule." Opp. 16. All that matters is that both the results and the logic of those cases are irreconcilable with the result and rationale of the Ninth Circuit here. That is enough to create a circuit conflict.

B. Betz Is Unable to Harmonize the Ninth Circuit's Approach to Reasonable Inquiry with the Approach of Other Circuits.

As Petitioners (and Chief Judge Kozinski) pointed out, the Ninth Circuit strayed further into uncharted territory and created a second circuit split with its alternative holding, which is independently worthy of this Court's consideration. Pet. 24-31. The alternative holding is that even if Betz had been on inquiry notice, summary judgment is improper because a jury could find that it was reasonable for Betz to suspend her inquiry in reliance on Petitioners' assurances that everything would be all right and that they would make her whole. App. 21a-22a. As Petitioners demonstrated, no other circuit has held this, and Betz, despite characterizing the Ninth Circuit's position as "prevailing law" fails to show otherwise.

Betz starts by addressing the wrong split. Petitioners are wrong, she says, because there is no "rift" between circuits following a "categorical rule" against reliance on assurances from the defendant and those following a "not quite so categorical rule." Opp. 21. That is not the split. The split is between these two fundamentally consistent articulations and the Ninth Circuit, which has "staked out a position *diametrically at odds with both permutations* of the rule against relying on a suspected swindler's assurances." Pet. 28.

Betz never returns to the real issue, scarcely addressing the cases Petitioners cited from the First, Second, Third, Seventh, and Eighth Circuits, all of which hold, as a matter of law, that it was unreasonable for the plaintiff in those cases to rely on the self-serving assurances of a suspected swindler to contradict known facts. Pet. 25-28. Ignoring these cases, Betz blithely asserts that the Ninth Circuit's contrary holding is the "prevailing law." But she manages to cite only two circuit cases, neither of which support her argument. Opp. 21-23 citing *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148 (2d Cir. 2003) and *Ritchey v. Horner,* 244 F.3d 635 (8th Cir. 2001).

As Petitioners have already demonstrated, *LC Capital Partners* illustrates the Second Circuit's *rejection* of the Ninth Circuit's alternate holding, not agreement with it. Pet. 27-28. And contrary to Betz's suggestion, *Ritchey* does not involve the central question presented by the Ninth Circuit's alternate holding, which is whether an investor is entitled to delay the running of the limitations period by relying on assurances that are flatly contradicted by the information in front of her. *See Ritchey,* 244 F.3d at 640 (where plaintiff had no information contradicting defendant's assurances, it was not unreasonable as a matter of law to rely on them). Nor do the handful of district court cases on which Betz further relies – including those discussing the so-called "multi-factor" test – hold, as the Ninth Circuit has, that a plaintiff who is *already* on inquiry notice

performs a reasonable inquiry by relying on assurances that confirm the falsity of original representation and are flatly contradicted by the facts known to that plaintiff. *See In re Exxon Mobil Corp. Sec. Litig.*, 387 F. Supp. 2d 407, 418 (D.N.J. 2005) (plaintiffs "may not simply rely on reassurances by management particularly when there are direct contradictions between the defendants' representations and the other materials available to plaintiffs regarding the possibility of fraud."); *Tracinda Corp. v. DaimlerChrysler AG (In re DaimlerChrysler AG Sec. Litig.)*, 269 F. Supp. 2d 508, 516 (D.Del. 2003) (relevant assurances did not confirm falsity of initial representation); *Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 229 (S.D.N.Y. 1999) (considering whether optimistic statements in a 10-Q prevented it from being a storm warning in the first place).

Betz's inability to establish that the Ninth Circuit followed "prevailing law" is not surprising because under the rule followed everywhere else in the country, nothing the Petitioners said could overcome the definitive proof that the alleged promise was false. Pet. 28-29. The Opposition thus confirms that the Ninth Circuit's alternate holding created a second circuit conflict relating to what constitutes the "reasonable inquiry" that an investor must undertake once he is put on inquiry notice.

II. NEITHER CONGRESS NOR THIS COURT HAS SIGNALED THAT A LACK OF UNIFORMITY ON THIS ISSUE IS ACCEPTABLE.

Betz contends that because this Court and Congress have yet to mandate an inquiry notice standard for 28 U.S.C. § 1658(b), they have signaled an intention to accept conflict amongst the circuits. Opp. 10-11. Because of this, Betz argues, the question presented by this case is not cert-worthy.

This nonsensical proposition cannot be squared with what both branches *have* said about Section 10(b)'s statute of limitations. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the Court adopted, for the first time, a uniform limitations period for Section 10(b) claims, and in 28 U.S.C. § 1658(b), Congress ratified that judgment. It defies logic to suggest that both branches took these steps – which were designed to apply the same limitations period nationally – while simultaneously accepting a circuit split. This case is cert-worthy precisely because Congress and the Court have not yet spoken on the issue.

CONCLUSION

For the foregoing reasons, this Court should

grant a writ of certiorari.

Respectfully submitted,

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