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IN THE SUPREME COURT OF THE UNITED STATES

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GLOBAL-TECH APPLIANCES, INC., :

ET AL., :

Petitioners : No. 10-6

v. :

SEB S.A. :

- - - - - x

Washington, D.C.

Wednesday, February 23, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 a.m.

APPEARANCES:

WILLIAM DUNNEGAN, ESQ., New York, New York; on behalf of Petitioners.

R. TED CRUZ, ESQ., Houston, Texas; on behalf of Respondent.

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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 10-6, Global-Tech Appliances v. SEB S.A.

Mr. Dunnegan.

ORAL ARGUMENT OF WILLIAM DUNNEGAN
ON BEHALF OF PETITIONERS

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

The standard for the state of mind element for a claim for inducing patent infringement should be: Did the accused inducer have a purpose to induce a third party to engage in acts that the accused inducer knew infringed the patent? That's what I'll call the purposeful, culpable test.

The Federal Circuit applied a standard of whether Pentalpha was deliberately indifferent to a known risk that a patent may exist. The Federal Circuit's deliberate indifference test was not a willful blindness test. Willful blindness would have required both an awareness of a high probability that a patent would exist and a deliberate effort to avoid learning the truth.

JUSTICE SCALIA: And that's okay, as far as

1 you're concerned? You would consider that comes within
2 your first test?

3 MR. DUNNEGAN: Your Honor, deliberate
4 indifference would not fall --

5 JUSTICE SCALIA: Would not, but willful
6 blindness would?

7 MR. DUNNEGAN: No, Your Honor. Willful
8 blindness would not fall within our purposeful, culpable
9 test.

10 JUSTICE SCALIA: So even willful blindness
11 wouldn't be enough?

12 MR. DUNNEGAN: Willful blindness in not a
13 purpose, Your Honor.

14 JUSTICE GINSBURG: You said that the
15 particular patent -- the defendant would have to know
16 that the device infringed the particular patent. I
17 think that would be a standard that would be impossible
18 to meet. We have to know if it was patent number,
19 whatever it was, '312.

20 MR. DUNNEGAN: Well, you wouldn't have to
21 know the patent number, Your Honor, but what you would
22 have to know is that your -- the product which you are
23 inducing a third party to make, use, or sell would be
24 within the scope of a -- of the claims of a particular
25 patent. If you don't know that, then you're

1 literally --

2 JUSTICE GINSBURG: But you can keep yourself
3 ignorant of it. I mean, for example, you pointed out
4 that the -- that the device that was copied was
5 purchased in Hong Kong, so it didn't have any marking,
6 but the same Pentalpha could have bought the device in
7 Montgomery Ward, looked to see if it had a patent
8 marking; didn't do that.

9 MR. DUNNEGAN: It didn't do that, Your
10 Honor. What it did was better. It hired a United
11 States patent attorney to conduct a search to see if
12 there was any patent which was infringed.

13 JUSTICE GINSBURG: But didn't tell that
14 patent attorney that they had reverse-engineered a
15 particular product. If the attorney had been told this
16 device copied the SEB fryer, isn't it 99 and 44/100ths
17 percent sure that the attorney then would have found
18 this patent?

19 MR. DUNNEGAN: We don't know, Your Honor.
20 We don't know why the patent search failed. It could
21 have failed for a number of reasons.

22 JUSTICE GINSBURG: But I didn't ask you
23 about this patent search. I said if they had told the
24 patent attorney we have copied a particular fryer, it's
25 SEB's fryer, now find out if it infringed any patent --

1 do you think an attorney would not have found the SEB
2 patent?

3 MR. DUNNEGAN: It's possible that he
4 wouldn't have. Maybe it's more probable that he would
5 have. There's just no evidence on that in the record,
6 Your Honor.

7 JUSTICE SCALIA: Well, why -- why wouldn't
8 you tell him? If you're -- if you're honestly
9 interested in finding out whether there is a patent that
10 you're infringing, why wouldn't you tell me the reason
11 we're concerned is that we have reverse-engineered this
12 from somebody else's product? Just check to see if SEB
13 has a patent on any of this stuff that we've
14 reverse-engineered. That's what I would have done.

15 MR. DUNNEGAN: Your Honor, maybe that's what
16 you would have done. Maybe that's what I would have
17 done, but there's no -- but the standard of that
18 business -- what they had done in the past was to give
19 their design drawings to the patent attorney and say
20 objectively check these design drawings. Their practice
21 was not to notify the attorney.

22 JUSTICE SCALIA: Was their practice to
23 reverse-engineer from other people's products?

24 MR. DUNNEGAN: Yes --

25 JUSTICE SCALIA: I mean, I can understand

1 when you have a new product of your own; of course, you
2 just give it to an attorney. But when you have
3 reverse-engineered, not to tell them that it was
4 reversed-engineered seems to me really trying to keep
5 yourself in the dark. What you want to get from the
6 attorney is a piece of paper that he can show to
7 Montgomery Ward that, yes, this product is not -- as it
8 turns out, Montgomery Ward did accept it and got hit
9 with liability for infringing a patent. I -- I find
10 that really incredible that, in an honest attempt to
11 find whether there was any patent infringement going on,
12 you wouldn't even tell the patent attorney that you've
13 reverse-engineered somebody else's product.

14 MR. DUNNEGAN: Your Honor, looking back at
15 this in hindsight, there's -- there's no question that
16 if they had to do it again, they would have taken the
17 additional step.

18 But --

19 JUSTICE SCALIA: No, they wouldn't.

20 MR. DUNNEGAN: No -- well, from an objective
21 perspective, Your Honor, if you're giving the design to
22 the -- to the attorney and you're saying do a complete
23 search, it seems to me that that's the antithesis of
24 being willful blind, because you're hiring a specialist
25 to go out and look for the answer for you. Now, the

1 gold standard was not met, but the gold standard would
2 rarely be met in any of these cases.

3 JUSTICE ALITO: But your position is that
4 even willful blindness is not enough. You have to have
5 actual knowledge that -- that the item is patented,
6 right?

7 MR. DUNNEGAN: That is correct, Your Honor.

8 JUSTICE ALITO: So if the attorney had
9 called up your client and said, I have an answer for
10 you, and the client said, well, you know what, on second
11 thought, I really don't want to know, because if I -- if
12 I have actual knowledge, that may put me in a box; so
13 forget about it. Then there's no liability.

14 MR. DUNNEGAN: Well, I would disagree in
15 that situation, because most probably the knowledge of
16 the attorney in that situation, because he has been
17 hired by the client, would be imputed to the client. So
18 I could see a different result in the hypothetical that
19 you posited.

20 JUSTICE SOTOMAYOR: Why would we -- wouldn't
21 the rule that you're setting forth, willful blindness
22 not being a part of it, mean that nobody would ever get
23 a patent search, because what would be the inducement to
24 do that?

25 MR. DUNNEGAN: Well, Your Honor, right now,

1 under -- under the Seagate case in the Federal Circuit,
2 there is no inducement to go get a patent search. Under
3 the Seagate decision, if a party --

4 JUSTICE SOTOMAYOR: No, but you're not
5 presumed to copy other people's items, which is the
6 difference.

7 Is there -- let me just ask you something.
8 Assuming we were to find the willful blindness test to
9 actual knowledge, the facts of your case, the fact that
10 they did not give the name of the product that they
11 copied to their patent attorney, is that just, as a
12 matter of law, willful blindness?

13 MR. DUNNEGAN: No, Your Honor, I don't think
14 that is willful blindness as a matter of law. Willful
15 blindness under the -- under the Santos standard has two
16 distinct elements. One would be that there's a high
17 probability that there would have been a patent on that
18 particular product.

19 JUSTICE SOTOMAYOR: Do patents -- are
20 patents -- can you do a patent search on the basis of
21 the name of the holder?

22 MR. DUNNEGAN: Yes, you can, Your Honor.

23 JUSTICE SOTOMAYOR: And the product that
24 they copied, did it have the name of the holder of the
25 patent?

1 MR. DUNNEGAN: Yes, it did, Your Honor.

2 JUSTICE SOTOMAYOR: So what is the
3 likelihood that if they had actually given the attorney
4 the name of the product, that he would not have found
5 the patent?

6 MR. DUNNEGAN: We don't know for sure, but
7 the probability would be greater than 50 percent, Your
8 Honor.

9 JUSTICE SOTOMAYOR: I think it would be
10 probably 90 percent, assuming -- because there's always
11 errors in searches. So --

12 JUSTICE KENNEDY: But didn't we take this
13 case to determine whether or not deliberate indifference
14 is the standard? I mean, willful blindness -- I don't
15 think an opinion for this Court has ever sustained.
16 Santos was a judgment -- was not a majority opinion.
17 That's just a subset of knowledge.

18 If we leave that out from it, isn't the
19 dichotomy that you present to us the difference between
20 deliberate indifference and knowledge or --

21 MR. DUNNEGAN: Purpose.

22 JUSTICE KENNEDY: -- or purposeful, culpable
23 expression, the -- the Grokster standard?

24 MR. DUNNEGAN: Yes. The -- well, I think to
25 answer the question presented in a cert petition, you

1 really need to determine what the standard is. Now, I
2 think we can also decide that it should not be -- or we
3 can agree that it should not be a deliberate
4 indifference to a known risk that a patent exists,
5 because that would be met in virtually every situation
6 where there was not actual knowledge of a patent.

7 JUSTICE ALITO: When I look at the language
8 of the statute, I see no scienter requirement
9 whatsoever. Whoever actively induces infringement of
10 the patent -- infringement is strict liability. So if
11 you actively induce somebody to engage in conduct
12 constituting infringement, you're -- you're liable as an
13 inducer.

14 MR. DUNNEGAN: Let me explain to you why
15 your -- why the language of the statute should not
16 support the interpretation which Your Honor just gave.

17 Let's begin with the word "induces."
18 "Induces" connotes some degree of intent, arguably.
19 Mr. Cruz agrees with that at page 20 of his brief. If
20 you put the word "actively" in front of the word
21 "induces," then you have a heightened intent standard --

22 JUSTICE ALITO: You have intent, but intent
23 to do what?

24 MR. DUNNEGAN: Exactly, Your Honor. That
25 brings you to the word "infringement" in the statute.

1 Now, I think it's critical that (b) uses the word
2 "infringement." It does not go back to (a) and say
3 anyone who actively induces the making, using, selling
4 of a patent device is an infringer.

5 JUSTICE ALITO: What difference does that
6 make? Because making, using, and selling equals
7 infringement.

8 MR. DUNNEGAN: Because those are the acts,
9 Your Honor. If Congress's intent had been to say we
10 only want to induce acts, it would seem to me the
11 clearest way they could say that is to say "making,
12 using, or selling." If they wanted to create a standard
13 which was inducing the actual infringement of a patent,
14 as opposed to the acts which constitute the
15 infringement, then they use the word "infringement."

16 JUSTICE ALITO: Well, I don't see that. And
17 not only that, I don't understand why the scienter
18 requirement for inducing should be higher than the
19 scienter requirement for a direct infringement. Isn't
20 the standard rule for aiding and abetting that the aider
21 and abetter -- if (b) is an aiding and abetting
22 provision, as one of the congressional reports said, the
23 -- the scienter for aiding and abetting is the scienter
24 of the underlying offense? So if the underlying offense
25 is a strict liability offense, then the inducement

1 should be strict liability as well.

2 MR. DUNNEGAN: That's not necessarily clear,
3 Your Honor. When you look at 18 U.S.C. section 2,
4 there's very little case law dealing with strict
5 liability offense and inducements of those. We have
6 been able to identify one Sixth Circuit case from 1989
7 which deals with the issue, and in that case, it holds
8 that there's actually a purpose to -- a purpose to cause
9 the underlying crime or violation, not necessarily
10 strict liability, not strict liability.

11 CHIEF JUSTICE ROBERTS: Is your --

12 MR. DUNNEGAN: I --

13 CHIEF JUSTICE ROBERTS: I'm sorry.

14 MR. DUNNEGAN: No, please, Your Honor.

15 CHIEF JUSTICE ROBERTS: Is your position
16 when you're -- when you're talking about willful
17 blindness or purpose, whatever, is that with respect to
18 a particular patent, or is it with respect to
19 infringement of a patent?

20 I don't think it's true with deep fryers,
21 but in some areas, you almost always know you're going
22 to hit something, that given the nature of the industry,
23 you're going to infringe something. Is that enough?

24 MR. DUNNEGAN: If there is an area -- for
25 example, semiconductors, where some amici have stated

1 that there's -- there's 420,000 patents dealing with
2 semiconductors. And you know that, and you know that if
3 you do virtually anything, and especially if you copy,
4 you're going to hit a semiconductor patent owned by
5 somebody, I think that, in that rare situation,
6 knowledge that you're infringing someone's intellectual
7 property rights should probably be enough of a -- of a
8 directed intent. If you -- that would be the basis for
9 inferring a purpose.

10 But here, we have to --

11 CHIEF JUSTICE ROBERTS: But that's -- I
12 mean, I understand you're in the deep fryer industry,
13 but that standard would bring the semiconductor industry
14 to a halt.

15 MR. DUNNEGAN: No. No, Your Honor. If you
16 copied a semiconductor and you knew that there were
17 420,000 patents that were unexpired out there, that
18 would make it -- if you didn't do your -- your
19 diligence, perhaps --

20 CHIEF JUSTICE ROBERTS: I think the -- the
21 problem is, even if you do do your diligence, given the
22 way patents are these days, if there are 420,000, you're
23 never going to know with any degree of comfort that
24 you're not going to infringe something.

25 MR. DUNNEGAN: That is very, very true, Your

1 Honor. And even in the -- in the deep-fryer industry,
2 it is going to be different, because there's very few --
3 I mean, compared to semiconductors --

4 JUSTICE SCALIA: Well, we're not going to
5 adopt a special rule for the deep-fryer industry.

6 (Laughter.)

7 MR. DUNNEGAN: Agreed.

8 JUSTICE SCALIA: Especially --

9 MR. DUNNEGAN: Completely agreed.

10 CHIEF JUSTICE ROBERTS: But we might decide
11 that it's more important to consider what's going to
12 happen to the semiconductor industry in articulating our
13 standard than what's going to happen to the deep-fryer
14 industry.

15 MR. DUNNEGAN: That's exactly correct, Your
16 Honor.

17 (Laughter.)

18 MR. DUNNEGAN: That's exactly correct. And
19 on balance -- I think there's one point that I should
20 make sooner rather than later, and it's is the standard
21 that I'm -- the standard that we are proposing is not
22 unique to us. It's the -- it's the standard that
23 Grokster developed. And with respect to willful
24 blindness, we believe that the standard -- the balance
25 was already struck, and it was struck in favor of

1 eliminating a willful blindness standard.

2 I'd like to --

3 JUSTICE KAGAN: Mr. Dunnegan, suppose I
4 disagree with you on that, and suppose I think that
5 actual knowledge of a patent or willful blindness as to
6 whether a patent exists is the right standard. Could a
7 reasonable jury have found that in this case?

8 MR. DUNNEGAN: We don't think that a
9 reasonable jury could have found willful blindness
10 because, first of all, there wasn't a high probability
11 that a patent would be found. Second, we do not think
12 that there was active --

13 JUSTICE KAGAN: A reasonable jury couldn't
14 have looked at the facts that Justice Ginsburg
15 suggested -- you know, you do not tell the lawyer that
16 you, in fact, have copied the product and say that's --
17 a reasonable jury -- that's willful blindness.

18 MR. DUNNEGAN: I don't think so, Your Honor,
19 because what we have done in that situation was, first,
20 we have done more than the law required. We went out to
21 get a patent. We gave the lawyer our actual patent
22 drawings and tell him to do his work.

23 JUSTICE GINSBURG: But if you really wanted
24 to know, wouldn't you have gone into Montgomery Ward and
25 bought one of the fryers and turned it around to see if

1 it had a patent number on it?

2 MR. DUNNEGAN: Your Honor, we have so many
3 products that you couldn't practically expect the
4 company to do that, I don't think.

5 JUSTICE SCALIA: Listen, the -- the reason
6 you got the opinion from the lawyer was -- was not to
7 make sure that there were no patents. It was to show
8 that opinion to Montgomery Ward.

9 MR. DUNNEGAN: But your -- your --

10 JUSTICE SCALIA: As a practical matter, you
11 needed an opinion from a lawyer, because otherwise,
12 Montgomery Ward was not going to sell this stuff.

13 MR. DUNNEGAN: Your Honor, I take issue with
14 you for the following reason: I don't think there was
15 any intention on the part of our client to -- to
16 infringe a patent at all, because if it knew about the
17 patent, it could have designed around it if it knew what
18 it was doing. There's no benefit to our client of
19 getting Montgomery Ward or Sunbeam or Fingerhut in
20 trouble for patenting infringement. We really want to
21 know what patents are out there.

22 JUSTICE GINSBURG: But isn't -- isn't it
23 true that Sunbeam was the party that asked for the
24 patent search?

25 MR. DUNNEGAN: I don't believe that's in the

1 record, Your Honor. I believe the record shows that
2 Sunbeam was given a copy of the patent search, but
3 Mr. Sham testified -- and I believe this is about at
4 page 50 of the joint appendix -- that the purpose of the
5 search was to find out whether or not there was an
6 infringement of any patent through this deep fryer.

7 JUSTICE GINSBURG: And there's nothing in
8 the record that says who -- who asked Pentalpha --

9 MR. DUNNEGAN: Not that I'm aware of, Your
10 Honor.

11 JUSTICE GINSBURG: -- to get -- to get a
12 letter?

13 JUSTICE ALITO: If this is not willful
14 blindness, I don't know what willful blindness is. Now,
15 maybe you can explain what more would have been required
16 to permit a reasonable jury to find willful blindness.

17 MR. DUNNEGAN: Okay. I think you'd need two
18 things, Your Honor. The first that you would need is
19 evidence that they were going to bump into a patent if
20 they -- if they proceeded. Is there the high
21 probability of finding a patent?

22 Now, if you -- if you just consciously avoid
23 knowledge in the absence of a high probability, that's
24 not willful blindness. That's not even culpable.

25 JUSTICE ALITO: But your client -- I don't

1 know whether you're using your time most effectively by
2 arguing this point, but your client thought that making
3 a deep fryer that wouldn't burn people's hands if they
4 touched it would be profitable, because there wasn't a
5 lot of competition in that market. This was a useful
6 product and apparently one that was different from other
7 deep fryers. Isn't that in itself -- doesn't that in
8 itself suggest, gee, there might be a patent on -- on
9 this?

10 MR. DUNNEGAN: No, I -- well, is there --

11 JUSTICE ALITO: One company is making this
12 and it seems to be better than what the other companies
13 are making; maybe it might be patented.

14 MR. DUNNEGAN: Your Honor, the record is
15 that there were six or so deep fryers which were the
16 cool-touch deep fryers which they -- which they used as
17 references. SEB was not the only cool-touch deep fryer
18 that was available.

19 Now, to turn back to the issue of whether or
20 not Grokster actually found that willful --

21 JUSTICE GINSBURG: Before -- before you pass
22 that question, then why as in '607 did they pick the SEB
23 fryer to reverse-engineer?

24 MR. DUNNEGAN: They reverse -- they looked
25 at all of them, Your Honor. They reverse-engineered all

1 of them. If you look at --

2 JUSTICE GINSBURG: And then they copied the
3 design of the SEB.

4 MR. DUNNEGAN: Actually, Your Honor, they
5 improved it. There's functional features that went
6 beyond and were better than what were in the SEB
7 product. For example, they used better metal to make
8 the cast iron pan. They put the --

9 JUSTICE GINSBURG: But there was a finding
10 that it was an infringement, that the Pentalpha fryer
11 infringed the SEB.

12 MR. DUNNEGAN: The jury did find that, Your
13 Honor.

14 JUSTICE KAGAN: Mr. Dunnegan, could I take
15 you to the standard? Because in Aro II we said that the
16 appropriate standard in subsection (c) was actual
17 knowledge. Why shouldn't we just say it's the same?
18 Whether it is (b) or (c), these are just two means of --
19 of doing a contributory infringement, and the
20 knowledge/willful blindness standard, once we've said it
21 applies to (c), it applies to (b) as well?

22 MR. DUNNEGAN: The reason that you shouldn't
23 take the standard from (c) is because (c) deals with
24 nonstaples and (b) deals with staples. Someone can be
25 liable under (b) if they -- if they sell a staple

1 article of commerce, when they can't be libel under (c),
2 even if they meet -- even if they meet the higher --
3 even they meet the state of mind element under (c),
4 which is knowing the patent and knowing that the
5 combination would be an infringement. Therefore, to
6 make sure that (b) does not swallow (c), it's very
7 important that (b) have a higher state of mind.

8 JUSTICE KAGAN: No, (b) and (c) have
9 different standards as to -- not the knowledge of the
10 patent but -- but what the person is -- the acts that
11 constitute infringement. But that's a different thing
12 from whether they should have different standards as to
13 the knowledge of the patent.

14 MR. DUNNEGAN: Well, when you say there's
15 different standards, the sale of an -- of a staple
16 article under (b) in itself with a proper state of mind
17 can be an inducement. The sale of a nonstaple article
18 with certain additional conditions can be a violation of
19 (c). The action element for (b) and (c) is -- is
20 essentially the same for the sale of components, and it
21 wouldn't make any sense to raise it for (b) because all
22 you would be doing in that situation is -- is
23 encompassing sellers that were helping their customers
24 do business more effectively, and you wouldn't be
25 getting any more bad guys.

1 The purpose of (b) is let's get the morally
2 culpable actors. Now --

3 JUSTICE KENNEDY: I had thought that you
4 wanted us to take the knowing standard in (c) and apply
5 it to (b).

6 MR. DUNNEGAN: No, Your Honor, I --

7 JUSTICE KENNEDY: Correct me if I'm wrong.

8 JUSTICE SCALIA: No, more than that.

9 MR. DUNNEGAN: I would think you have to go
10 with the Grokster standard, Your Honor. And the reason
11 for that is, one, in Grokster you found what the state
12 of mind standard was for inducing infringement under
13 (b), and you moved that into the copyright law. Then,
14 under the --

15 JUSTICE KAGAN: But, Mr. Dunnegan, in
16 Grokster, there was no question as to whether they knew
17 that the -- that the things were copyrighted.

18 MR. DUNNEGAN: That was conceded in that
19 case, Your Honor. Yes.

20 JUSTICE KAGAN: So why is Grokster relevant
21 here? They conceded the very thing that we're arguing
22 over.

23 MR. DUNNEGAN: Well, it's -- it's -- it's
24 relevant because it deals with the standard what is --
25 what is the state of mind element for inducing copyright

1 infringement.

2 JUSTICE KENNEDY: And you say it's
3 purposeful, culpable.

4 MR. DUNNEGAN: Purposeful, culpable conduct
5 -- yes.

6 CHIEF JUSTICE ROBERTS: And why is that --
7 how is that different from knowing? I -- I -- my
8 impression was the same as Justice Kennedy's. I thought
9 you wanted the knowing standard.

10 MR. DUNNEGAN: Knowing, well -- the way I
11 understand knowing, Your Honor, is that in Sony, for
12 example, there was no liability even though Sony knew
13 that some people were going to use the VCR to infringe
14 copyrighted works. That was collateral damage even
15 though they knew it; it wasn't the basis for liability.

16 In Grokster, the basis for liability was
17 even though the defendant knew that there were going to
18 be some infringements, it couldn't be liable for
19 contributory copyright infringement, the equivalent of
20 271(c), because there was substantial noninfringing uses
21 for the Grokster software. Grokster was -- was allowed
22 to be found liable because the defendants had a -- a
23 culpable objective -- they had a culpable purpose, or at
24 least a jury could so find, that they wanted to
25 encourage infringements.

1 JUSTICE SOTOMAYOR: I'm -- I'm a little
2 confused. If you knew that there was a patent under
3 (b), and you still gave the fryer -- patented the fryer
4 that you know it is a patented fryer to Montgomery Ward
5 or Sunbeam to sell, you're not liable under (b), because
6 why? What act of yours was not purposeful?

7 MR. DUNNEGAN: Your Honor, I believe the
8 first sentence of your question was if you knew that
9 there was a patent. Is that a hypothetical?

10 JUSTICE SOTOMAYOR: Yes.

11 MR. DUNNEGAN: Okay. If we knew that there
12 was a patent and we knew the claims of the patent and we
13 read them and we --

14 JUSTICE SOTOMAYOR: Well, we'll go as to --
15 let's -- let's just stop there. Justice Kennedy and I
16 believe the Chief have asked you, isn't your entire
17 argument that we should move the knowing knowledge of
18 (c) into (b)? And you said no.

19 MR. DUNNEGAN: No.

20 JUSTICE SOTOMAYOR: Explain to me --

21 MR. DUNNEGAN: Because it should be -- it
22 should be higher. It should be the Grokster standard of
23 purposeful, culpable conduct. And -- me the reason for
24 that --

25 JUSTICE SOTOMAYOR: Well, then explain to

1 me --

2 MR. DUNNEGAN: Okay.

3 JUSTICE SOTOMAYOR: -- what's not purposeful
4 or knowing -- what's not purposeful, culpable conduct,
5 if you know there's a patent or -- you can decide
6 whether knowledge includes willful blindness or not, but
7 it's not my issue. If you know there's a patent and you
8 give the product to someone else to sell, how can you
9 not be culpable for it?

10 MR. DUNNEGAN: Because, Your Honor, if --
11 you could or you could not be, depending on what your
12 purpose is with respect to infringement. If you had a
13 legal opinion which told you that the sale of that
14 product would not infringe the patent, then you wouldn't
15 have a purposeful --

16 JUSTICE SOTOMAYOR: So you're introducing a
17 mistake of law defense to knowledge. You're saying, I
18 really didn't know that it was unlawful. I knew that
19 there was a patent, but I really thought that it wasn't
20 a legal patent, so I was going to violate what I know
21 wasn't legal. Is that what you're saying?

22 MR. DUNNEGAN: Well, not exactly, Your
23 Honor, because if you're reaching the conclusion that
24 the product is not within the scope of the claims of the
25 patent, I don't think that's law. That's fact. The

1 reason it's not law is that -- it couldn't be repealed.
2 It's -- you can't pass a law abrogating a patent.

3 CHIEF JUSTICE ROBERTS: Well, you're
4 talking --

5 JUSTICE SOTOMAYOR: Why do you get off the
6 hook for making a mistake of law?

7 MR. DUNNEGAN: A mistake of law -- generally
8 you don't get off the hook. What we have here is a
9 mistake of fact concerning the scope of the claim of the
10 patent. Now, granted, under --

11 JUSTICE SOTOMAYOR: You would never have any
12 patents enforced under your theory.

13 MR. DUNNEGAN: Yes, we would, Your Honor.
14 Let's take the situation that there was a prior
15 adjudication that the direct infringer was directly
16 infringing. Let's take the situation where there's
17 going to be advertising which references the patents, as
18 there was in Grokster and says go infringe it. Let's
19 take the situation where there's internal documents at
20 the company suggesting that there is a purpose to
21 infringe, as there was in Grokster.

22 CHIEF JUSTICE ROBERTS: But if you're -- I'm
23 sorry. I do not want to interfere with your time.

24 MR. DUNNEGAN: No, Your Honor. Please.

25 CHIEF JUSTICE ROBERTS: I'll wait.

1 MR. DUNNEGAN: If the Court has no further
2 questions, I would like to reserve my time.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Cruz.

5 ORAL ARGUMENT OF R. TED CRUZ
6 ON BEHALF OF RESPONDENT

7 MR. CRUZ: Mr. Chief Justice, and may it
8 please the Court:

9 Whatever test that this Court adopts for
10 inducing infringement, the central objective of that
11 test will be to separate culpable bad actors from
12 innocent corporate behavior actors. And by any measure,
13 Pentalpha in this case was a culpable bad actor. In
14 fact, we've got really extraordinary testimony in this
15 case --

16 JUSTICE KAGAN: So would you have any
17 objection to an actual knowledge willful blindness
18 standard? Would that be all right with you?

19 MR. CRUZ: I think that is one of multiple
20 standards this Court could adopt if this Court were to
21 adopt actual knowledge. I do not think actual knowledge
22 is in the statute, but if this Court were to adopt
23 actual knowledge and conclude also that willful
24 blindness is a long-recognized means of demonstrating
25 actual knowledge, that would support the judgment.

1 JUSTICE KAGAN: I take it that we would do
2 that on the basis of Aro II? We would just say that's
3 the standard for (c) and that should be the statement
4 for (b)?

5 MR. CRUZ: Respectfully, Justice Kagan, I
6 don't think that would be an interpretation that is
7 faithful to the text of 271. There is an enormous
8 difference between 271(c) and 271(b). 271(c) includes
9 the word knowing. 271(b) does not include the word
10 knowing and your question assumes essentially --

11 JUSTICE KAGAN: Well, 271(c) includes the
12 word knowing, you have to know that an item has no
13 noninfringing uses. That is a different kind of
14 knowledge than the knowledge that we are talking about
15 here.

16 MR. CRUZ: Respectfully, in Aro II what the
17 Court did and it was, as you know, a splintered majority
18 in Aro II where the dissenters flipped back and forth,
19 but with the particular paragraph that addressed the
20 holding on what had to be demonstrated, the Court
21 concluded that that word knowing effectively modified
22 both the knowledge that the nonstaple article had no
23 noninfringing use and, and that it would cause the
24 infringement. That is how the Court read knowing, as
25 modifying everything that follows it in 271(c).

1 JUSTICE KAGAN: And because of the
2 infringement, but not necessarily that there was a
3 patent, not necessarily the legal effect as opposed to
4 the act.

5 MR. CRUZ: Well, that is necessarily part of
6 what the Court held in 271(c). And I would agree, this
7 would be a very, very different case if 271(b) had the
8 word knowing. I mean Aro in many ways was a much easier
9 case, but the question is do you have to demonstrate
10 that something is knowing and the statute says it must
11 be knowing, then that is --

12 JUSTICE BREYER: How do you say, I am not
13 certain that willful blindness would support the
14 conclusion below. The standard, the district court or
15 the trial court said really, negligence, as I read it.
16 The circuit said deliberate disregard of a known risk.
17 Well, how much of a risk? I mean, the business world
18 there is always a risk and we are talking about a
19 complicated world, probably quite a lot of risk. And so
20 I think that standard would create a great deal of
21 uncertainty. Willful blindness has a tradition. So are
22 you okay with willful blindness and we say we are afraid
23 they did not do it, i.e., we are afraid, we do not know
24 what they really meant here and so send it back and do
25 it again. I am sure you wouldn't be overjoyed. But do

1 you think that would be a reasonable result?

2 MR. CRUZ: I think if the conclusion were to
3 send it back and do it again, I don't think that would
4 be a reasonable result.

5 JUSTICE BREYER: What are you supposed to
6 say known risk, sure he says he looked at five. And he
7 says anybody can figure this thing out, all you do is
8 put the little gizmos between the two sides, you know,
9 and you have an inside and outside and you just suspend
10 the inside with little bars of some kind. I do not know
11 what, chewing gum or something, and he says anybody
12 could figure that out, it couldn't possibly be bad. And
13 so that is their view, but how much of a risk, they will
14 say little risk, big risk. So you see why I think we
15 should send it back. Now you tell me why that is not --

16 MR. CRUZ: That is what they argued to the
17 jury and that's --

18 JUSTICE BREYER: I am not saying they are
19 right in that, I bet they would lose. But my problem is
20 do I accept the words deliberate disregard of the known
21 risk or do I say the more traditional accompaniment to
22 knowledge is willful blindness, which for all its
23 obscurity, at least has a history.

24 MR. CRUZ: The jury heard those arguments,
25 the jury rejected those arguments. The argument that

1 was presented to the jury, although the precise words
2 willful blindness weren't used, the argument that was
3 presented to the jury was willful blindness argument.

4 CHIEF JUSTICE ROBERTS: How was the jury
5 instructed?

6 MR. CRUZ: What the jury was instructed was
7 several things and the jury instructions are at RA 26
8 and 27. The jury instruction that was used, by the way,
9 was the model jury instruction that has been used since
10 1998, has been unchanged and has included largely this
11 language since 1998 over and over again. That is the
12 jury instruction we are dealing with.

13 CHIEF JUSTICE ROBERTS: I am still waiting
14 to hear what it was?

15 MR. CRUZ: It is a complicated instruction,
16 so part of what --

17 CHIEF JUSTICE ROBERTS: Well, I thought
18 there was some question about that it was so low that it
19 in effect amounted to a negligence standard.

20 MR. CRUZ: That is part of the argument
21 Pentalpha presents. I don't believe that is accurate.
22 Number one, the jury was instructed that plaintiff had
23 to prove by preponderance of the evidence that defendant
24 actively and knowingly aided and abetting the direct
25 infringement. That is part of the instruction. That

1 they actively and knowingly.

2 JUSTICE GINSBURG: Where are you reading
3 from, Mr. Cruz?

4 MR. CRUZ: RA 26 and 27. It is the end of
5 the red brief.

6 JUSTICE BREYER: I don't think that is the
7 part they are complaining about.

8 JUSTICE KENNEDY: It is in the red brief,
9 the Respondent's brief, page 26, toward the bottom it
10 says if you find, I have a problem that I do not know
11 that they preserved this objection, but let's talk about
12 what the standard ought to be. At the bottom it says,
13 if you find that the someone has directly infringed a
14 patent and that the defendants knew or should have known
15 that its actions would induce direct infringement. So
16 this means to me that in order to be liable for an
17 inducement you can be liable if you knew or should have
18 known. Now, if we can just discuss this for a moment.
19 It seems to me that this is the important point in the
20 case because if you say should have known, then you have
21 a standard that is less than intentional for inducers.
22 And that means that every supplier, every business
23 person that takes a product from a manufacturer has the
24 duty to inquire and to find out if there is a patent.
25 And it is a standard that is less than intentional and

1 that is a very substantial change or a very substantial
2 burden to impose on those who are selling and
3 distributing products.

4 MR. CRUZ: Justice Kennedy, I don't believe
5 that is correct. Number one, we are certainly not
6 advocating a general burden on all producers to do a
7 patent search. That is not remotely the position we are
8 presenting.

9 JUSTICE KENNEDY: Well, if you say should
10 have known, that is the necessary consequence of the
11 holding.

12 MR. CRUZ: What I would suggest the import
13 of that language is, is to allow constructive knowledge.
14 Is to allow essentially willful blindness, which was the
15 entire way it was argued to the jury.

16 JUSTICE KENNEDY: Well, as you say, willful
17 blindness was never used really until this Court and
18 this Court has never in a full opinion for the Court
19 adopted it even in the criminal context. So can we talk
20 about knowing as opposed to should have known.

21 MR. CRUZ: The argument that was presented
22 to the jury, in closing what trial counsel said and this
23 is the trial transcript, page 929 through 31, which is
24 not in one of the appendixes in front of you. I
25 apologize for that. But what the transcript says is

1 that Mr. Sham, the CEO, never told his patent lawyer,
2 look, what we are doing is copying this SEB product.
3 What he did, I suggest to you, is he set Mr. Levy up to
4 fail. He set him up to fail by not telling him he had
5 copied the product. That was the theory that was argued
6 as to why they should have known, because this was in
7 effect a sham, that not telling the lawyer about the
8 product, it wasn't an accident.

9 JUSTICE KENNEDY: But you're presenting to
10 us the proposition, I take it, correct me if I am wrong,
11 that we should write an opinion that is saying that know
12 or should have known is the standard for an inducer.
13 And I question whether that is a wise interpretation and
14 a necessary interpretation of (b), especially as we are
15 informed through (c) as to what (b) might mean.

16 MR. CRUZ: Justice Kennedy, we are not
17 proposing that, and I would say two things. Number one,
18 there is an entire instruction on inducement and there
19 is also the language I read before that is part of the
20 jury charge on inducement. And I don't think the jury
21 can be presumed to have only listened to one snippet of
22 the instruction without the entire instruction.

23 JUSTICE KENNEDY: If we are arguing about
24 whether or not you can protect your judgement based upon
25 all that's in the record, I think you may have a strong

1 point. But I am interested in what the standard ought
2 to be. I'd like you to know what a properly instructed
3 jury should be told with reference to knowledge or
4 something less than knowledge.

5 MR. CRUZ: I would suggest with respect to
6 the language knew or should have known, that if there is
7 not an actual knowledge requirement, which in my
8 judgment is nowhere in the statute, then you have to
9 have something like should have known because I do not
10 know what you alternative instruct. If it is not actual
11 knowledge then there is a situation where someone is
12 allowed to have constructive knowledge.

13 JUSTICE KENNEDY: So you're saying that (b)
14 should have a lesser standard of culpability than (c)?

15 MR. CRUZ: Absolutely. I don't think the
16 statute makes any sense unless (b) is understood to have
17 a lesser standard. Otherwise, the inclusion of the word
18 "knowing" is given no effect.

19 JUSTICE BREYER: The difference, they say,
20 between (b) and (c) is that (c) applies to a person who
21 makes some really special thing that looks like a
22 Japanese kabuki theater costume, and it's actually made
23 out of metal and it's really -- has a very bizarre
24 thing, and it is only used -- good use is to do this
25 infringing thing.

1 But (b) could apply to somebody who makes
2 plastic shields. (B) can apply that -- (b) could apply
3 to anybody who makes anything; is that right?

4 MR. CRUZ: Justice Breyer, under that
5 argument, the statute would be interpreted identically
6 if the word "knowing" were added to (b). And given that
7 they added it to (c) and not to (b) --

8 JUSTICE BREYER: Well, the argument is that
9 the words "actively induced" are meant to be something
10 greater than knowing, not something less than knowing.
11 Because otherwise, you're going to hold Aluminum Company
12 of America, if that still exists, liable when it makes
13 these aluminum sheets, because somebody uses an aluminum
14 sheet apparently, et cetera. You see the problem.

15 It is quite different when you make this
16 weird kabuki-looking thing that only has one use,
17 and they -- and that's why it should be -- it should be
18 harder to hold that person to contributory infringement,
19 not easier.

20 Now, that's their argument. What do you
21 say.

22 MR. CRUZ: Justice Breyer, that -- that may
23 be a reasonable policy argument. However, that is also
24 a reasonable policy argument for modifying A, because
25 right now, the aluminum company is liable under strict

1 liability for direct infringement today.

2 JUSTICE BREYER: I'd like to get, really, an
3 answer from you on Justice Kennedy's question, because
4 at the moment I am not worried about your case. You, of
5 course, are. I understand that.

6 But the -- I am worried about Alcoa or the
7 little backyard maker of clay pots, or -- I mean,
8 millions and millions of people make things that are
9 used in millions and millions of ways. And I am worried
10 about what kind of burden we are supposed to impose on
11 them.

12 I see three candidates. One is, you're
13 liable if you should have known. Two is, you're liable
14 if you consciously disregarded a -- a risk, a known
15 risk; that is sort of like a -- you know, the Model
16 Penal Code, sort of. And third is willful blindness.

17 Is there a fourth? And if there is not,
18 what do you choose among those three? No, not what you
19 choose. What should we choose?

20 MR. CRUZ: We have suggested three possible
21 standards to be the rule in this case. The first, the
22 Court could choose to adopt the standard that was
23 adopted in Grokster, and we have argued at considerable
24 length that under the standard this Court adopted in
25 Grokster, the plaintiffs -- the defendants, rather,

1 would be liable and it would uphold the judgment below.
2 That is the broadest standard the Court could adopt.

3 A more narrow standard the Court could adopt
4 is that at a minimum, willful blindness of the patented
5 issue suffices to allow inducement liability. That is a
6 more narrow standard. It would cover a much narrower
7 universe of conduct. It would exclude much of the
8 conduct both Justice Breyer and Justice Kennedy are
9 suggesting. That is the second way this judgment could
10 be affirmed and a more narrow rule.

11 The most narrow rule we have suggested this
12 Court could adopt is in the limited circumstances when a
13 defendant deliberately copies another commercial
14 product, at a minimum, that defendant has an obligation
15 to ascertain if that specific product has protected U.S.
16 intellectual property, that it is a very minor
17 obligation that is triggered only when you take a
18 commercial product on the marketplace, reverse-engineer
19 it, and copy it, because it is a situation that is
20 highly likely to be indicative of bad conduct, to be
21 risking a very substantial infringement of someone
22 else's IP, and in terms of a low-cost avoider, one of
23 the things at footnote 20 of our brief --

24 JUSTICE SCALIA: Wait. Before you go --
25 before you go further, what if you do that, okay? And

1 you get an opinion from a lawyer, as they did here,
2 saying you're not violating any copyright or any -- any
3 patent?

4 MR. CRUZ: If they had said three words
5 differently, this would be a very, very different case.
6 If they had simply, in talking to their lawyer, said:
7 We copied SEB.

8 JUSTICE SCALIA: Okay. You have to tell the
9 searcher that you copied.

10 MR. CRUZ: Yes.

11 JUSTICE SCALIA: That is part of your test,
12 right?

13 MR. CRUZ: If you specifically copy a
14 product, you have to look to see if that particular
15 product is protected by IP.

16 JUSTICE BREYER: So is that -- is that
17 another standard? Maybe that is an example of what it
18 is to be willfully blind. If, in fact, you go out and
19 you copy something, it could well be patented, and you
20 do not tell your lawyer, go look up this one, that is
21 willfully blind.

22 MR. CRUZ: Well, and -- and that --

23 JUSTICE BREYER: That is why you say they
24 are the same. I don't want to put words in your mouth.

25 MR. CRUZ: Well, the Court could certainly

1 craft the rule at least narrowly tailored to the facts
2 here, which is copying. And look, copying is not a
3 unique problem. It is a serious problem
4 internationally, with U.S. intellectual property being
5 stolen, copied, and marketed. And if Pentalpha were to
6 prevail, if this Court were to conclude unless you had
7 actual knowledge, you know to a hundred percent
8 certainty, this violates patent '312, you're immune from
9 liability, that decision of this Court would serve as a
10 roadmap.

11 JUSTICE KENNEDY: You're not immune from
12 liability for direct infringement. You're immune from
13 liability, under the hypothetical, for actively
14 inducing. And that is where there is a very substantial
15 policy difference.

16 MS. BLATT: But, Justice Kennedy, the reason
17 in this case why we brought a cause of action for both
18 direct infringement and active inducing is because the
19 argument of Pentalpha was their conduct was all
20 overseas, and so they weren't covered by 271(a). The
21 entire reason for the inducing strategy is they may well
22 prevail in another case on saying, we stole your
23 property overseas so you can't get us for direct
24 infringement. And in that instance, inducing is the
25 only way to get the actual mastermind. I mean, that was

1 one of the phrases Giles Rich used in defense of 271.

2 JUSTICE KENNEDY: So are you saying that the
3 standard of knowledge would be the same for direct
4 infringement as for active inducement?

5 MR. CRUZ: I think there is a reasonable
6 statutory argument to be made that it is the same,
7 namely, that it is strict liability. We are not
8 pressing that as the only way to prevail, but I think
9 there is certainly a reasonable statutory argument.

10 CHIEF JUSTICE ROBERTS: I am a little
11 confused about the relationship between knowledge and
12 the Grokster standard. You think knowledge is a more
13 favorable standard for Petitioner than Grokster. You're
14 willing to accept Grokster, but not willing to accept
15 actual knowledge.

16 MR. CRUZ: I do, and I will tell you why.
17 Because --

18 CHIEF JUSTICE ROBERTS: Well, before you
19 tell me why, do you understand -- it's unfair to ask
20 you, I guess, but I understood Petitioner to take the
21 opposite position: That Grokster was a more favorable
22 standard for him than actual knowledge.

23 MR. CRUZ: I agree with you that is what
24 Petitioner said here. My understanding of Petitioner's
25 position was the same as yours, Mr. Chief Justice and

1 Justice Kennedy, that they are effectively requiring
2 actual knowledge, that that's what their urging is.

3 JUSTICE KAGAN: Why aren't you both wrong,
4 that Grokster didn't deal with the question that we are
5 dealing with, which was knowledge of a patent or
6 knowledge of a copyright, that Grokster dealt with
7 whether there was specific intent or whether there
8 needed to be specific intent to encourage infringing
9 acts. That is what Grokster was about, an entirely
10 separate question.

11 MR. CRUZ: Let me answer both your question,
12 Justice Kagan, and the Chief Justice's question
13 together.

14 Grokster used language about purposeful
15 culpable conduct, but it went further. It specified how
16 you ascertain whether that standard is met, and it said
17 as shown by other affirmative acts to encourage
18 inducement. Now, in Grokster, part of the argument
19 Grokster made was, we do not know what copyrights are
20 going to be violated. We do not know what is going to
21 be -- they made the same argument Pentalpha is making:
22 We have no idea of any specific copyright that will ever
23 be infringed. They argued, we do not have actual
24 knowledge of the specific copyrights. And this Court
25 said: That doesn't matter.

1 JUSTICE SCALIA: Well, one of the -- one of
2 the briefs -- one of the amicus briefs in this case
3 points out that that argument is a lot less plausible in
4 copyright than it is in -- in patents. It is very easy
5 to find out whether you're infringing a copyright. It
6 is very difficult to find out whether you're infringing
7 a patent, especially in the modern age of warehouse
8 patents. I am not sure that we -- that we want to use
9 the same test for copyrights that we use for -- for
10 patents.

11 MR. CRUZ: That policy differential -- there
12 may well be differences between patent law and copyright
13 law that are implicated in other cases. Here, what
14 occurred is an entire commercial product was copied. It
15 is much more akin to copyright infringement, where the
16 entire product was copied and they just changed the
17 cosmetic features.

18 JUSTICE SCALIA: Well, that's fine. I am
19 just -- I am just expressing reservations about your
20 suggestion that we simply take Grokster wholesale and
21 apply it to this situation.

22 MR. CRUZ: Let me be -- let me be clear,
23 Justice Scalia. I am not advocating this Court do so.
24 What I am saying is if this Court were to apply the
25 Grokster test, we believe we prevail under it, and in

1 fact any comparison of Grokster to Pentalpha, Pentalpha
2 is clearly the more culpable actor. In Grokster, the
3 individuals violating the copyrights were the ones who
4 made the choice to directly and deliberately violate the
5 copyrights and Grokster simply provided the tool to do
6 so. Here the only bad actor was Pentalpha. Sunbeam,
7 Montgomery Ward, they had no idea of the infringement.
8 Pentalpha was the mastermind behind the entire patent
9 violation, and in fact because of its actions procuring
10 a right to use opinion, by keeping the relevant
11 information from its patent lawyer, it lured, it induced
12 Sunbeam and Montgomery Ward and Fingerhut into
13 committing the bad act.

14 JUSTICE KENNEDY: Would you say, even though
15 you -- I think you disagree with this in this case,
16 would you say that there is a reasonable argument in our
17 precedent for saying that the standard of knowledge
18 under (b) should be greater than reckless disregard?

19 MR. CRUZ: I do not believe there is in the
20 precedent. For one thing, reckless disregard is the
21 standard now. Willfulness and recklessness are the
22 standard right now for enhanced damages and attorney's
23 fees; and if it were the case that every violation of
24 271(b) required willfulness or recklessness, it would
25 also mean that every violation would qualify for

1 enhanced damages or attorney's fees. I don't think
2 that's consistent with the statutory standard. That's
3 not the language Congress adopted.

4 JUSTICE KENNEDY: All right. Would you say
5 that there is substantial authority for the proposition
6 that it should -- the state of mind should be greater
7 than "should have known"?

8 MR. CRUZ: You know, I do not believe there
9 is. Particularly how "should have known" was used in
10 this case, A, the jury was -- the way the jury was
11 instructed, I would suggest it was effectively a
12 constructive knowledge instruction.

13 JUSTICE GINSBURG: They're dealing --

14 MR. CRUZ: If you look at --

15 JUSTICE GINSBURG: They're dealing with a
16 Federal Circuit decision, they're reviewing that
17 decision, the Federal Circuit had a formula. It said
18 standard is deliberate disregard of a known risk. One
19 thing you must surely do is to say whether that standard
20 is right or wrong.

21 So the Federal Circuit, whatever the jury
22 found, Federal Circuit said the law is that you are
23 liable under 271(b) if you are deliberately -- if you
24 deliberately disregard a known risk. Is that standard
25 the right one?

1 MR. CRUZ: I agree the Federal Circuit had
2 that language. I would not suggest that standard was
3 the wrong standard, but what I would say, what the
4 Federal Circuit in fact did is it applied willful
5 blindness. If you look at the cases it cited, if you
6 look at how it in fact interpreted it, although it used
7 the deliberate indifference language, which I will
8 concede was somewhat confusing in its reasoning. If you
9 look at it, it framed it as whether Pentalpha had
10 constructive knowledge of the patent, and it then cited
11 willful blindness cases from other circuits that focused
12 it on actively disregarding a known risk and deliberate
13 avoidance and consciously avoided knowledge. All of
14 that is willful blindness knowledge.

15 JUSTICE ALITO: Mr. Cruz, while we are
16 certainly interested in what the standard should be.
17 But in terms of the deposition of this case, maybe you
18 could help me with this. The -- the instruction to
19 which there was an objection on, 124A to -- well,
20 wherever it is in the joint appendix -- was the newer
21 should have known, right?

22 MR. CRUZ: Correct.

23 JUSTICE ALITO: And the objection that I see
24 was that the words "or should have known that their
25 actions" -- this is 135A of the joint appendix -- should

1 have been stricken. So am I right that the only issue
2 that was preserved is the question whether actual
3 knowledge was required? Because that was the only --
4 that was what -- that was the error, the alleged error
5 that was identified by Mr. Dunnegan.

6 MR. CRUZ: I agree with that entirely.

7 JUSTICE ALITO: So if he is wrong on that,
8 then the judgment should be affirmed.

9 MR. CRUZ: I agree with that entirely, and
10 indeed we have suggested the central issue, the question
11 before this Court is, is there a requirement of actual
12 knowledge of the specific patent? And in my judgment
13 there is no reasonable argument from the statutory
14 language that in order to be liable under 271(b) you
15 must specifically know to 100 percent certainty this is
16 violating patent number 312. That is the issue they
17 objected. That is the issue that has been brought
18 before this Court. Is --

19 JUSTICE SOTOMAYOR: -- do so, because we
20 still have to define knowledge. If we accept that
21 actual knowledge can have a different definition, just
22 not the should have known definition --

23 MR. CRUZ: Well --

24 JUSTICE SOTOMAYOR: Do we have to define
25 what knowledge -- what kind of knowledge we are talking

1 about?

2 MR. CRUZ: If it is a case that you must
3 specifically know the specific patent, it will ensure
4 that unscrupulous --

5 JUSTICE SOTOMAYOR: I agree. We can say
6 that. But how does it help --

7 MR. CRUZ: Well --

8 JUSTICE SOTOMAYOR: -- the development of
9 law for us to simply say you -- it is not so much
10 knowledge that you have to know the specific patent by
11 number.

12 MR. CRUZ: I am going to suggest it is a
13 binary choice. It is either actual specific knowledge
14 of the patent, or it is some form of "should have known"
15 that allows constructive knowledge.

16 JUSTICE BREYER: That is where I am. At the
17 moment, the should have known or willful blindness, the
18 disregard -- the problem, and it seems like a real
19 problem, is know what, exactly? Well, know there is a
20 risk. Well, at that point half the country in the
21 business world is very upset because there is always a
22 risk.

23 MR. CRUZ: But, Justice Breyer --

24 JUSTICE BREYER: And the other problem is if
25 you -- as you move away from that and say, no, no, I

1 mean a real risk -- I mean a huge risk -- I mean a risk
2 that in fact, you almost knew that this was it -- now I
3 can do it with my tone of voice, but I need the words to
4 put in there that are going to calm people's fears that
5 they are not suddenly going to be held liable because
6 there is some fairly small risk of this. So what words
7 would I use?

8 MR. CRUZ: In this case, you had unusual --

9 JUSTICE BREYER: I know this case; I am not
10 worried about. I am worried about what I said.

11 MR. CRUZ: Well, let me suggest what words
12 you could use to resolve this case. Because --

13 JUSTICE BREYER: I do not want to just
14 resolve the case.

15 (Laughter.)

16 JUSTICE BREYER: The reason we took the case
17 is because there seemed a bunch of standards floating
18 around. Now I know our interests differ in this matter,
19 but I would appreciate any help you can give me about
20 what I am thinking now is words that will quantify the
21 risk that you had to have known about, a risk; so that
22 it doesn't look like some small thing that is always
23 there that looks like some giant thing that is pretty
24 close to actually --

25 MR. CRUZ: The language that -- that was

1 used in Santos was that willful blindness is that when a
2 party aware of a high probability of a fact deliberately
3 avoids learning the truth.

4 JUSTICE BREYER: Well, I've heard about
5 that.

6 MR. CRUZ: That language would encompass
7 this case --

8 JUSTICE BREYER: Yes, it would.

9 MR. CRUZ: And it would not bring in
10 innocent actors.

11 JUSTICE BREYER: -- my problem, is a high
12 probability that. You have to be -- you have to
13 consciously, that is the model penal code, that is the
14 -- you know, torts -- you have to consciously disregard
15 a high probability that this item was patented and also
16 meet the other requirements that are part of active
17 inducement. That is what your thought is?

18 MR. CRUZ: I think that would be an
19 acceptable test this Court could --

20 CHIEF JUSTICE ROBERTS: A high probability
21 of what? A high probability that you will infringe
22 this -- a patent or any patent?

23 MR. CRUZ: A -- with respect to what was
24 happening here, when you copy a commercial product,
25 there is a high probability that product is protected by

1 a patent, and when you engage in what the district court
2 characterized --

3 JUSTICE SCALIA: He is not interested in
4 what happened here. I mean, we are still talking about
5 a general test.

6 MR. CRUZ: I -- what I would suggest and
7 that is one of the reasons we proffered the narrow test
8 that is keyed on copying, because copying of completed
9 commercial products is the most egregious. If the Court
10 is concerned about unintended consequences, that narrow
11 rule is the most narrow rule. Let -- if I could briefly
12 suggest --

13 JUSTICE SOTOMAYOR: Forget the narrow rule.
14 What do you think the rule should be to articulate what
15 Justice Breyer would like?

16 MR. CRUZ: With respect, my client doesn't
17 care --

18 (Laughter.)

19 MR. CRUZ: -- as long as the result is at
20 the end, the opinion is affirmed.

21 JUSTICE BREYER: I know your client doesn't
22 care. But still we have to write this. So what about
23 the answer?

24 To follow it up a little bit, it is
25 knowledge -- you're familiar with these areas, so you're

1 helpful, and -- and it is a knowledge or a known -- or
2 consciously disregarding a known risk where the risk
3 consists of a high probability that that item that you
4 are inducing to be produced will infringe a patent.

5 MR. CRUZ: I agree that would suffice.

6 With respect to why this Court should not
7 remand, if I may very briefly make three points. Number
8 one, this case has been going on for 12 years. To
9 remand for a new trial would drag it on to more endless
10 litigation for no purpose. The district court observed
11 below this case was not a close case. It took the jury
12 109 minutes to resolve against Pentalpha on every single
13 ground that was presented to it.

14 Number two, the jury charge that was sent to
15 the jury was more than sufficient under any of these
16 standards. But number three, the alternative argument
17 we made, there was a finding of direct infringement.
18 That finding of direct infringement is also supported by
19 the damage award and that is an alternative ground to
20 remand it. Now, in the reply brief Pentalpha says,
21 focuses on the same differential that the Federal
22 Circuit did between the language of the jury charge and
23 the language of the verdict form, but the only evidence
24 the jury had of the number of units sold by anybody was
25 the stipulation. In their reply brief they say, well,

1 there could have been some sold in Canada. That was
2 lawyer argument. The only evidence, which everyone
3 agreed, was the stipulation and if that is true that
4 supports the damage award.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.

6 Mr. Dunnegan, you have four minutes
7 remaining.

8 REBUTTAL ARGUMENT OF WILLIAM DUNNEGAN

9 ON BEHALF OF PETITIONERS

10 MR. DUNNEGAN: Five points in rebuttal, I
11 believe, Your Honor. The first is what should the
12 standard be with respect to willful blindness. And I do
13 want to call the court's attention to one sentence in
14 Grokster appearing at page 941 of the opinion. And it
15 provides, this is worth reading, I believe. If
16 liability for inducing infringement is ultimately found,
17 it will not be on the basis of presuming or imputing
18 liability, excuse me, fault, but from inferring a
19 patently illegal objective from statements and actions
20 showing what that objective was.

21 Now, in the context of an amicus brief from
22 the solicitor general in that case suggesting a willful
23 blindness standard, it seems to me that that language is
24 a rejection of imputing a willful blindness standard.

25 JUSTICE ALITO: So you want actual knowledge

1 of the patent? That is your test?

2 MR. DUNNEGAN: The test that we are looking
3 for is the Grokster test. Is there purposeful, culpable
4 conduct.

5 JUSTICE ALITO: Do you want actual knowledge
6 of the patent?

7 MR. DUNNEGAN: Yes, Your Honor.

8 JUSTICE ALITO: And that is the issue you
9 preserved with your objection?

10 MR. DUNNEGAN: Not precisely. We preserved
11 other issues beyond that. We preserved both the jury
12 charge by objecting at 135A of the joint appendix and we
13 objected to the judgment as a matter of law motion by
14 making it and saying specifically there is no evidence
15 here that there was actual knowledge of the patent
16 before April 9th of 1998. Now --

17 JUSTICE GINSBURG: And after that date you
18 admit you -- because you continued to sell the product
19 to the retailers?

20 MR. DUNNEGAN: Yes, Your Honor.

21 JUSTICE GINSBURG: So after Sunbeam sued,
22 then you are actively inducing infringement?

23 MR. DUNNEGAN: No, Your Honor. At that
24 point we have actual knowledge of the patent and the
25 analysis has to go to what was our purpose. For the

1 bulk of that period of time, we had a legal opinion from
2 a very competent New York City lawyer stating that we
3 did not infringe. And the jury, I guess the second
4 point I was trying to make is the jury never evaluated
5 any standard higher than new or --

6 JUSTICE GINSBURG: I thought that opinion
7 was after the first finding of infringement, that you
8 redesigned the product and that, the evidence you got
9 dealt with the redesigned products.

10 MR. DUNNEGAN: I believe your timing is
11 correct, Your Honor. The --

12 JUSTICE GINSBURG: But after just
13 originally, Sunbeam is suing for infringement. Sunbeam
14 notifies Pentalpha. At that point, Pentalpha is
15 continuing to make sales. Is it infringing? Is it
16 actively inducing infringement.

17 MR. DUNNEGAN: That is a question of fact,
18 Your Honor. The jury resolved it against us, but the
19 point I was trying to make is that for some period of
20 time after that we had a legal opinion saying we did not
21 infringe and we believe that legal opinion from the New
22 York City attorney would prevent or should prevent, as a
23 matter of fact, a finding of purposeful, culpable
24 conduct. Now, the second standard I wanted to address
25 was --

1 JUSTICE GINSBURG: You admitted there was
2 purposeful, culpable conduct when you did not, when you
3 had the original design and that was, and you were sued
4 for actively inducing infringement of that design, by
5 that design.

6 MR. DUNNEGAN: No, Your Honor. We would
7 never concede that we were purposefully --

8 JUSTICE GINSBURG: But you think a jury
9 could have found that from the facts?

10 MR. DUNNEGAN: Yes. We are not seeking
11 judgment as a matter of law for any claims that arose
12 after April of 1998 when we had actual knowledge of the
13 patent, only before we had actual knowledge of the
14 patent are we seeking judgement as a matter of law.
15 Now, going to the issue of whether willful blindness
16 could be found by the failure of someone to tell the
17 patent attorney that there was a copying --

18 JUSTICE SOTOMAYOR: I am sorry. Why are you
19 doing that? I thought that you came in arguing that you
20 have to have actual knowledge of the patent.

21 MR. DUNNEGAN: Yes, Your Honor.

22 JUSTICE SOTOMAYOR: By number, and that was
23 the conversation we had earlier, and that the patent
24 covered the scope of your invention.

25 MR. DUNNEGAN: Yes, Your Honor. That's our

1 primary argument, but if the court were to adopt willful
2 blindness as being enough, then I would question whether
3 or not simply not telling the patent attorney what
4 references were used or even which ones were copied
5 would be enough. Because in that situation, the company
6 has taken an effort to find out what the truth is and it
7 simply failed to meet the gold standard in meeting that
8 obligation.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 12:14 p.m., the case in the
12 above-entitled matter was submitted.)

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