IN THE SUPREME COURT OF THE UNITED STATES

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TELLABS, INC., ET AL., :

Petitioners :

v. : No. 06-484

MAKOR ISSUES & RIGHTS, :

LTD., ET AL. :

- x

Washington, D.C.

Wednesday, March 28, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C., on behalf of Petitioners.

KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

ARTHUR R. MILLER, ESQ., Cambridge, Mass., on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-484, Tellabs, Inc. versus Makor Issues & Rights.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF PETITIONERS

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

In 1995, Congress acted decisively to curb abusive private securities litigation. It took the extraordinary step of rejecting categorically the traditional rule of notice pleading in complaints that are filed under the securities laws. Instead it declared that, and this is at page 2 of our petition, "The complaint shall state with particularity facts giving rise to a "strong inference" that the defendant acted with the required state of mind."

The fundamental error in the court of appeals' analysis in this case was in writing out of the statute the "strong inference" language that Congress clearly intended to be not only in those statutes, but obviously applied rigorously.

JUSTICE KENNEDY: At some point during your

argument -- and I know you only have 20 minutes -- will you tell me whether or not in your view the pleading standard that the judge must follow is equivalent, is the same as the instruction that's given to the jury? Because if it isn't, then the Seventh Amendment argument may have some more force.

MR. PHILLIPS: I think the answer to the question is that it does not have to be the same. I think Congress actually has greater authority in dealing with pleadings that is distinct from the Seventh Amendment right, but the Court doesn't need to go that far in this particular case because I think the inferences that we are asking the Court to draw from the record in this case would avoid any --

JUSTICE KENNEDY: Well, in writing -- I take it, so far as the jury, it's just whether it's more likely than not, preponderance of the evidence.

MR. PHILLIPS: That's what the Court held -- held in Huddleston, yes, Your Honor.

JUSTICE KENNEDY: So your submission is -- maybe not in this case, but insofar as your theory of the case -- that the trial judge can, and in fact must apply basically a standard of fact -- standard of proof that's higher than that what the jury would have.

MR. PHILLIPS: Well, it's important -- a

standard of allegation, because what we're talking about here is an analysis of the allegations of the lawyers, and not any kind of an evidentiary showing by any of the plaintiffs. So I do think it's removed. I mean, this Court has never really addressed the issue of the extent to which the Seventh Amendment extends to pleadings. And I don't think this is the case in which to take up that issue because I think it is quite clear that what at least we're asking for as the appropriate interpretation of the Reform Act is that you need to follow -- is that you simply follow Matsushita and Monsanto, and that is force the plaintiff to demonstrate that innocent explanations can be set aside. And if you take that particular approach, which clearly is consistent with the Seventh Amendment, then it seems to me you've -- that your Seventh -- that your problem under the Constitution, is eliminated.

JUSTICE GINSBURG: Mr. Phillips, Seventh Amendment or not, the question in 12(b)(6) is has the plaintiff stated a claim, and at the end of the line it's has the plaintiff proved a claim. But you're stating two different claims. The claim that must be stated is a stronger claim than the claim that must be proved, and I don't know of any other instance where that is so.

MR. PHILLIPS: I don't know that there are any other instances in which that's true, Justice Ginsburg, but I don't think it's a constitutional problem. I think at the end of the day the question is, does Congress have the power to enforce its view of the appropriate way to proceed as a matter of policy at the pleadings stage, and I think the answer to that question is yes. But again, you don't have to --

JUSTICE GINSBURG: I wasn't asking it as a matter of constitutional law but I'm thinking, how do you construe these words, what is it, "strong inference"? And the words come out of, as I understand it, a Second Circuit decision. So I would think the most logical thing is that you'd look at the Second Circuit decision and say ah, Congress picked up those words from Second Circuit decision, then it should pick up the standards that the Second Circuit applied.

But your definition of "strong inference" is quite different from what the Second Circuit's was.

MR. PHILLIPS: Well, I'm not sure that's 100 percent true. I think the real problem with the Second Circuit is there's no monolithic Second Circuit rule that's out there. The Second Circuit applied a number of cases under its particularity standards under 9(b)

prior to the time Congress adopted the "strong inference" standard. Some of them -- I think we would be very comfortable with the analysis in Shields versus Citytrust Bank, for instance. The way Judge Jacobs analyzed the complaint in that case is precisely the way we're trying to analyze the complaint in this case. So if you --

JUSTICE STEVENS: Mr. Phillips, can I ask this question?

MR. PHILLIPS: I'm sorry.

JUSTICE STEVENS: One of the amicus briefs talks in terms of percentages, how likely the inference, the word "strong inference" means 50 percent, 30 percent, 60 percent. Do you think the inference has to be stronger or less strong than the inference of probable cause in an affidavit for a search warrant to get access to the privacy of a home and so forth?

MR. PHILLIPS: I think it would have to be stronger than that, although I don't know how to translate that into percentages, Justice Stevens.

JUSTICE STEVENS: Does it seem likely that Congress would -- in civil case would impose a higher standard for getting discovery in a civil case than they would for getting access to a citizen's private papers and the like?

MR. PHILLIPS: I think the use of the language "strong inference" carries with it a very significant burden that has to be demonstrated by the --

JUSTICE STEVENS: A burden of over 50 percent?

MR. PHILLIPS: Oh, to be sure over 50 percent.

JUSTICE SCALIA: In the criminal case, the person seeking that action is a Government officer who presumptively is not acting out of selfish motives, whereas we're talking here about private suits and some private litigants are selfish.

MR. PHILLIPS: Absolutely, Justice Scalia. And if you read the Securities Industry's amicus brief, it ticks off all of the instances of harms that are caused by allowing -- too much of the private litigation is precisely that, which Congress was responding to.

JUSTICE KENNEDY: Just to make it clear, is the high likelihood, or "strong inference", is greater than more likely than not?

MR. PHILLIPS: Yes. I believe Congress would have intended it to be more --

JUSTICE ALITO: Doesn't the -- doesn't the standard at the pleading stage have to be the same as the standard at the summary judgment stage? If -- suppose that a certain set of facts is sufficient to

defeat summary judgment. If the plaintiff alleges all of those facts in the complaint, are you saying that that complaint could be dismissed even though supporting those facts at the summary judgment stage would be enough to defeat a summary judgment motion?

MR. PHILLIPS: I think at the end of the day I would make that argument. I don't have to make that argument here because it's clear to me that the same standards of Matsushita and Monsanto that say you have to exclude innocent explanations would apply at the summary judgment stage as we're trying to apply at the pleading stage, so there is no disconnect.

But if I were actually forced into that position, I think I would take that view, although I probably would argue first that the standard of Huddleston ought to be reconsidered, rather than rejecting what clearly Congress had in mind in 1995 when it acted to curb the abuses of private securities litigation.

JUSTICE SOUTER: But isn't the difference between Matsushita and this particular case -- at least as you are presenting this case -- the -- focused on the strength of this exclusion of innocent conduct?

As, as I recall Matsushita, there -- there had to be at that stage, there had to be evidence from

which one could infer that the -- that the conduct was not innocent; but you're arguing for something stronger than that. You're arguing for, in effect, an -- an ultimate conclusion that excludes innocent conduct. And aren't you asking for more than just what Matsushita did at -- at that later stage?

MR. PHILLIPS: I think there may be a slight semantic difference there, but the truth is at end of the day all we're asking for the Court to do is to evaluate the complaint, taking both the positive and the negative inferences from it, excluding ambiguities, interpreting them not in favor of the plaintiff, as you traditionally do, take into account whether there is an allegation of motive, and say at the end of the day whether or not that reaches a -- rises to the level of a "strong inference".

JUSTICE SOUTER: But -- but Matsushita as I recall did not require it to rise beyond the level of a plausible inference. And I think you're arguing for something stronger than that. And I think the language of Congress forces you to do it but I -- I'm just finding it difficult to conclude the -- to equate the plausibility standard in, in Matsushita with the strong inference standard here. If you --

MR. PHILLIPS: Well, if I'm going to err on

either side, obviously I prefer that the Court carries out Congress's intent. We thing you needn't go any further than Matsushita did in order to reverse the court of appeals in this particular case.

Obviously there is probably some potential distance between the two, or you could certainly interpret the "strong inference" standard more in the line with the way the United States interprets it, as creating a high likelihood of scienter. And we don't -- we're certainly not objecting to that. We're just saying to the Court that you needn't go that far in order to decide this case, although obviously we would welcome a ruling along those lines if the Court's inclined to go that far.

JUSTICE GINSBURG: Is it fair to say that at the pleading stage it's the equivalent of a clear and convincing standard, whereas at the end of the road it would only be more probable than not?

MR. PHILLIPS: Well, again, I think it -- I think it puts an issue -- and we raised this in our reply brief, whether or not Huddleston should be reconsidered in light of this sort of basic change in the way Congress is approaching private securities litigation. But, so my --

JUSTICE GINSBURG: So you do --

MR. PHILLIPS: There are a number of ways to go at it. But if it turned out to be a disconnect, that would not offend at least my sense of what Congress was trying to achieve here.

JUSTICE SCALIA: Yes. Well, I don't think Congress was trying to achieve an alteration in the ultimate standard, either, in the jury standard. What it was concerned with is the enormous expense of -- of discovery. And, and tried to set a high wall to get to the discovery stage. I don't know why that should have to affect or should logically affect the standard that the jury is told to use.

MR. PHILLIPS: All I'm suggesting is that if the Court were concerned that somehow there is a disconnect between the pleading standard and the ultimate standard of proof, the way to resolve that incongruity -- if it is one -- would to be reconsider the ultimate standard of proof, not to throw out the clearly congressionally-approved baby as part of that bath water.

JUSTICE KENNEDY: Can you tell me a little bit of how -- how this should work in your view? Assume the CEO makes misstatements as to the earnings report and the acceptance of one of its new products. Just assume that.

MR. PHILLIPS: Right.
JUSTICE KENNEDY: Can we make a strong inference that a CEO knows what his own earnings reports are?
MR. PHILLIPS: You mean with a specific earnings report rather than just simply sort of sales projections and demand?
JUSTICE KENNEDY: Can we make a strong inference that a CEO knows the status of current earnings --
MR. PHILLIPS: Well, my guess is they would have --
JUSTICE KENNEDY: -- when he makes, when he makes a statement.
MR. PHILLIPS: Well, I think they would have to make an allegation that the -- that the CEO routinely is provided with that information rather than simply assume it. I think it's the same problem you have with their -- with their allegation that it's common sense that CEOs will act to protect their own personal self interest and the overall welfare of the company by misrepresenting the status of events. I don't think he --
JUSTICE SCALIA: What about just saying that he knew it?
MR. PHILLIPS: I'm not --

JUSTICE SCALIA: Just saying that he knew it. Without saying why they knew that he knew it? You're saying they have to give the reason why they knew that he knew it, namely he routinely read these reports? Suppose they didn't say that. They just said knowing that the -- that the -- figures were otherwise, he -- he set them forth.

MR. PHILLIPS: I don't think that's sufficient, because it requires facts that particularly show --

JUSTICE BREYER: Well suppose it says, which I think it did say, that Mr. Notebaert typically stayed on top of the company's financial health by having weekly conversations with other executives. He had his hands on the pulse of the company. He saw weekly sales reports and product -- projection -- production projections. Now that seems like an allegation that's very specific.

MR. PHILLIPS: But the -- but the problem with that allegation, and we're talking about the 6500, the Titan 6500 product specifically, in that context, the report is -- there's nothing in there that says what those reports say about the 6500. And remember, this is a case where the plaintiffs have 27 whistleblowers inside the company who could provide you with all of the

detail in the world; and yet when it comes time to tell you what was in the 6500 report that would -- that would suggest that it's not available, there's not word one in the allegation.

JUSTICE BREYER: Well, I thought they alleged at least that for about a year previously in respect to the 50--6500 that it was long known throughout the company that the 6500 had been delayed. Don't they make an allegation like that?

MR. PHILLIPS: Right but that's -- that being delayed for a year is not the basis for the claim. The question was is the, is the 6500 being sold; and that was the allegation. And the answer to that is he -- I -- he had every reason to believe that, based on what they've claimed because they've not produced a report or said that there's anything inside a report that says to the contrary about that.

Again, it seems to me --

JUSTICE BREYER: The 6500 has long been delayed. Everyone knows that in the company. So he knows it's long been delayed.

MR. PHILLIPS: Right, but that goes --

JUSTICE BREYER: Then what he says is it is being shipped and delivered. Something like that.

MR. PHILLIPS: But Justice Breyer, that --

that long been delayed period runs all the way back to 1998. And we're talking about events in 2000 and 2001. So the notion that it's been long delayed says nothing about what Mr. Notebaert was -- was revealing in March and April and June of 2001.

It, it could potentially, but it equally, it couldn't. It's the same problem you get with the 5500, where the court of appeals specifically said it is quite plausible that Mr. Notebaert never saw those reports.

Now how you can make that concession and nevertheless say there is a "strong inference" that he acted to deceive, strikes me as absolutely implausible.

JUSTICE BREYER: April '01, he says everything we can build we are building, and shipping. The demand is very strong. And then what they say is of course nobody wanted any of it, it was long delayed, and they've known that since 1998 and he has his finger on the pulse of the company.

MR. PHILLIPS: But you -- you -- Justice Breyer, you make a leap there.

JUSTICE BREYER: Oh. Yes.

MR. PHILLIPS: Is that they all knew that. The point is they knew that it was delayed back in 1999. What they don't do is tie that in to what he knew in 2001; and that, to me, that's the central point in this

case, is do you require that kind of specificity? And it seems to me there's no other way to read what Congress says in this statute than to do that. I'd like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you Mr. Phillips.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM,
ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,
SUPPORTING PETITIONERS

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

While meritorious private actions are an essential supplement to Government enforcement of the securities laws, abusive actions impose substantial costs on companies and their shareholders. As a cornerstone of its effort in the Reform Act to address the problem of abusive actions, Congress adopted uniform and more stringent pleading requirements including the strong inference requirement at issue in this case.

The court of appeals erred by holding that a plaintiff can satisfy that requirement simply by alleging facts from which an inference of state of mind could be drawn. The court of appeals thereby misinterpreted the Reform Act. And --

CHIEF JUSTICE ROBERTS: Do you have a position on Justice Alito's earlier question about whether the standard at the summary judgment stage is the same as the standard at the pleading stage?

MR. SHANMUGAM: First of all to be clear, Mr. Chief Justice, we don't believe that the Court needs to address that question in this case, because we don't believe that that sort of disparity would present any Seventh Amendment concerns. However, if the Court does believe that any disparity in the degree of probability required does present Seventh Amendment concerns, we believe that it is more consistent with Congress's intent to apply the "strong inference" requirement at the proof stage as well as the pleading stage rather than to water down the "strong inference" requirement that Congress adopted at the pleading stage.

And we believe that that requirement does impose a very high burden. In our view, it requires a plaintiff to allege facts that give rise to a high likelihood that the conclusion that the defendant acted with the necessary state of mind follows from those allegations.

JUSTICE KENNEDY: And by the proof stage you mean both summary judgment and submission to jury?

MR. SHANMUGAM: I think that that is right,

Justice Kennedy. I suppose that if the perceived constitutional concern is solely regarding the degree of likelihood that is required, it could be applied simply at the summary judgment stage; but to the extent that the Court believes that it is a matter for the jury to determine whether a given set of facts gives rise to an inference of the requisite strength then yes, the jury would need to be instructed in a manner consistent with the strong --

JUSTICE BREYER: What would you think about the following --

JUSTICE STEVENS: May I ask this question? May I ask this very briefly? Putting aside the constitutional problem, do you think the standards are the same or different between the pleading stage and the constitutional stage -- and the summary judgment stage?

MR. SHANMUGAM: Well, again, we don't believe that the Court needs to address that question.

JUSTICE STEVENS: I understand that. That's not my question.

MR. SHANMUGAN: And the statute by its terms only --

JUSTICE STEVENS: It is either a yes or no question.

MR. SHANMUGAM: Well, I think that the

answer is yes if the Court feels it needs to address that question. And to be sure, the "strong inference" standard that Congress adopted was framed only in terms of the pleading stage. And our view --

JUSTICE GINSBURG: Let's stay with the pleading stage because I would like your clear view on how much that changes. It has been the understanding that when there is a 12(b)(6) motion, you look only to the face of the complaint and you construe the allegations in that complaint in the light most favorable to the plaintiff.

Is that rule not applied under the interpretation you are giving us of "strong inference"?

MR. SHANMUGAM: I think that it is, Justice Ginsburg, to this limited extent. In an ordinary civil case, the case is governed of course by rule 8. And in some sense the rule that the allegations in the complaint must be construed in the light most favorable to the plaintiff is really derived from rule 8 and its requirement that a plaintiff need only provide a short and plain statement of the relevant underlying facts in order to survive a motion to dismiss.

What Congress did in the Reform Act was to require first of all some degree of particularity in allegation; but Congress went further than that; and to the extent that Congress spoke in terms of the

inferences that can be drawn from those allegations, we do believe that Congress abrogated the background rule that the allegations must be read in the light most favorable to the plaintiff, or as some courts have put it, that all reasonable inferences that can be drawn from the complaint should be drawn in the plaintiff's favor.

That clearly is a change on the preexisting law; and it is a change with regard to the law that circuits were applying before the enactment of the Reform Act.

JUSTICE SOUTER: Why don't we simply assume that the read-most-favorably-to-the-plaintiff rule is still in place, but that reading it most favorably to the plaintiff, it must rise to the level of supporting the "strong inference"?

MR. SHANMUGAM: I guess, Justice Souter, that I would wonder what it would mean to say that you read the allegations in the light most favorable to the plaintiff. If what it means is that a plaintiff can simply accumulate reasonable subsidiary inferences in order to create the "strong inference" of state of mind that is ultimately required, then I think I would disagree that that rule remains in effect. Precisely because our view is that in applying the strong

inference standard, a court should consider other possible explanations for the defendant's conduct that are not foreclosed by the allegations --

JUSTICE SOUTER: Well, but I was using the word "inference" to -- to refer to some reasoning process based on what is stated. Not on assumptions favorable to the plaintiff.

And if "inference" is to tie -- is, is a term that is tied to what is alleged, then I don't see any -- any contradiction between reading those allegations most favorably, but saying the statute, the new statute requires that the -- that the total force of the inference rise to the level of strength that you speak of.

MR. SHANMUGAM: I think our only concern, Justice Souter, would be that where a plaintiff includes ambiguous allegations in the complaint, a court should consider the possibility that those ambiguities work to the defendant's favor as well as working to the plaintiff's favor. And one concrete example of that in this case are the allegations that concern the Titan 5500. There are allegations in this case that there was a study and there were various internal reports that indicated that demand for that product was declining.

But the complaint does not specifically

allege that that study and those internal reports were even available at the time that the CEO made the alleged --

JUSTICE SCALIA: Mr. Shanmugam, could -- could I get you back to -- to your, your assertion that we don't have to reach in this case the question of whether the same standard applies at trial as, as at the pleading stage?

It seems to me a Seventh Amendment claim has been raised. It's our usual policy to avoid unnecessary constitutional adjudication. If indeed the two standards are the same, there's certainly no Seventh Amendment problem. So why don't we have to first of all decide, in resolving the Seventh Amendment claim, whether the two standards are the same?

MR. SHANMUGAM: Well, that is certainly correct, Justice Scalia, but in our view, there is no constitutional problem here. And the reason that there is no constitutional problem here is that in making the probabilistic determination that is required by the Reform Act, a court is taking the allegations in the complaint as true. It is not engaging in any weighing of the evidence.

JUSTICE SCALIA: But you're getting to the merits of the constitutional problem. And we usually run away from constitutional problems. We don't even

want to consider the merits of it. And we don't have to, if indeed the two standards are the same.

MR. SHANMUGAM: Well, to the extent that the Court views the constitutional issue in this case as sufficiently substantial to trigger the canon of constitutional avoidance, then we do believe that the better view, the view that is more consistent with Congress's intent, is that if the Court is choosing between raising the standard at the proof stage and watering down the standard at the pleadings stage, we believe that the former is more consistent with Congress's intent.

JUSTICE ALITO: But even if there is no Seventh Amendment problem, what sense would it make to have a regime that says the plaintiff has to plead more than the plaintiff has to show at summary judgment or prove at trial?

MR. SHANMUGAM: Well, Congress was concerned, Justice Alito, with the problem of abusive pleading. That much is crystal clear. And as part of that concern, Congress was concerned that plaintiffs could readily allege fraud by hindsight, and Congress may have been concerned that the plaintiff could do so not only by making a conclusory allegation of state of mind, but also making a slightly less conclusory

allegation of state of mind by alleging facts that merely give rise to a reasonable inference of state of mind.

If Congress hadn't had that concern, it obviously could have codified the reasonable inference standard that was then in use by a number of other courts.

JUSTICE BREYER: What do you think in writing this opinion? There are a couple of ways. One, you can define "strong inference" in terms of some other words. Two, you could look to history. Or three, you could just try an example. Say "strong inference" means "strong inference". Here's an example. This is a complaint. It meets it, or it doesn't meet it. Which way, in your opinion, will work best in this case?

MR. SHANMUGAM: Justice Breyer, our primary concern in this case is with the way that the court of appeals articulated the applicable standard, which we believe may have pernicious effects in future cases. And so we certainly believe that it would be appropriate for the Court to vacate and remand for the court of appeals to apply the correct standard. But just to be clear --

JUSTICE GINSBURG: You said the Court of Appeals to apply it. Could the court of appeals

applying the standard that you say is correct come to the same decision that it came to using a different verbal formula?

MR. SHANMUGAM: In our view, Justice Ginsburg, applying the correct standard, the decision of the court of appeals in this case should be reversed. And if the case were remanded to the court of appeals for application of the standard, we certainly think that the court of appeals should come out the other way.

JUSTICE BREYER: You had something else to say in answer to my question, which I would like to hear.

MR. SHANMUGAM: I think it was just that point, Justice Breyer, namely, that if the Court believes that it would be useful to provide guidance to the lower courts by applying the standard itself in this case, we do believe that the decision of the court of appeals should be reversed rather than vacated.

JUSTICE KENNEDY: Is the requisite standard knowledge of falsity?

MR. SHANMUGAM: The requisite scienter is either intent or recklessness, with regard to the underlying conduct at issue, and in effect I think --

JUSTICE KENNEDY: Intent to make a false

statement?

MR. SHANMUGAM: Yes, that's right. And in effect, in misstatement cases, that is knowledge of falsity. Thank you.

CHIEF JUSTICE ROBERTS: Thank you Mr. Shanmugam.

Mr. Miller.

ORAL ARGUMENT OF ARTHUR R. MILLER

ON BEHALF OF RESPONDENTS

MR. MILLER: Mr. Chief Justice, and may it please the Court:

We believe the Seventh Circuit had it right. We believe that what the Seventh Circuit did -- and this is in partial response to you, Justice Breyer -- is take more or less a holistic view of the entirety of the complaint. The business about the 5500, the business about the 6500 not being available when on December 11, 2000, Notebaert says it's available, the fact that they weren't shipping it, they weren't selling it, it didn't work, and the extensive information from confidential sources that there were, as one judge once referred to it, accounting shenanigans going on, designed to shift income into the fourth quarter of 2000.

We think that when the court looked at that, it said, looks to us as if there's beef here.

JUSTICE KENNEDY: And do we take judicial notice that a CEO knows these things and that's the strong inference?

MR. MILLER: Again, you have confidential sources in this case, indicating that Notebaert is hands on, he's talking to people, he's on the phone all the time. We're talking about the 5500 --

JUSTICE KENNEDY: But you agree you have to have that? You have to have some specific allegation to show of his knowledge? We can't just infer that?

MR. MILLER: I would think you should be able to infer it with the CEO. I think the confidential sources demonstrate in this case, he must have had it, given his nature, the status of these products, his day-to-day activities --

JUSTICE BREYER: The most suspicious thing in the complaint that I could find was where you say there's an internal market report, and it revealed demand for the 5500 was drying up, and revenue would decline by 400,000,000. Then you date that with in or about early '01. Now, I think if you knew or had reason to believe that it was prior to March or April of '01, you would have said so.

MR. MILLER: If we knew.

JUSTICE BREYER: Yes, and therefore,

there's quite a good chance here that this report was written after he made the statements.

What am I supposed to do with that? I mean, I know what you said. And you said your best. And that's your best.

MR. MILLER: Yes. This notion of strategic ambiguity is in a sense humorous, given the obstacles that a plaintiff has to get the goods, so to speak. Just think of the investigation efforts that went into this case. What you do, Justice Breyer, is -- and I think this is what the Seventh Circuit did -- look at everything, look at the fact that you have got confidential sources saying 5500 demand is drying up, perhaps as early as middle 2000. Parts are not being ordered. People are going home early. Verizon dropped 25 percent, fourth quarter. Verizon dropped 50 percent in January.

You're the CEO. You don't know that your flagship product is drying up? That there's inventory, that people are going home? That your best customer doesn't know you anymore?

CHIEF JUSTICE ROBERTS: You're arguing that the facts and the inferences -- and you said the Seventh Circuit got it right. As I read their articulation of the standard on page 20a of the petition appendix, it's the

normal standard that would have been applied prior to the passage of the PSLRA. Could a reasonable person infer -- Congress passes a law saying they've got to give rise to a "strong inference". Shouldn't that have changed the standard?

MR. MILLER: We believe two propositions. Number one, you can't exceed the Seventh Amendment, and the Seventh Circuit made it --

CHIEF JUSTICE ROBERTS: I don't understand the Seventh Amendment argument here. Congress can surely articulate the standard that's going to be applied as a matter of substantive law. If Congress says, you have to prove by clear and convincing evidence, that doesn't interfere with the Seventh Amendment because a jury would be instructed pursuant to that standard.

MR. MILLER: That is correct, Chief Justice. But that is not what Congress did. Congress did not elevate the burden of proof. That is why Mr. Phillips has asked you to, in effect, to overrule Huddleston.

JUSTICE SCALIA: Well, but Congress just established an entry qualification for getting into court.

And there are a lot of entry qualifications. In diversity cases, you -- if you allege diversity, and

it existed at the outset, that's fine. Yet that doesn't have to be proved at the end of the case. Indeed even if you prove the contrary, the case is still validly there. Congress can establish entry requirements even when they differ from, or have indeed nothing to do with the merits that the jury is supposed to decide.

MR. MILLER: I think that is absolutely correct, and indeed rule 9(b) has been an entry qualification since 1938. But there are entry qualifications, and there are entry qualifications.

In this case, in effect, the motion to dismiss operates as a dispositive motion. It cuts off the ability to proceed at all, and it does it, if you listen to the standards being proposed by Petitioners, and by the United States --

JUSTICE BREYER: What's the difference between what Justice Scalia was just saying? You can't come into Federal court unless you have at least $200,000 damages. Now, you might have been just as much hurt if you had less, but that would be constitutional. So here you can't get into Federal court unless you have a really strong claim, an overwhelming claim that you have to demonstrate at the beginning.

Now, you might have a good claim, but we're not going to let you come into Federal court. We only

want those people who are really strong, just as we only want those people who are really suffering.

MR. MILLER: And if Congress raised the burden of persuasion, fine but --

JUSTICE BREYER: No. No, not the burden of persuasion -- it's the entry.

MR. MILLER: The entry point. The entry points you referred to, the so-called pleas in abatement, to put on my common law hat, a jurisdiction venue, et cetera, they may raise issues of fact and Congress, in control of the Federal courts, can calibrate it any way they want.

But when you are dealing with the core function of the jury -- and matters of abatement were never considered to be core functions of the jury -- I think a whole range of cases starting with Slocum versus New York Life in 1913 --

CHIEF JUSTICE ROBERTS: I thought you told me that Congress could set a high level of burden on factual issues, and that that wouldn't intrude upon the Seventh Amendment.

MR. MILLER: I'm distinguishing, Mr. Chief Justice, between the merits and the entry point.

CHIEF JUSTICE ROBERTS: Are you saying that Congress cannot set a fact burden on the merits that is different than preponderance of the evidence?

MR. MILLER: No. No. No. No. If Congress wants to change preponderance to clear and convincing, it can.

JUSTICE KENNEDY: So you would say that you could have a beyond reasonable doubt standard that must be met at the pleading level, but more likely than not at the jury level?

MR. MILLER: No. That is something I disagree with. If the substance of the law --

JUSTICE KENNEDY: We want to know what the rule is.

MR. MILLER: I'm not sure it's the rule. It's what I would advocate. If the substance says predominance, then to raise the pleading bar on what in effect is a dispositive motion -- and I don't think it makes any difference whether it's a JNOV, a directed verdict, a summary judgment, motion for judgment on the opening statement -- and you have decided all of those cases. And you protected what Justice Souter referred to in Markman as the core function of the jury. You have always said these procedures are okay, as long as it does not call for the resolution of fact issues, because that's the core function of the jury.

Now this Court is faced with, in effect, coming back down that time line to the motion to

dismiss.

CHIEF JUSTICE ROBERTS: What -- if I'm with you so far, why would you suppose that Congress would create a different standard on the motion to dismiss than they meant to apply at the merits standard?

MR. MILLER: I don't think Congress would. I do not believe Congress ever intended -- it's not in the statute, it is not in the legislative history, it is not in any case, Matsushita, Monsanto are unique antitrust cases. In both cases, the Court, if you read the opinions fully, protected the jury function. They said there was simply nothing beyond the assertions standing alone when you have competitive and anticompetitive conduct to protect substantive antitrust law. Standing alone, that doesn't do it.

CHIEF JUSTICE ROBERTS: Well, then what was Congress trying to do when they said "strong inference"? It seems to me that if you think the standards have to be the same at pleading and at proof, and Congress says "strong inference" at pleading, it means you have to show a "strong inference" at proof, and that's why there's no Seventh Amendment problem.

MR. MILLER: What you have to show at proof is preponderance.

JUSTICE STEVENS: Do you think there is a

difference between the meaning of "strong inference" and "reasonable inference"?

MR. MILLER: Our standard, as proposed, and we think --

JUSTICE STEVENS: You don't want to answer yes or no there?

MR. MILLER: -- is reasonable jurors, who are finders of fact, could find by a preponderance of the evidence that the defendants acted with scienter.

JUSTICE STEVENS: So you're saying the words, "strong inference", mean essentially the same thing as reasonable inference.

MR. MILLER: No. You can have lots of reasonable inferences that don't meet a preponderance notion.

JUSTICE BREYER: That's true, but you -- imagine a case where the plaintiff with tremendous candor sets forth every bit of testimony that's going to be heard on both sides.

And then you read that document and you conclude this is the weakest case I've ever heard, but I do think a reasonable juror could find for the plaintiff.

And that would be the weak evidence standard.

And lo and behold, that could be -- you know, what do we do about that? Because using your do-you-send-it-to-a-jury test, we could easily imagine cases where that meets the weak evidence standard, the weak inference and not the "strong inference". And what I'm driving at is, I don't see a way of avoiding this Seventh Amendment problem.

MR. MILLER: If --

JUSTICE BREYER: Because they certainly didn't intend the weak inference standard.

MR. MILLER: If you follow Petitioners in their attempt to deconstruct not simply rule 8's construction, but hundreds of years of what this Court in Jones versus Bock referred to as usual procedural practices which are not to be lightly departed from, the historic notion is you look at the complaint and in a curious way, you have blinders on. You look at the complaint. You read it in the light favorable to the pleader. You do not weigh. That is a jury function. You do not look for exculpatory explanations.

JUSTICE ALITO: How can you assess the strength of the inference that can be drawn from the facts alleged in the complaint without considering all of the inferences that could be drawn from those facts? I just don't understand that argument.

You see somebody -- let's say you saw somebody today walking east on Pennsylvania Avenue in the direction of Capitol Hill. Now you -- there's -- you could draw an inference that the person is coming to the Supreme Court. And if there were no other building in Washington, that would be a very "strong inference". But don't you have to also consider the inference that the person is going to the Capitol, the person is going to the Library of Congress, the person is going to some other location up here? You have to consider all of the inferences that you can draw from the facts.

MR. MILLER: As the Seventh Circuit did, we agree, you look at the totality of the complaint. That's a given.

But there are contrary inferences that undermine the strength of the plaintiff's inferences. They weaken it. And they're -- they emanate from the complaint.

There are other kinds of inferences, let's call it nonculpability, that don't denigrate the strong inference which let's assume hypothetically has been established. They're just side-bar possibilities.

JUSTICE GINSBURG: Well, let's take one specific example that the Petitioners give, and that is this matter of the channel stuffing. They say here's a

notion, channel stuffing. It could mean goods were shipped that nobody ever ordered, or it could mean something different. It could mean discounting and other incentives to get people to buy. So there's a good channel stuffing and a bad channel stuffing, and it's kind of like good cholesterol and bad cholesterol; you can't tell from the allegation that it's the bad stuffing that's at issue.

MR. MILLER: The Seventh Circuit reached that conclusion, I think, by looking at some of the confidential sources which sort of indicated that there was channel stuffing in the sense of pushing product out which was coming back. The head of Verizon complained about the channel stuffing, so there's reason to believe that at least some of it is bad. Just enough.

Now, is that in and of itself determinative? No. Again, I come back to the notion that what the Seventh Circuit did is look at the 5500, look at the 6500, look at the earnings projections which proved false, looked at back-dating, channel stuffing. Looked at all of that and said okay, even if I treat channel stuffing as weak, I have these other things. And as Judge Lynch of the First Circuit said, each fact of scienter is like a brush stroke.

JUSTICE SOUTER: Are you entitled to

consider the brush strokes that are not there as well as the subsidiary brush strokes that are? In Justice Alito's example, if the pleadings don't point out that the Library of Congress and the Capitol are also up on this Hill, is the judge at the motions stage entitled to consider that?

MR. MILLER: Obviously, if it's something you can take judicial notice of, yes.

JUSTICE SOUTER: Okay. Then that is engaging in something more than simply construing the pleadings most favorably to the plaintiff.

MR. MILLER: But it's within the realm of what courts have done for the longest of time. They look at documents attached. They look at judicial notice.

JUSTICE BREYER: What do you think about that?

JUSTICE SOUTER: But there are at least some circumstances, then, in which there is this kind of critical assessment function that you concede must go on, rather than simply a piling favorable inference onto favorable inference to see if it gets to the strong points. Do you agree?

MR. MILLER: I repeat what I said a couple of minutes ago, Justice Souter. If the negative

depletes the affirmative, if there's a correlation between them, I can understand that. Maybe it eliminates that fact. Maybe it reduces that fact.

But when we hear about motive, what does motive and guidance reductions months after the false statements have to do with whether the statements were false, whether the 5500 was --

JUSTICE SOUTER: That is -- that is an argument for the weight of considering motive rather than the relevance of the motive consideration per se.

MR. MILLER: I think it is a tough line. I think this is the kind of line district judges have to draw. I think if you look at your own precedents like Anderson versus Liberty Lobby and all of those jury trial cases, you see the repetition of the notion that judges do not balance inference chains on a matter going to the core function of a jury.

CHIEF JUSTICE ROBERTS: But all of those cases were before the PSLRA where Congress, it seems to me, established a very different standard. They said they have to support a "strong inference".

MR. MILLER: A "strong inference". Not a conclusive inference.

CHIEF JUSTICE ROBERTS: Strong inference was not the test that was being applied in Anderson, Liberty

Lobby, in any of those cases.

MR. MILLER: But can't -- but strong inference, as Justice Ginsburg said much earlier, was the standard not only in the Second Circuit but in the First Circuit and in the Third Circuit.

JUSTICE BREYER: What do you think about the approach -- because I have had some of these cases. And I see -- I think words, words, words.

And what Congress said was "strong inference", and we're not going to get any further by looking for some other words. So therefore, take "strong inference". The most helpful thing is take it, look at the complaint, read it, and then say okay, this is a strong inference. Or maybe we'd say it isn't. We read it, and avoid all the other issues. What do you think about that?

MR. MILLER: Live to fight another day?

JUSTICE SCALIA: Well, and then on appeal, we would say, no, it's not a "strong inference", or yes, it is a "strong inference".

I mean, I hope we're going to establish some standards for how you go about determining whether there's a "strong inference" or not.

JUSTICE KENNEDY: And I hope we're going to recognize that Congress thought it was doing something.

Your argument so far, Professor, doesn't indicate that Congress was doing --

MR. MILLER: Excuse me.

JUSTICE KENNEDY: You indicated that the -- you know, the plaintiff had to do all this investigation. The whole point of this was that the defendants were being disadvantaged.

MR. MILLER: Look at the statute in its entirety. This isn't a statute that just deals with pleading scienter. Look at the provisions dealing with the selection of lead representative, which has produced this incredible shift from '95 to public institutions, pensions and labor unions. They don't bring frivolous cases. Look at the control that statute gives over selection of them with notice provisions to make sure you've got the best --

CHIEF JUSTICE ROBERTS: How does that change how we should read "strong inference" in the statute? Are you saying don't worry whether it's a "strong inference" or not because labor unions are bringing the cases and they're not going to bring a frivolous case? No. Congress said there has to be a "strong inference". And what concerns me is that the very standard that the Seventh Circuit articulated said simply could a reasonable person infer. The notion of "strong inference"

isn't in that standard at all.

MR. MILLER: The notion of "strong inference" starting with the Second Circuit doctrine, as used in many other circuits, was actually a much lower standard than what we are recommending.

If I believe -- if I think back at Greenstone, it was reason to believe, or tends to believe, or circumstantial evidence in Greenstone and in Burlington Coat.

Under our standard of preponderance, the ability to find preponderance, you are elevated. You are also elevated by the preceding subdivision which requires a level of particularization, never known in Federal Rule era --

JUSTICE STEVENS: Mr. Miller, going back just to the word "strong," forgetting the particularization from it, do you think you can categorize the strength in percentage terms? They have to be more than 50 percent? More than probable cause?

We're talking all abstractly here and I find it easier to think when I think about numbers.

MR. MILLER: I have -- forgive me. I haven't seen a judicial opinion that says at the 33 and one-third percentage of probability, I've got to give it to the jury, because that jury might file for my --

JUSTICE SCALIA: I think it's 66 and two-thirds. I think that is --

(Laughter.)

MR. MILLER: Is that because you never met a plaintiff you really liked?

(Laughter.)

JUSTICE STEVENS: At least we know that in the probable world --

MR. MILLER: I took a liberty there with the Justice. I don't think you can ascribe a percentage to it. I think --

JUSTICE KENNEDY: Well, I think more likely than not, most people think of 49, 50 percent. Can you tell us whether "strong inference" is stronger than more likely than not?

MR. MILLER: I do not believe it is. I think --

I think "strong inference" -- if we're doing the numbers game -- may actually be 40 percent. If a district judge is looking, again, I say at the entirety of discounts --

JUSTICE STEVENS: Let me just reclaim the question. Is it stronger or weaker than probable cause in a criminal context?

MR. MILLER: Oh, I would hope it's stronger.

I would hope it's higher than probable cause.

JUSTICE SCALIA: But not clear and convincing? Is it below clear -- I mean, really the only two standards I actually understand, without picking a number out of air, is preponderance, I think I can figure that out. And I guess I can figure out beyond a reasonable doubt. But other than those, when you talk about "strong," when you talk about clear and convincing, I have no idea what those things mean.

Do you?

MR. MILLER: In --

JUSTICE SCALIA: You don't think they mean anything?

MR. MILLER: No, I think they mean what a district judge honoring his Article III commission concludes after an intensive evaluation of the entirety of the complaint, looking for that "strong inference", putting on his sort of motion-to-dismiss-12(b)(6) hat, says okay -- now Chief Justice --

CHIEF JUSTICE ROBERTS: Just okay? See that's exactly what was said --

MR. MILLER: No, I did not mean that. Don't take me literally on that. For heavens sakes, I'm from Brooklyn. I'm very colloquial. I'm very sorry about that.

JUSTICE SCALIA: Let me write this down. We should not take you literally. All right.

(Laughter.)

CHIEF JUSTICE ROBERTS: Okay, you two are even now.

(Laughter.)

MR. MILLER: Understand, you keep asking, quite properly obviously, how does "strong inference" change anything?

The test we have proposed and the test I believe the Seventh Circuit applied is not the classic 12(b)(6) have you stated a claim, because we all know at least traditionally, under notice pleading, you can march through that.

This test, if you follow that time line backward, is in effect asking that district judge to make a decision on looking at the totality of this complaint, is this case trial worthy? It's a curious thing. I don't envy district judges who have to do this.

Is it trial worthy? Why would Congress say, if a district judge is willing to say under the classic test, I think it's trial worthy, there's no reason to believe that Congress wanted to cut that case off.

CHIEF JUSTICE ROBERTS: Trial worthy under a

preponderance standard or trial worthy under the strong inference standard?

MR. MILLER: Oh, I think he is becoming slightly schizoid, he is saying, I'm looking at strong inference. I'm looking at the motion to dismiss structure as it's been, the usual procedure, 200 years, and I have to make a judgment because Congress was pushing here. There's no doubt about it.

I have to make a decision on the basis of what I've got, which is virtually nothing -- let's face that -- I think -- I think if these allegations are proven, it is certainly trial worthy.

JUSTICE KENNEDY: It sounds to me what you've described is regular --

JUSTICE STEVENS: It doesn't sound to me -- it's not trial worthy, but rather discovery worthy.

MR. MILLER: I'm sorry.

CHIEF JUSTICE ROBERTS: Justice Stevens.

JUSTICE STEVENS: I said, I think the question is not whether it's trial worthy, it's whether it's worthy for discovery. That's really what's at issue in this.

MR. MILLER: Well, the realities out there are they built a wall. They put in all of these procedural protections and they said no discovery until you climb the wall. Now what kind of a wall was it?

Was it a Dutch dike or the Berlin Wall? If you look at that statute, contrary to what Mr. Phillips urges, there are multiple policies expressed in that statute, one of which is, private cases are good. Let's just get the right people to run those private cases. Let's control them. Let's, let's have a greater threshold, but let's not throw the baby out with the bath water. Because everybody seemed to agree private cases help.

JUSTICE KENNEDY: I want, I want to be fair. I interpreted your argument -- and please tell me if this is incorrect -- as indicating that if I think "strong inference" is greater, more onerous than more likely than not, at the pleading stage, I then also have to say this is the instruction that must be given to the jury? In order to avoid the, the discontinuity between the pleading stage and what --

MR. MILLER: The way you state it, Justice, is something very hard for me to respond to. Congress did not change the persuasiveness, the proof burden. If you go through the statute, you will see spots where they did. Congress knew how to change proof standards. Congress knew how to change Federal rules.

Congress did not change the proof in private actions. Congress did not change all of the background procedure like the background procedure in Jones and --

it is just not there yet. Congress did change a couple of Federal rules explicitly.

So I, I cannot comprehend how, if the case reached the jury, you would have to charge above predominance. And I, I think we've got a stone rolling downhill to the dismissal point, which is why we have urged in the brief and why the Seventh Circuit was concerned as was the Sixth about this jury trial implication --

JUSTICE BREYER: Yes, and so I think we have to reach it, because it can't possibly be you would instruct the jury you need a "strong inference", and it couldn't possibly be that a predominance standard if imported into the pleading would always mean a strong inference. You see, that's -- that's a dilemma. And I don't see how to remain true to the words of the statute which are "strong inference", without actually producing a dichotomy. And so either Congress can do it or it can't, and -- and -- and that's -- and we could fudge it by just, you know, avoiding it at this moment. But I don't --

JUSTICE SCALIA: Mr. Miller, suppose Congress set up an entirely separate cause of action. It's caused -- it's called a discovery cause of action, okay? And it sets forth as the condition for pursuing

that cause of action a standard that your, your allegation has to be indeed clear and convincing.

Okay?

And then if you win that, you can take whatever you get out of the discovery and bring a lawsuit. Would that be unconstitutional?

MR. MILLER: Why do I feel wind whipping past my ears as I go through a trap door?

(Laughter.)

MR. MILLER: Ironically, ironically, I think I'd have to say if Congress -- leaving to one side justiciability problems with the discovery cause of action -- if Congress created a discovery cause of action it could ascribe to it whatever incidents it wanted to --

JUSTICE STEVENS: Surely it could prohibit discovery altogether which it did before they adopt -- in 1938.

MR. MILLER: That is correct. And I don't think anybody seriously argues that discovery is a constitutional right.

The jury trial implications of this new cause of action are interesting. This Court has protected post-1791 statutory claims and their right to jury trial, but you're positing one that wasn't known in

1791, and maybe it could be done without a jury. That's really a hypothetical.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Miller.

Mr. Phillips, you have four minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS,
ON BEHALF OF PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice.

I have to confess I'm -- I'm slightly perplexed by exactly what the Respondent's position is in this case so I'm inclined to kind of go back to the core points that have been raised by the questions from -- from the Court. And in the first instance, it seems to me quite clear that the Seventh Circuit did not apply a "strong inference" standard. If -- you can compare the language from the First Circuit that specifically says it has to be reasonable and strong, strong has completely fallen out here. I don't see any way to read it the other way.

I think in response to Justice Breyer's question, which is how do, how should you write the opinion, I think the meaningful way to write the opinion is to be respectful of Justice Scalia's desire to provide guidance. So I do think you should say, you have to, as Justice Alito said, review the entirety of

the document and -- and infer both positively and negatively as you go forward. We know that has to be true. Almost every court that's dealt with these issues --

JUSTICE GINSBURG: But then you're doing away with reading the allegations in the light most favorable to the plaintiff.

MR. PHILLIPS: Absolutely. Absolutely, Justice Ginsburg. There's no question that that's -- that that's what Congress had to have meant under these circumstances. And the best example of that is the CEO who sells securities during the time period of the class action. There are dozens of cases in which that happens. Does it create an inference of scienter? It might, because it's quite possible that he sold and -- he lied about the stock in order to keep the price up to sell. It is also possible that he sells only about 1 percent of the stock and therefore it's trivial.

JUSTICE GINSBURG: But Mr. Phillips, you don't look at these things one at a time. You look at them altogether.

MR. PHILLIPS: Well, that is --

JUSTICE GINSBURG: Is the statute all you had?

MR. PHILLIPS: Justice Ginsburg, I couldn't

disagree with you more about that. That is precisely what Congress says when it says with particularity. And when Congress says you have to look at each defendant. You cannot do --

JUSTICE GINSBURG: It says you must plead the facts with particularity.

MR. PHILLIPS: Yes.

JUSTICE GINSBURG: But when one judges the adequacy of the complaint, one looks at all the facts pleaded with particularity, not just one of them.

MR. PHILLIPS: But the "strong inference" of scienter is not pled on a group basis. It has to be pled with respect to each individual defendant. So it's quite convenient --

JUSTICE GINSBURG: Well, I think that this case was a good example. There were two defendants and the court of appeals --

MR. PHILLIPS: Well, there were a lot more than that.

JUSTICE GINSBURG: Well, to take the two that were at issue in this opinion. The court of appeals said the CEO, yes, there's enough there to get over that threshold. The other guy, no, there wasn't.

So it's not that she's saying what you find for one, you find for all. She is going at it defendant

by defendant.

MR. PHILLIPS: Well, I -- I -- I mean, I was commenting primarily on Professor Miller's decision to just sort of sweep everything in and say look, back in 1999 and 2000 when the Seventh Circuit itself specifically said that the knowledge, for instance, of the 5500 decline didn't happen until March of 2001. So I was just saying you can't just start sweeping everything in.

But -- and it is true, the court distinguished between those two individuals; but the bottom line remains the same. You have to analyze them, each. And you have to take into account contending inferences. You have to construe ambiguity contrary to the plaintiff sometimes --

JUSTICE GINSBURG: What do you do with a report that you know exists because you had one of these 26 confidential people tell you? But you haven't seen the report, so you don't have the date on it? And you won't know that date unless you have access to discovery. Do you have to assume that the date is later rather than sooner?

MR. PHILLIPS: I think you better make an allegation with particularity that that date was at a time when the individual would know that the -- that the

information that he was conveying was -- was wrong. I don't see how you can infer strongly --

JUSTICE GINSBURG: But you -- if the plaintiff --

MR. PHILLIPS: -- scienter otherwise.

JUSTICE GINSBURG: The plaintiff can't know for sure without seeing the document with a date on it.

MR. PHILLIPS: Well, the plaintiff can ask the confidential informant as much as, as he wants about the information; and if he can't come up with it, that's the price you pay. That was exactly what Congress said, is if you cannot make those particular allegations, then you're out of luck. And it's not as though they give you one shot for this.

JUSTICE GINSBURG: Congress -- Congress used words, "strong inference". Those words are not self-defining. One can think of several ways, in fact the courts of appeals did think of several ways. Why should we pick your way as opposed to the other ways one might define them?

MR. PHILLIPS: I could be flip to say it's the right way. But I think the -- I mean the answer to the -- the answer to why choose our approach is because it is consistent with Matsushita and Monsanto and it will allow, Justice Breyer, to apply it in an

individualized way, in a fashion that will give guidance to the lower courts. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips. The case is submitted.

[Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.]

Q