

**In The
Supreme Court of the United States**

MAGUIRE FINANCIAL, LP, ON BEHALF OF
ITSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

POWERSECURE INTERNATIONAL, INC.
AND SIDNEY HINTON,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit’s opinion was in error even though the court repeatedly stated the correct standards for pleading a strong inference of scienter as set forth in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), conducted a holistic evaluation of the facts alleged in the amended complaint, and held that an inference of scienter is neither cogent and compelling nor strong in light of other explanations.

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

Respondent PowerSecure International, Inc. (“PowerSecure”) was merged into PowerSecure, Inc. in December 2016, with PowerSecure, Inc. assuming all rights and obligations of PowerSecure International, Inc.

PowerSecure, Inc. is privately held by the following parent corporations:

Southern PowerSecure Holdings, Inc.; and

The Southern Company, Inc. (The Southern Company, Inc. is the 100% owner of Southern PowerSecure Holdings, Inc., which is the 100% owner of PowerSecure, Inc.).

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STATEMENT OF THE CASE

In its amended complaint, Petitioner isolated a single phrase uttered by PowerSecure’s Chief Executive Officer (“CEO”) Sidney Hinton—“contract renewal”—and attempted to spin it into a scheme to mislead the market and defraud investors. The District Court (twice) dismissed Petitioner’s claim for failure to adequately plead that the alleged misstatement was made with scienter. The Fourth Circuit agreed.

Before this Court, Petitioner takes the same approach. It isolates a single phrase from the Fourth Circuit’s opinion—“just as likely”—and attempts to spin it into a finding that, holistically, an inference that the alleged misstatement was made *with* scienter is as compelling as an inference that it was made *without* scienter. Based on this misreading, Petitioner argues that, in affirming the District Court’s dismissal for failure to plead a strong inference of scienter, the Fourth Circuit violated this Court’s test for analyzing scienter allegations as set forth in *Tellabs*.

Petitioner’s argument is without merit. The Fourth Circuit’s opinion simply does not say what Petitioner claims. Instead, the panel accurately cited and applied the *Tellabs* standard, and used the phrase “just as likely” only in comparing a nonculpable inference that the CEO did not know the costs of the contract to a single, “conceivable” culpable inference that the CEO negotiated the contract, and was therefore aware of its costs. The Fourth Circuit considered many other inferences, including the ambiguity of the word “renewal” and the CEO’s use of the additional

phrase “renewed and expanded,” before holding that an inference of scienter was neither cogent and compelling nor strong in light of other explanations. Because the Fourth Circuit’s opinion does not conflict with *Tellabs*, Petitioner fails to present a compelling reason for this Court to grant the Petition for a Writ of Certiorari. The Petition should be denied.

A. Factual Background¹

1. PowerSecure provides utility and energy technologies to electric utilities and their customers. Sidney Hinton, PowerSecure’s President and CEO, has three decades of experience in the energy industry. Appendix to the Petition (“App.”) at 3a. The company has three operating units: Interactive Distributed Generation (“DG”), Energy Efficiency, and Utility Infrastructure (“UI”). Its UI products and services include construction and maintenance of transmission and distribution systems, installation of advanced metering and efficient lighting, and storm restoration. The UI unit generated 41% of PowerSecure’s 2013 revenue. Prior to the class period, Florida Power & Light (“FP&L”) had a three-year contract with PowerSecure for the West Palm Beach, Florida, area that would soon expire. FP&L’s contract accounted for approximately 10% of PowerSecure’s UI revenue, and therefore just 4.1% of its total revenue. *Id.*

2. PowerSecure announced through a June 6, 2013, press release additions to its revenue backlog,

¹ All facts are presented as of the time the operative complaint was filed.

which included “approximately \$49 million from a renewed and expanded three year [UI] award.” App. 3a-4a. While not named, this referred to the FP&L contract.

3. On August 7, 2013, Mr. Hinton stated during a conference call for securities analysts and investors that PowerSecure had secured “a \$49 million three-year contract renewal, both the renewal and expansion with one of the largest investor [owned] utilities in the country.” App. 4a. In its amended complaint, Petitioner alleges that this statement was materially false or misleading.

4. Nine months after the alleged misstatement, on May 7, 2014, PowerSecure reported first-quarter losses of almost \$4.3 million as its gross margins decreased from 30.6% to 20.9%. App. 27a. On a conference call with analysts that day, Mr. Hinton attributed the disappointing results to long sales cycles in the DG unit and inefficiencies in the UI unit, including the unreliability of workflow from a new customer that was not FP&L. App. 22a, 27a.² One other source of UI unit inefficiency identified by PowerSecure was FP&L, which had changed the area PowerSecure served from West Palm Beach, Florida, to Ft. Myers, Florida. App. 4a. Mr. Hinton explained that “we probably underestimated the negativity [and] the complexity of basically

² See App. 27a (Mr. Hinton “stated in part that ‘we had a customer, a key that – I think we said specifically, that \$7.5 million of work in the fourth quarter that we then got \$1 million of work in the first one. . . . We adjust, we try to guess the rhythm of how work is released and it’s a relatively new account and we just guessed wrong.’”).

starting from scratch in a new territory,” and that work in the new territory proved to be harder than imagined. *Id.* Thus, though PowerSecure was given more work in Ft. Myers than in West Palm Beach, the higher costs reduced its short-term profitability.

B. Proceedings Below

5. On December 29, 2014, Petitioner filed a consolidated class action complaint against PowerSecure, Mr. Hinton, and Christopher T. Hutter, then PowerSecure’s Chief Financial Officer, challenging twenty-six statements made between August 7, 2013, and April 30, 2014, concerning many aspects of PowerSecure’s business, of which the FP&L contract was only one.

6. On September 15, 2015, the District Court granted Respondents’ motion to dismiss the complaint without prejudice. It held that Petitioner failed to plead with particularity that twenty-five of the twenty-six alleged misstatements were materially false or misleading. As the sole exception, the District Court held that Petitioner adequately alleged that Mr. Hinton’s passing reference to the FP&L contract as a “renewal” was materially misleading, but it nevertheless dismissed the complaint because Petitioner failed to plead a strong inference of scienter.

7. On October 16, 2015, Petitioner filed an amended complaint, dropping Mr. Hutter as a defendant and proceeding on the basis of the sole alleged misstatement not originally dismissed for failure to plead falsity.

On September 14, 2016, the District Court granted Respondents' motion to dismiss the amended complaint with prejudice. After reviewing the new allegations and considering holistically all of the facts offered in support of scienter, the District Court held that Petitioner had again failed to plead a strong inference of scienter.

8. Petitioner filed its notice of appeal on October 7, 2016. On November 15, 2017, the Fourth Circuit affirmed the District Court's decision. Like the District Court, the Fourth Circuit considered Petitioner's allegations individually and holistically and concluded that an inference of scienter was not "strong in light of other explanations." App. 14a (quoting *Tellabs*, 551 U.S. at 324).

9. On November 29, 2017, Petitioner filed a petition for rehearing or rehearing en banc, advancing the same argument it makes here: that the Fourth Circuit violated *Tellabs* when it noted that certain nonculpable inferences were "just as likely" as a single, arguably culpable inference. App. 17a. On December 12, 2017, the Fourth Circuit denied the petition, noting that no judge had requested a poll on rehearing en banc.

10. On March 12, 2018, Petitioner filed this Petition for a Writ of Certiorari.



REASONS FOR DENYING THE PETITION

Petitioner plucks a single phrase out of the Fourth Circuit’s reasoning, inflates it into the court’s “holding,” and asserts that this “holding” is so irreconcilable with *Tellabs* as to be worthy of certiorari. Petitioner is wrong.

The Petition fails to set forth a single factor that favors granting certiorari: (1) it fails to qualify for review under Rule 10(c) because the claimed conflict with *Tellabs* does not exist; (2) the Fourth Circuit’s opinion was correct, and review would not alter the outcome of the case; and (3) even if an error exists in the opinion—it does not—at best it was an isolated misapplication of law unworthy of this Court’s review.³

I. The Fourth Circuit’s Opinion Does Not Conflict with *Tellabs*

In *Tellabs*, this Court set forth the test for determining whether a securities fraud plaintiff has pleaded a “strong inference of scienter” as required by the Private Securities Litigation Reform Act. Courts must “accept all factual allegations in the complaint as true[,] . . . consider the complaint in its entirety,” and “in determining whether the pleaded facts give rise to a ‘strong’ inference of scienter, . . . take into account plausible opposing inferences.” *Tellabs*, 551 U.S. at 322-23. A complaint pleads the requisite “strong” inference

³ The Petition also fails to merit “an exercise of this Court’s supervisory power,” Pet. 4, as it asserts only an error of law, not a departure from proper judicial procedure. *See* Sup. Ct. R. 10(a).

“only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.” *Id.* at 324. In short, if a holistic analysis of all plausible inferences finds the culpable and nonculpable inferences to be in equipoise, the “tie” goes to the plaintiff.

It is clear that the Fourth Circuit understood and applied *Tellabs*’ instructions; indeed, it cited *Tellabs* and its progeny throughout its opinion. In Section II, the legal standards section, the Fourth Circuit quoted *Tellabs*’ test for analyzing scienter allegations, including this Court’s instruction that “the inference of scienter must be more than merely ‘reasonable’ or ‘permissible’—it must be cogent and compelling, thus strong in light of other explanations.” App. 8a-9a (citing *Tellabs*, 551 U.S. at 322-24). “Reversal is appropriate,” the court continued, “only if we find the inference that [the defendants] acted with scienter ‘**at least as compelling**’ as the inference that the defendants lacked the required mental state.” App. 10a (emphasis added) (quoting *Pub. Emps.’ Ret. Ass’n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 312 (4th Cir. 2009) (quoting *Tellabs*, 551 U.S. at 324)). Directly following this correct recitation of the test, the Fourth Circuit “conclude[d] that [Petitioner] ha[d] not adequately alleged scienter as required by . . . the PSLRA.” *Id.*

In Section III.B of its opinion, the Fourth Circuit began its holistic analysis by reiterating the test it must apply, which it framed as determining “whether the

allegations in the complaint, viewed in their totality and in light of all the evidence in the record, allow us to draw a strong inference, ***at least as compelling*** as any opposing inference,” that the Respondents “either knowingly or recklessly defrauded investors,” App. 13a (emphasis added) (citing *Deloitte*, 551 F.3d at 313), and “conclud[ing] that they do not,” App. 14a. For good measure, the court again directly quoted *Tellabs* when it held that “the facts alleged do not make the inference of scienter more than merely reasonable or permissible, cogent and compelling, or strong in light of other explanations.” App. 14a (quoting *Tellabs*, 551 U.S. at 324) (internal quotation marks omitted).

In Section III.B.1 of its opinion, the Fourth Circuit reasoned:

It is ***conceivable*** that [Mr.] Hinton was involved in negotiating the minutiae of the second contract such that he would be aware of the costs associated with hiring and training low-level workers. But it is ***just as likely*** that in practice [Mr.] Hinton did not personally learn those specific details about the agreement, that he believed the cost of establishing a presence in Ft. Myers would not be substantial, or that he believed any cost increase would be offset by savings from winding down operations in West Palm Beach.

App. 17a (emphasis added). Petitioner extracts the two sentences above and argues that the phrase “just as likely” sums up the opinion’s entire scienter analysis and conclusion. It does not.

The quoted language merely relates to a single inference from the first of the panel’s three-subsection holistic analysis. In both Section III.B.1 and the following two subsections, the panel analyzed additional inferences that unquestionably counted against an inference of scienter. App. 16a-19a; *see also* Section II *infra* (identifying those inferences).

Petitioner not only misstates the significance of the “just as likely” passage within the Fourth Circuit’s opinion as a whole, but also the passage’s meaning on its own. The panel did not conclude that an inference that Mr. Hinton negotiated, and therefore knew the likely costs posed by, the FP&L contract was **cogent** or **compelling**. Rather, the panel found that this inference was merely **conceivable**. App. 17a. But *Tellabs* makes clear that a conceivable inference is not a strong inference: “Congress did not merely require plaintiffs . . . to allege facts from which an inference of scienter rationally *could* be drawn. Instead, Congress required plaintiffs to plead with particularity facts that give rise to a ‘strong’—*i.e.*, a powerful or cogent—inference.” 551 U.S. at 323.

In short, the Fourth Circuit concluded that, far from being “precisely in equipoise,” *Tellabs*, 551 U.S. at 331 (Scalia, J., concurring), Petitioner’s single “conceivable” inference of scienter was far outweighed by multiple nonculpable inferences. App. 14a (concluding holistic analysis by holding “the facts alleged do not make the inference of scienter . . . ‘cogent and compelling,’ or ‘strong in light of other explanations’” (quoting *Tellabs*, 551 U.S. at 324)). The Fourth Circuit

did not diverge from this Court's clear instructions in *Tellabs*. Certiorari should be denied for the simple reason that the conflict claimed does not exist.

II. The Grant of Review Would Not Alter the Ultimate Resolution of the Case

The Petition should also be denied because the underlying decision is correct and review would not result in a different outcome. Viewed most favorably to Petitioner, the amended complaint alleges a single “conceivable” culpable inference that was “just as likely” as another nonculpable inference. Even if this Court determined that the Fourth Circuit improperly gave this “tie” to the Respondents rather than the Petitioner, the fact would remain that aside from this single tie, all other inferences weighed against an inference of scienter. Specifically, the court resolved that the word “renewal” need not have been intended to suggest a contract on identical terms, particularly when Mr. Hinton described the FP&L contract as a “renewed and *expanded*” contract. App. 17a-18a (emphasis added). It determined that Mr. Hinton’s statement did not suggest that PowerSecure would continue servicing West Palm Beach, and in fact made no reference to geographical area whatsoever. App. 15a. It considered the alleged fact that the FP&L contract represented only 4.1% of PowerSecure’s annual revenue, making it reasonable to infer that Mr. Hinton was unfamiliar with its details and that “[e]ven if someone at PowerSecure believed that a contract for Ft. Myers would cause the company to

incur additional costs, no fact alleged suggests that [Mr.] Hinton was this person.” App. 16a. And it rejected an inference of scienter based on Petitioner’s stock sales allegations. App. 18a-19a.

Review by this Court would not change the facts alleged nor expunge the nonculpable inferences drawn from those allegations. Indeed, if certiorari were granted, the resolution of the case would be the same: dismissal.⁴ That Petitioner quibbles with the words used to describe the deficiency of its allegations does not make the allegations themselves any less deficient.

III. Even if Error Exists, It Is Isolated and Unlikely To Recur

Even if the issue Petitioner advances did exist—it does not—the Petition does not argue that it is widespread or likely to recur. It does not claim that the opinion threatens the ongoing validity and authority of *Tellabs*. In fact, it does not assert that the opinion will have *any* ramifications beyond this case.

Nor could it: because the Fourth Circuit’s opinion accurately articulates the *Tellabs* test, Petitioner’s claim is simply one of misapplication. But “misapplication of a properly stated rule of law” is not worthy of this Court’s consideration. *See* Sup. Ct. R. 10; *see also*

⁴ This Court has denied certiorari in instances where resolution of an aspect of a case would not have altered the ultimate judgment. *E.g.*, *Gamache v. California*, 562 U.S. 1083 (2010) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari). It should do the same here.

Cavazos v. Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting from grant of writ of certiorari) (“Error correction is ‘outside the mainstream of the Court’s functions.’” (quoting E. Gressman et al., *Supreme Court Practice* § 5.12(c)(3), at 351 (9th ed. 2007))). Indeed, a petition such as this, involving a fact-bound opinion which unquestionably states the correct rule of law, is precisely the type this Court is inclined to deny. *Id.* at 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

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