

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TELLABS, INC., ET AL., :

4 Petitioners :

5 v. : No. 06-484

6 MAKOR ISSUES & RIGHTS, :

7 LTD., ET AL. :

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9 Washington, D.C.

10 Wednesday, March 28, 2007

11

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

15 APPEARANCES:

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

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

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

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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

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

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

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

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

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

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

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

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

1 MR. PHILLIPS: I don't know that there are
2 any other instances in which that's true,
3 Justice Ginsburg, but I don't think it's a
4 constitutional problem. I think at the end of the day
5 the question is, does Congress have the power to enforce
6 its view of the appropriate way to proceed as a matter
7 of policy at the pleadings stage, and I think the answer
8 to that question is yes. But again, you don't have to
9 --

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

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

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

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

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

10 MR. PHILLIPS: I'm sorry.

11 JUSTICE STEVENS: One of the amicus briefs
12 talks in terms of percentages, how likely the
13 inference, the word "strong inference" means 50 percent,
14 30 percent, 60 percent. Do you think the inference has
15 to be stronger or less strong than the inference of
16 probable cause in an affidavit for a search warrant to
17 get access to the privacy of a home and so forth?

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

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

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

4 JUSTICE STEVENS: A burden of over 50
5 percent?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: So you do --

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

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

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

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

1 MR. PHILLIPS: Right.

2 JUSTICE KENNEDY: Can we make a strong
3 inference that a CEO knows what his own earnings reports
4 are?

5 MR. PHILLIPS: You mean with a specific
6 earnings report rather than just simply sort of sales
7 projections and demand?

8 JUSTICE KENNEDY: Can we make a strong
9 inference that a CEO knows the status of current
10 earnings --

11 MR. PHILLIPS: Well, my guess is they would
12 have --

13 JUSTICE KENNEDY: -- when he makes, when he
14 makes a statement.

15 MR. PHILLIPS: Well, I think they would have
16 to make an allegation that the -- that the CEO routinely
17 is provided with that information rather than simply
18 assume it. I think it's the same problem you have with
19 their -- with their allegation that it's common sense
20 that CEOs will act to protect their own personal self
21 interest and the overall welfare of the company by
22 misrepresenting the status of events. I don't think he --

23 JUSTICE SCALIA: What about just saying that
24 he knew it?

25 MR. PHILLIPS: I'm not --

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

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

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

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

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

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

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

18 Again, it seems to me --

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

22 MR. PHILLIPS: Right, but that goes --

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

25 MR. PHILLIPS: But Justice Breyer, that --

1 that long been delayed period runs all the way back to
2 1998. And we're talking about events in 2000 and 2001.
3 So the notion that it's been long delayed says nothing
4 about what Mr. Notebaert was -- was revealing in March
5 and April and June of 2001.

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

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

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

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

21 JUSTICE BREYER: Oh. Yes.

22 MR. PHILLIPS: Is that they all knew that.
23 The point is they knew that it was delayed back in 1999.
24 What they don't do is tie that in to what he knew in
25 2001; and that, to me, that's the central point in this

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

5 CHIEF JUSTICE ROBERTS: Thank you
6 Mr. Phillips.

7 Mr. Shanmugam.

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

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

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

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

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

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

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

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

25 MR. SHANMUGAM: I think that that is right,

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

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

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

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

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

21 MR. SHANMUGAM: And the statute by its terms
22 only --

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

25 MR. SHANMUGAM: Well, I think that the

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. SHANMUGAM: I think our only concern,
16 Justice Souter, would be that where a plaintiff includes
17 ambiguous allegations in the complaint, a court should
18 consider the possibility that those ambiguities work to
19 the defendant's favor as well as working to the
20 plaintiff's favor. And one concrete example of that in
21 this case are the allegations that concern the Titan
22 5500. There are allegations in this case that there was
23 a study and there were various internal reports that
24 indicated that demand for that product was declining.

25 But the complaint does not specifically

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE KENNEDY: Is the requisite standard
21 knowledge of falsity?

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

25 JUSTICE KENNEDY: Intent to make a false

1 statement?

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

5 CHIEF JUSTICE ROBERTS: Thank you
6 Mr. Shanmugam.

7 Mr. Miller.

8 ORAL ARGUMENT OF ARTHUR R. MILLER

9 ON BEHALF OF RESPONDENTS

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

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

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

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

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

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

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

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

24 MR. MILLER: If we knew.

25 JUSTICE BREYER: Yes, and therefore,

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

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

6 MR. MILLER: Yes. This notion of strategic
7 ambiguity is in a sense humorous, given the obstacles
8 that a plaintiff has to get the goods, so to speak.
9 Just think of the investigation efforts that went
10 into this case. What you do, Justice Breyer, is -- and
11 I think this is what the Seventh Circuit did -- look at
12 everything, look at the fact that you have got
13 confidential sources saying 5500 demand is drying up,
14 perhaps as early as middle 2000. Parts are not being
15 ordered. People are going home early. Verizon dropped
16 25 percent, fourth quarter. Verizon dropped 50 percent
17 in January.

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

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

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

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

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

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

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

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

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

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

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

16 JUSTICE BREYER: What's the difference
17 between what Justice Scalia was just saying? You can't
18 come into Federal court unless you have at least
19 \$200,000 damages. Now, you might have been just as much
20 hurt if you had less, but that would be constitutional.
21 So here you can't get into Federal court unless you have
22 a really strong claim, an overwhelming claim that you
23 have to demonstrate at the beginning.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 dismiss.

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

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

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

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

25 JUSTICE STEVENS: Do you think there is a

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

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

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

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

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

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

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

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

24 And that would be the weak evidence
25 standard.

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

8 MR. MILLER: If --

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

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

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

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

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

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

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

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

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

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

16 Now, is that in and of itself determinative?
17 No. Again, I come back to the notion that what the
18 Seventh Circuit did is look at the 5500, look at the
19 6500, look at the earnings projections which proved
20 false, looked at back-dating, channel stuffing. Looked
21 at all of that and said okay, even if I treat channel
22 stuffing as weak, I have these other things. And as
23 Judge Lynch of the First Circuit said, each fact of
24 science is like a brush stroke.

25 JUSTICE SOUTER: Are you entitled to

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

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

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

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

16 JUSTICE BREYER: What do you think about
17 that?

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

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

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

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

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

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

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

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

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

1 Lobby, in any of those cases.

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

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

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

17 MR. MILLER: Live to fight another day?

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

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

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

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

3 MR. MILLER: Excuse me.

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

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

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

1 isn't in that standard at all.

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

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

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

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

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

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

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

3 (Laughter.)

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

6 (Laughter.)

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

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

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

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

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

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

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

1 I would hope it's higher than probable cause.

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

10 Do you?

11 MR. MILLER: In --

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

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

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

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

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

3 (Laughter.)

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

6 (Laughter.)

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Trial worthy under a

1 preponderance standard or trial worthy under the strong
2 inference standard?

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

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

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

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

17 MR. MILLER: I'm sorry.

18 CHIEF JUSTICE ROBERTS: Justice Stevens.

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

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

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

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

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

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

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

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

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

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

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

3 Okay?

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

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

9 (Laughter.)

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

16 JUSTICE STEVENS: Surely it could prohibit
17 discovery altogether which it did before they adopt -- in
18 1938.

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

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

1 1791, and maybe it could be done without a jury. That's
2 really a hypothetical.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr. Miller.
4 Mr. Phillips, you have four minutes
5 remaining.

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

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

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

1 the document and -- and infer both positively and
2 negatively as you go forward. We know that has to be
3 true. Almost every court that's dealt with these issues
4 --

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

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

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

22 MR. PHILLIPS: Well, that is --

23 JUSTICE GINSBURG: Is the statute all you
24 had?

25 MR. PHILLIPS: Justice Ginsburg, I couldn't

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

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

7 MR. PHILLIPS: Yes.

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

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

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

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

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

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

1 by defendant.

2 MR. PHILLIPS: Well, I -- I -- I mean, I was
3 commenting primarily on Professor Miller's decision to
4 just sort of sweep everything in and say look, back in
5 1999 and 2000 when the Seventh Circuit itself
6 specifically said that the knowledge, for instance, of
7 the 5500 decline didn't happen until March of 2001. So
8 I was just saying you can't just start sweeping everything
9 in.

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

16 JUSTICE GINSBURG: What do you do with a
17 report that you know exists because you had one of these
18 26 confidential people tell you? But you haven't seen
19 the report, so you don't have the date on it? And you
20 won't know that date unless you have access to
21 discovery. Do you have to assume that the date is later
22 rather than sooner?

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

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

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

5 MR. PHILLIPS: -- scienter otherwise.

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

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

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

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

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

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

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

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