IN THE SUPREME COURT OF THE STATE OF OREGON

THE STATE OF OREGON by and through the Oregon State Treasurer and the Oregon Public Employee Retirement Board on behalf of the Oregon Public Employee Retirement Fund, Petitioner on Review, and MARSH & McLENNAN COMPANIES, INC.; MARSH, INC., Respondent on Review, and JEFFREY GREENBERG; and RAY GROVES, Defendants.	Multnomah County Circuit Court Case No. 0508-08454 Oregon Court of Appeals No. A139453 Oregon Supreme Court No. _____

BRIEF OF *AMICUS CURIAE*
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
IN SUPPORT OF PETITION FOR REVIEW OF THE STATE OF OREGON

IF REVIEW IS ALLOWED, NASAA INTENDS TO MOVE FOR LEAVE TO APPEAR AS AMICUS CURIAE

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Hon. Frank L. Bearden.

Opinion Filed:	February 23, 2011
Author of Opinion:	Schuman, P. J.
Concurring Judges:	Hon. Robert Wollheim; Hon. Ellen F. Rosenblum

May 2011

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STATEMENT OF IDENTITY

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

The members of NASAA include the state agencies that are responsible for regulating securities transactions under state securities statutes, commonly referred to as "Blue Sky" laws. Their fundamental mission is protecting investors, and their principal activities include registering certain securities; licensing the firms and agents who offer and sell securities and offer investment advice; investigating violations of state law; and, where appropriate, pursuing enforcement actions for violations of state law. State securities regulators also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by coordinating multi-state enforcement actions, conducting training programs, publishing investor education materials, and presenting the views of its members in testimony before Congress

on matters of securities regulation. Another core function of the association is to represent the membership's position, as *amicus curiae*, in significant cases involving the interpretation of securities laws and the rights of investors.

INTEREST OF *AMICUS CURIAE*

NASAA is particularly interested in the instant case because the Court of Appeals' decision threatens to severely weaken investor protection laws not only in the State of Oregon, but nationwide. Specifically, NASAA is concerned with the Court of Appeals' holding that: (1) Blue Sky claims under ORS 59.137 require proof of reliance; and (2) reliance cannot be presumed under the "fraud on the market" doctrine based on the general investment market's reliance on the misstatements. *State of Oregon v. Marsh & McLennan Companies, Inc.*, 241 Or. App 107, 123, 120, __ P3d __ (2011).

At stake in this litigation is the right of a claimant to pursue a remedy for a serious violation of state law. If the Court does not accept review and overturn the ruling of the Court of Appeals, Oregon will join a small minority of only four states that require a plaintiff to personally rely upon a defendant's materially false statement or omission.[1] The Court of Appeals' holding severely jeopardizes investor protection in the State of Oregon by significantly weakening the deterrent effect of the statute and by constructing road blocks that will prevent countless

[1] *See infra* Section B(i).

defrauded Oregonians from seeking restitution. Finally, the Court of Appeals' decision will place Oregon well outside the mainstream of Blue Sky jurisprudence, potentially inviting other courts to erode similar investor protections nationwide. Accordingly, NASAA submits this *amicus* brief in support of the State's petition for review.

SHORT STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

For purposes of this *amicus* brief, the relevant background facts and procedural history are sufficiently set forth in the Court of Appeals' decision and incorporated into the petition for review filed by Petitioner, the State of Oregon on April 27, 2011.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

For purposes of this *amicus* brief, NASAA incorporates the questions presented and proposed rules of law proffered by the State of Oregon in its Petition for Review filed on April 27, 2011.

REASONS FOR GRANTING REVIEW

A. The Consequences of the Rule Announced in the Court of Appeals' Decision is of the Utmost Importance to All Oregonians and Investors Across the Country.

The Court of Appeals' decision has far-reaching implications for investors. If the Court of Appeals' decision is not reviewed and overturned, the Oregon Public Employee Retirement Fund will be foreclosed from seeking recovery of a

$10 million loss; all Oregonians will be subjected to a severely weakened securities regulatory scheme; and defendants in cases brought in other states will cite to this Blue Sky decision in an attempt to avoid liability. ORAP 9.07(3) states that, when determining whether to grant discretionary review, the Supreme Court will consider "[w]hether many people are affected by the decision in the case [or] [w]hether the consequence of the decision is important to the public, even if the issue may not arise often." For the aforementioned reasons, NASAA respectfully submits that this issue is of the utmost importance and, thus, strongly urges the Court to accept review.

The immediate economic and regulatory costs to the citizens of Oregon cannot be understated. The actions of the Defendants in the instant case resulted in a $10 million loss to the Oregon Public Employee Retirement Fund. To deny review would be to deny over 300,000 employees and their families a fair chance to prove their case and obtain recovery of these losses. Moreover, similarly situated Oregon plaintiffs will find it increasingly difficult, if not impossible, to recover losses in future cases with similar facts. Conversely, those seeking to perpetrate securities fraud in the United States will view Oregon as a preferred haven for fraud because of its extraordinarily high liability hurdles.

The vast majority of state securities fraud statutes do not require a plaintiff to personally rely upon a defendant's materially false statement or omission.[2] For years, Oregon has stood with the correct majority view. *See*, *e.g. Everts v. Holtmann*, 64 Or App 145, 152, 667 P2d 1028 (1983). Accordingly, NASAA is concerned that if Oregon adopts the standard set for in the Court of Appeals' Decision, which stands well outside the mainstream of Blue Sky jurisprudence, it will set a dangerous precedent with the potential to erode investor protections nationwide. Therefore, review is warranted, consistent with ORAP 9.07(3), because the instant case is of the utmost importance to all Oregonians and investors in other states.

B. The Court of Appeals' Decision Appears to Be Wrong, Resulting in a Distortion or Misapplication of a Legal Principle.

ORAP 9.07(14) provides that the Supreme Court will also consider "[w]hether the Court of Appeals decision appears to be wrong." NASAA firmly believes that the Court should grant review based on this provision because the decision erroneously: (1) confuses an express remedy with an implicit remedy; (2) misapplies basic cannons of statutory construction recognized by Oregon Statute and the Oregon Supreme Court; and (3) fails to recognize a "fraud on the market"

[2] *See* Joseph C. Long, 12A Blue Sky Law § 9:117.19 (2010)("The overwhelming weight of authority in … Uniform Act states … have … held reliance not to be an element"); *See also* Joseph C. Long, 12A Blue Sky Law § 9:117.31 (2010)(several non-Uniform Act states, including Arizona, California, Colorado, and Texas … have [also] held that reliance should not be required").

presumption of reliance in light of its erroneous decision to require reliance as an element of recovery.

i. The Court of Appeals' Decision is wrong because it confuses an express remedy with an implicit remedy.

As mentioned above, the vast majority of states do not require that individual investors prove reliance on a defendant's materially false financial statements or omissions to state a claim.[3] Indeed, Official Comment 4 to the Uniform Securities Act § 509(b) (2002), the precursor to which the Oregon anti-fraud provisions were modeled from, also expressly states that, "[u]nlike the current standards on implied rights of action under Rule 10b-5, neither causation nor reliance has been held to be an element of a private cause of action under the precursor to Section 509(b)."[4]

The reasoning of the outlier state courts that have created a reliance requirement has been fiercely criticized by two leading Blue Sky treatises as "misplaced" and "fallac[ious]." *See* Joseph C. Long, 12A Blue Sky Law § 9:117.29 (2010); Robert N. Rapp, 2-13 Blue Sky Regulation § 13.02 (2011). Only three states with statutes modeled after the Uniform Securities Act have read a

[3] *See supra* n. 2.
[4] As the official comments note, the precursor to Section 509 was Uniform Securities Act § 410 (1956).

reliance requirement into their statute.[5] Each of these courts has erred by confusing an implicit and an express remedy. Federal Securities Law, codified at SEC Rule 10b-5,[6] requires reliance because there is no express cause of action under Rule 10b-5. Therefore, in creating an implied cause of action, federal courts have been forced to turn to common law to flesh out the contours of the statute. *See* Joseph C. Long, 12A Blue Sky Law § 9:117.29 (2010). Conversely, state "Blue Sky" statutes contain an express cause of action within the text of the statute. *See* ORS 59.115. Therefore, "**the language of the statutes, not a comparable common law tort should provide the elements necessary for recovery** ... [because w]ithout statutory language supporting the imposition of a reliance requirement … there should not be a reliance requirement." *Id.* (emphasis added). As the following section demonstrates, the text of the statute contains absolutely no reference to a reliance requirement. Therefore, the Oregon Court of Appeals committed error when it decided to impose an implicit element into a statute containing an express cause of action with no such requirement.

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[5] It should be noted that one state with a statute not modeled after the Uniform Securities Act, Illinois, has found reliance to be an element of its anti-fraud statute although the issue has not yet been considered by the Illinois Supreme Court. *See* Joseph C. Long, Blue Sky Law 12A Blue Sky Law § 9:117.33 (2010)(citing *Tirapelli v. Advanced Equities, Inc*., 351 Ill. App. 3d 450, 286 Ill. Dec. 445, 813 N.E.2d 1138 (1st Dist. 2004)).

[6] 17 C.F.R. § 240.10b-5.

Furthermore, Oregon and all other states uniformly and consistently interpret securities statutes broadly to protect their citizens from financial fraud. As this Court previously held in *Bergquist v. International Realty, Ltd.*, 272 Or 416, 423, 537 P2d 553 (1975), securities statutes must be construed "liberally in light of the legislative purpose of the Oregon Securities Law to afford the 'greatest possible protection' to the public." Moreover, as one leading treatise noted,

> [i]f the state law remedies appear harsh to unsuspecting swindlers and overly protective of resident investors when compared to the federal laws, it is because they were intended to be so."

Robert N. Rapp, 2-13 Blue Sky Regulation § 13.02 (2011). This policy of respect and concern for the financial welfare of the citizens of Oregon will be compromised if the Court does not correct the mistakes of the Court of Appeals. NASAA's mission is to protect the citizens of all its member agencies, including Oregonians. Accordingly, NASAA respectfully requests that the Court grant the Petition for Review to prevent Oregon from duplicating and compounding the mistakes of a misguided minority of states.

ii. <u>The Court of Appeals' decision ignores basic canons of statutory interpretation recognized by Oregon Statute and the Oregon Supreme Court.</u>

The Court of Appeals' decision ignores well-settled rules of statutory construction routinely recognized in Oregon case law and statutory law. ORS 174.010 mandates that, "[i]n the construction of a statute, the office of the judge is

* * * not to insert what has been omitted[.]" Nonetheless, the Court of Appeals' decision erroneously inserted a reliance element that does not exist in the text of the statute. The Court of Appeals' interpretation is also at odds with the Oregon Supreme Court's holding in *Portland General Electric Co. v. BOLI*, 317 Or 606, 610-11, 859 P2d 1143 (1993) that the starting point for statutory construction is the text and context of the statute. *See also, State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009), quoting *State v. Wilson*, 277 Or 747, 750, 562 P2d 172 (1977). ("as this Court and other authorities have long observed, there is no more persuasive evidence of the intent of the legislature 'than the words by which the legislature undertook to give expression to its wishes'"). Neither ORS 59.135 nor ORS 59.137 make any reference to reliance as an element, but nonetheless, the court has read a reliance requirement into the statute. Therefore, this Court should grant review to correct the Court of Appeals' divergence from widely-recognized and well-settled rules of statutory construction.

iii. <u>The Court of Appeals' decision is wrong because it fails to incorporate a "fraud on the market" presumption of reliance in light of its erroneous decision to require reliance as an element of recovery.</u>

Furthermore, although a reliance requirement should not be read into ORS 59.137, even if the Court ratified the Court of Appeals' decision to incorporate such a requirement, the Court should correct the Court of Appeals' failure to

recognize the long-standing "fraud-on-the-market" securities law doctrine. This long established doctrine presumes reliance where there is a large and efficient market of investors relying upon the available information in the market to set the price for the securities. *See Basic v. Levinson*, 485 U.S. 224, 247 (1988); *Blackie v. Barrack*, 524 F2d 891, 908 (9th Cir. 1975). Accordingly, the Court of Appeals was incorrect to ignore this well-settled doctrine of securities law, and the Court should grant review to correct this mistake.

C. This Case Presents Issues Concerning the Interpretation of an Oregon Statute that is Inconsistent with this Court's Interpretation of Other Statutes.

Among the criteria relevant to the Supreme Court's decision whether to grant discretionary review are "whether the case presents a significant issue of law" such as the interpretation of a statute, ORAP 9.07(1); "[w]hether the legal issue [presented] is an issue of state law," ORAP 9.07(4); and "[w]hether present case law is inconsistent." ORAP 9.07(9). In the instant case, the Court of Appeals' decision presented a significant issue of law by interpreting ORS 59.137 in a manner inconsistent with this Court's previous interpretation of an analogous statute, ORS 59.115. Therefore, review is warranted consistent with ORAP 9.07(1), (4), and (9).

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i. This case involves the interpretation of a state statute and, thus, presents a significant issue of state law.

The issues presented in this case involve the interpretation of Oregon statutes, namely ORS 59.135 and ORS 59.137. These statutes combine to provide anti-fraud protection to Oregon citizens who purchase securities. Thus, the case presents a significant issue of state law, and the court should grant review pursuant to ORAP 9.07(1) and (4).

ii. The Court of Appeals' decision is inconsistent with prior interpretations of a similar statute.

Moreover, the Court of Appeal's decision is inconsistent with prior interpretations of a similar statute, ORS 59.115. Unlike common law fraud, a securities law claim under ORS 59.115 has consistently been held to not require reliance. *See Everts v. Holtmann*, 64 Or App 145, 152, 667 P2d 1028 (1983)("ORS 59.115(1)(b) imposes liability without regard to whether the buyer relies on the omission or misrepresentation"); *Elston v. Toma*, CV 01-1124-K1 (D Or 2004) (Judge King imposed liability under ORS 59.115(1)(a) for a violation of ORS 59.135 without making any finding of reliance). ORS 59.115 is virtually analogous to ORS 59.137 as they both provide a private cause of action for a violation of ORS 59.135. However, the Court of Appeals has read a reliance requirement into ORS 59.137 where it is well-settled that the analogous ORS 59.115 does not have

such a requirement. Therefore, the interpretations are inconsistent and this Court should grant review to resolve the inconsistency.

D. Whether ORS 59.137 Contains a Reliance Requirement and Whether That Requirement is Satisfied by a "Fraud on the Market" are Issues of First Impression for the Oregon Supreme Court.

ORAP 9.07(5) provides that the Supreme Court also will consider "[w]hether the issue is one of first impression for the Supreme Court." The Court has not yet considered whether ORS 59.137 contains a reliance requirement and, if so, whether that Requirement is satisfied by a "fraud on the market" presumption of reliance. Decisions made by state appellate courts are important to national Blue Sky jurisprudence, and Oregon's highest court should be the one to opine on these important issues. Accordingly, this Court should grant review to decide these important issues of first impression.

E. NASAA is Able and Willing to Advise the Court.

ORAP 9.07(16) provides that the Supreme Court will consider "[w]hether an *amicus curiae* has appeared, or is available to advise the court. As described in the "Statement of Identity" and "Interest of the *Amicus Curiae*" sections above, NASAA, the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico, stands able and willing to assist the court in its review of this matter which is of great importance to investors nationwide. Therefore, review is warranted in the instant case.

CONCLUSION

For the reasons stated above, NASAA respectfully requests that the Court grant Oregon's Petition for Review.

Respectfully submitted May 11, 2011.

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(d) and ORAP 9.05(3)(a). I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes a required in ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE AND FILING

I certify that I served this **BRIEF OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC. IN SUPPORT OF PETITION FOR REVIEWOF THE STATE OF OREGON** on May 11, 2011, by mailing two copies to each recipient by first class mail to each of the following recipients at their last known addresses as follows:

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