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**PUBLIC PENSION FUND GROUP AND SHAREHOLDER ADVOCATES WARN OF MAJOR THREAT TO INVESTORS' ABILITY TO SUE COMPANIES THAT COMMIT FRAUD, IN SUPREME COURT CASE TO BE HEARD MARCH 28**

**Securities and Exchange Commission takes position against investors, contrary to its investor-protection responsibilities**

Washington DC, March 27 -- Two organizations representing investors warned today that the outcome of an Enron era fraud case to be heard March 28 by the Supreme Court could seriously threaten the ability of investors to sue companies that commit fraud. The National Conference on Public Employee Retirement Systems (NCPERS), which represents pension funds with approximately \$3 trillion in assets, and the National Association of Shareholder and Consumer Attorneys (NASCAT), warned that the case, Makor v. Tellabs, Inc., could result in "nearly insurmountable" barriers to investors seeking to recover fraud losses if the Supreme Court finds in favor of the defendants (the company and its CEO) instead of in favor of investors.

In a particularly alarming development, the Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) filed a "friend of the Court" brief favoring the defendants who are accused of fraud in a securities fraud class action lawsuit brought by shareholders of Tellabs, Inc. They took this action despite their roles as the federal government's primary investor protection and law enforcement agencies. The SEC and DOJ, in representing the Bush Administration, seek to impose a pleading standard for investor lawsuits, which the law does not require, and which is at odds with the traditional manner in which allegations of a complaint are viewed by a court.

"The Supreme Court will in effect be deciding whether or not the securities fraud class action remedy will survive as the primary vehicle for investors to recover legitimate fraud

losses,” explained Hank H. Kim, executive director and counsel, NCPERS. “As if the restrictions already put in place by the heightened pleading standards in the Private Securities Litigation Reform Act of 1995 (PSLRA) and subsequent tightening of federal procedural rules governing class actions were not enough, now the Supreme Court petitioners and Administration ask the Court to impose yet another procedural barrier – this one, nearly insurmountable – on the ability of private investors to deter corporate wrongdoing and recoup some of their fraud losses.”

### **Role of Juries Would be Pre-empted**

“Petitioners and the Administration are essentially urging the Supreme Court to endorse a mini-trial before a federal judge on factual allegations at the early pleading stage of a case before plaintiffs have been afforded the benefit of any formal discovery,” explained Kevin P. Roddy, counsel for NASCAT. “Under America’s system of justice, weighing facts, inferences, and evaluating defendants’ behavior is the responsibility of juries, not judges. And, under our Constitution, plaintiffs and defendants alike are entitled to trial by jury in both civil and criminal cases.”

In commenting on the Supreme Court case, attorneys Kim and Roddy also released their March 8 amici curiae (friend of court) brief supporting Tellabs’ defrauded shareholders. Securities fraud class action lawsuits filed in federal courts, like the Tellabs’ lawsuit, not only serve to deter corporate misbehavior, but are the primary method for investors to recover their losses in investment frauds.

The Supreme Court Tellabs case focuses on varying interpretations of a provision of the PSLRA that requires investors to allege that a “defendant acted with a particular state of mind . . . giving rise to a strong inference that the defendant” intended to violate the law. In deciding to permit the Tellabs class action lawsuit to move forward to trial, the United States Court of Appeals for the Seventh Circuit had said Tellabs’ investors had alleged sufficient facts to meet the “state of mind” requirement and that it was unnecessary to consider competing inferences offered by the corporate defendants. Rather, the “strong inference” requirement was met if it would permit “a reasonable person” to strongly infer that defendants “acted with the required intent.” The Seventh Circuit’s view is consistent with positions taken by other United States Courts of Appeal, including the Tenth Circuit and the Second Circuit in several earlier securities fraud cases.

NCPERS and NASCAT agree with the circuit courts’ approach, specifically restating and endorsing the Second Circuit’s pleading requirements. In order for plaintiffs to meet the required PSLRA pleading standard of demonstrating a “strong inference” of defendants’ intent to violate the law, the Second Circuit said investors could take one of two approaches: providing factual allegations that established a strong motive to commit fraud and an opportunity; or, alternatively, to allege facts constituting circumstantial evidence of either reckless or conscious behavior.

### **Bush Admin Would Require Detailed Evidence on Defendants’ “States of Mind”**

Tellabs' defendants and the Administration say fulfilling those Second Circuit factual pleading requirements – difficult in and of themselves – is not sufficient. Plaintiffs, they argue, must produce detailed facts in their complaint specifically demonstrating that defendants intended to violate the law – an impossible feat before legal discovery is permitted.

Moreover, defendants and the Administration say judges must also “consider whether the facts alleged in the complaint leave open a range of non-culpable explanations for the defendants’ conduct.” Regardless of the facts of the fraud, if an innocent explanation is possible, a judge should throw out the case, they argue.

### **Meritorious Claims of Defrauded Investors Would be Routinely Thrown-Out**

“If the Supreme Court agrees with Tellabs defendants and the Administration, meritorious lawsuits filed by defrauded investors would be routinely thrown out of federal court, permitting white-collar wrongdoers to escape accountability and undermining the integrity of U.S. capital markets,” NASCAT attorney Roddy continued. “Fraud victims would be effectively deprived of their right to a trial by jury as guaranteed under the Seventh Amendment to the Constitution.”

Mr. Roddy said the underlying Tellabs fraud case provides a good case example. As found by the Seventh Circuit, the investors’ second amended complaint provides strong circumstantial evidence that would lead a “reasonable person” to find a “strong inference” that a conscious fraud was perpetrated. Indeed, the complaint is based on interviews with former Tellabs employees, including senior marketing executives and others with inside knowledge, a review of the company’s public filings with the SEC, and an analysis of corporate news releases, securities analyst reports, and media interviews, among other sources.

### **Tellabs Execs Allegedly Lied to Investors, Securities Analysts and the Media**

The shareholders’ complaint explains in detail how Tellabs, which manufactured and marketed optical networking and broadband access equipment, experienced a “dramatic slowdown” in its markets during the period mid-2000 to mid-2001. Demand for Tellabs’ products was slowing and in internal meetings attended by the defendant senior managers, the company’s salesmen and marketing managers reported that sales of key products were declining by as much as 50 percent, the complaint says.

At the same time, however, the company was engaging in deceptive and fraudulent sales practices including falsifying orders and lying to the media and securities analysts about the company’s performance to give the appearance that sales and revenues were continuing at a “robust” pace, according to the complaint.

During the period covered by the class action, Tellabs' share price rose to a peak of \$65.38 and, when the truth about the company's business reversals finally came out, plunged to \$16.04.

### **Court Should Consider Context of Enron, WorldCom & Other Corporate Scandals**

“The alleged Tellabs fraud is just one of several cases in the early 2000s that followed a similar pattern of corporate prevarication and deception aimed at artificially inflating stock prices,” NCPERS’ Hank Kim added. “Any reasoned analysis of the PSLRA’s ‘strong inference’ requirement cannot be viewed in isolation, but, rather must take into account the remarkable breaches of fiduciary duty, failed audits, and corporate scandals that have infected this nation’s capital markets almost from the date of passage of the PSLRA.”

“Financial scandals at Enron, WorldCom, Tyco International, Global Crossing, and Adelphi Communications, among others, have cost shareholders staggering amounts of money,” NASCAT’s counsel, Kevin Roddy, concluded. “There is no reason to make a defrauded investor’s task of deterring securities fraud and recovering some of their losses more difficult than it is at present.”

*The National Conference on Public Employee Retirement Systems is the largest national nonprofit public pension fund association with a membership including more than 500 pension funds with approximately \$3 trillion in assets.*

*The National Association of Shareholder and Consumer Attorneys is a nonprofit organization comprised of about 100 law firms representing investors – including pension funds and individuals – in cases of securities fraud and other forms of “white collar” criminal activity.*

*Copies of the NCPERS/NASCAT brief and other documents are available by contacting Jeff McCord (Tel: 540-364-4769, or e-m: [jmccord@crosslink.net](mailto:jmccord@crosslink.net)).*

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