Who Stole the Jade Falcon?
Tellabs Re-Writes the Rules for Bringing a Private Securities Case

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borrowed and amended from the concurring opinion of Justice Scalia. In the example, A and B are the only persons who have access to a room from which a jade falcon is stolen.[6] An inference can be drawn that A stole the jade falcon. An inference can be drawn that B stole the jade falcon. In the Court's view, the inference that A stole the statue is a "strong inference" as that phrase is used in the Reform Act. "Strong," in this context, thus means at least equal to any contrary inferences.[7]

Perhaps more importantly, however, the Court rewrote the rules for determining whether a securities fraud complaint should be permitted to survive a motion to dismiss.[8] Previously, those rules favored plaintiffs. Under the new rules, there is a level playing field, focused on the factual basis of the claim. To analyze the decision in *Tellabs* and its impact, four key points will be considered: (1) the Reform Act provision requiring that a "strong inference" of scienter be pled and its background; (2) the split among the circuit courts which led to the *Tellabs* decision; (3) the Supreme Court's opinion; and (4) the implications of the decision and its potential impact on private securities fraud actions.

Reform Act Section 21D(b)(2) and its Origins

Section 21D(b)(2) of the Reform Act,[9] requiring that a securities fraud plaintiff plead facts demonstrating a "strong inference" of scienter, was added to the Securities Exchange Act as part of a package of provisions focused on curbing abuses in bringing private securities cases. The legislative hearings on which the Reform Act is based are replete with testimony about lawyer-driven securities fraud suits initiated with complaints containing few facts by plaintiffs with little or no real stake in the case. Although Congress was frequently told these suits lacked real merit, they often settled with the payment of large sums, including attorneys' fees, completely disproportionate to the merits of the cases because of the huge costs and risks inherent in defending the suits.[10]

To curb these abuses, Congress imposed substantive and procedural requirements and limitations on private securities fraud cases. Those requirements included, for example, new provisions favoring the selection of institutional investors as lead plaintiffs and limitations on settlements and fee awards.[11] Standards for bringing a suit were heightened by imposing stringent new pleading standards and requiring that discovery be stayed pending a ruling on a motion to dismiss.[12] These procedures differ markedly from those used in most civil litigation, in which plaintiff need only state a claim on which relief may be granted in a complaint that, when filed, authorizes the beginning of discovery.[13]

Section 21D(b)(2), which incorporates the "strong inference" requirement, provides in pertinent part that:

> In any private action ... the complaint shall ... state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.[14]

The phrases "strong inference" and "required state of mind" are not defined.

The legislative reports make it clear that Congress drew on the then-existing standards in crafting the "strong inference" standard. At the time the Reform Act was passed, pleading standards in securities fraud cases were governed primarily by Fed. R. Civ. P. 9(b), which required that fraud be pled with "particularity," and a series of circuit court decisions. The Rule 9(b) particularity requirement was generally interpreted to require plaintiff to detail the who, what, when and where of the claim.[15] The heightened pleading standard of the Rule did not, however, apply to pleading the required state of mind. Those pleading requirements were governed by the minimal standards of Federal Civil Rule 8(a).[16]

Despite the dictates of Rule 9(b), the circuit courts split over what must be pled regarding the required state of mind. The Second Circuit created what was widely viewed as the most stringent scienter pleading standard at that time. Under its standard, a securities law plaintiff was required to plead a "strong inference" of scienter in one of two ways: (1) by alleging facts demonstrating a motive and opportunity to commit fraud; or (2) by alleging specific facts constituting circumstantial evidence of either reckless or conscious behavior.[17] In contrast, the Ninth Circuit required only a general allegation of scienter.[18] Most circuit courts adopted a middle ground, concluding that a securities law plaintiff must plead facts demonstrating a basis for a belief that the required state of mind existed.[19]

Congress crafted Section 21D(b)(2) against this backdrop. While the legislative history to the section is complex and frequently confusing, a careful study of the materials establishes four points. First, Congress sought to strengthen and standardize pleading requirements for securities fraud suits.[20] Second, the "particularity" requirements of the statute were keyed to Rule 9(b). Third, the "strong inference" test was borrowed from Second Circuit case law, since it was widely viewed as reflecting the highest pleading standards.[21] Finally, Congress declined to codify the Second Circuit case law interpreting the "strong inference" phrase, although the committee report notes that the circuit's case law should be consulted as "instructive."[22]

The Circuit Courts Split Again

Following the passage of the Reform Act, the circuit courts had to resolve three key questions: (1) the applicable state of mind; (2) what constitutes a "strong inference"; and (3) whether, and if so how, to consider competing inferences on a motion to dismiss when assessing if the required "strong

inference" has been pled. As in the past, the Second and Ninth Circuits took opposite views on the critical issues, while most other circuits adopted positions in between.[23]

First, courts had to define "applicable state of mind." Most circuit courts quickly reached the conclusion that Congress had not disturbed the well-developed body of pre-Reform Act case law defining the required state of mind for Section 10(b) securities fraud claims. Thus, the Supreme Court's *Hochfelder* decision,[24] requiring that scienter be established to prove securities fraud, would continue to apply. Likewise, circuit court decisions holding that scienter included reckless conduct would also continue to apply.[25]

The Ninth Circuit however, took a different position. In *Silicon Graphics*,[26] that court read the Reform Act legislative history to mean that Congress sought to implement a pleading standard which exceeded the then-existing Second Circuit requirement. Following this line of reasoning, the court concluded that to plead the requisite state of mind, a securities law plaintiff must allege facts demonstrating "a strong inference of, at a minimum, 'deliberate recklessness.'" This standard, the court held, "strongly suggests actual intent."[27] No other circuit adopted this standard.

Not surprisingly, the circuit courts also split on a second key issue—the meaning of "strong inference." The Second and Third Circuits, along with the Securities and Exchange Commission ("SEC"), concluded that Congress had adopted the pre-Reform Act Second Circuit case law. Thus, for example, in the leading Second Circuit case of *Press v. Chem. Inv. Serv. Corp*,[28] the court held that the Reform Act "heightened the requirement for pleading scienter to the level used by the Second Circuit. As a pleading requirement, a plaintiff must either (a) allege facts to show that 'defendants had both motive and opportunity to commit fraud' or (b) allege facts that 'constitute strong circumstantial evidence of conscious misbehavior or recklessness."[29]

The Ninth Circuit in *Silicon Graphics* took the opposite position. That court rejected the motive and opportunity prong of the Second Circuit's test as inadequate, based on its reading of the legislative materials. As with its definition of scienter, the court concluded that Congress adopted a more stringent standard requiring "a private securities plaintiff proceeding under [the Reform Act to] plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct."[30] In holding that plaintiffs must, at a minimum, cite facts that come closer than motive and opportunity to a strong inference of deliberate recklessness,"[31] the Ninth and Second Circuits reversed their pre-PSLRA positions. Now, the Ninth Circuit had the most stringent test.

Other circuits took essentially a middle position, focusing on whether the facts pled were sufficient to create a strong inference of scienter. The First Cir-

cuit may have best summarized the debate over the use of the Second Circuit's motive and opportunity test concluding "the debate about the adoption or rejection of prior Second Circuit standards strikes us as somewhat beside the point ... we have analyzed the particular facts alleged in each individual case to determine whether the allegations were sufficient to support scienter."[32]

The circuit courts also failed to agree on the third issue – how to construe competing inferences on a motion to dismiss when evaluating whether the requisite strong inference of scienter had been pled. Traditionally, on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the facts in the complaint are presumed to be true, all inferences are drawn in favor of plaintiff and discovery can go forward while the motion is considered.[33] The Reform Act altered this procedure by requiring that the courts determine the sufficiency of the inferences pled regarding scienter and precluding discovery until after the sufficiency of the complaint is resolved. These procedures grew out of the repeated testimony Congress heard about essentially bare-boned and baseless securities fraud complaints being used as vehicles to initiate massive and costly discovery which precipitated settlements out of proportion to the merits of the action.[34]

Congress gave the courts little guidance on how the new standards were to be reconciled with the existing Rule 12(b)(6) motion to dismiss procedures. Again, the circuit courts diverged on the question. For example, the First Circuit, concluded that there was no change to existing motion to dismiss standards in one decision and that "Congress has effectively mandated a special standard," although in another case it held that the Reform Act created a "special standard."[35] In contrast, the Ninth Circuit held that there was a "tension" between Rule 12(b)(6) and Section 21D(b)(2) of the Act. Thus in *Gompper*, the court flatly rejected a traditional Rule 12(b)(6) argument that all inferences be drawn in favor of the plaintiff, concluding that to follow such a procedure would "eviscerate the PSLRA's strong inference requirement ... ."[36] The court thus held that all inferences must be assessed to determine whether a "strong inference" had been pled.

Other courts determined that only some inferences should be considered in assessing plaintiff's complaint. The Tenth Circuit, for example, seemed to have limited consideration to inferences drawn from facts pled with particularity. In this regard, the court noted that "[i]f a plaintiff pleads facts with particularity that, in the overall context of the pleading, including potentially negative inferences, give rise to a strong inference of scienter, the scienter requirement of the Reform Act is satisfied."[37] The Sixth Circuit adopted a variation of this approach in an en banc decision in *Helwig*,[38] holding that "strong inference" means plaintiffs are entitled "only to the most plausible of competing inferences." The split views of the circuits on the use of inferences, as well as what evidence must be considered to evaluate a "strong

inference," undercut the clear, uniform standard Congress sought to create in the Reform Act.

The Decision in *Tellabs*

In *Tellabs*, the Supreme Court agreed to resolve the split in the circuits concerning the use of inferences.[39] In essence, however, the Court also resolved the question regarding "what evidence" should be considered in evaluating whether a strong inference of scienter has been pled.

Tellabs arose from the partial reversal by the Seventh Circuit of a district court decision dismissing a class action securities fraud complaint. The complaint alleged four claims: (1) that sales for a key product were stable when they were not; (2) that statements made by company officials claiming that the next generation of product was available and demand was good were not true; (3) that the quarterly results were inflated from channel stuffing; and (4) that earnings and revenue projections were exaggerated.[40]

In reviewing the decision of the district court dismissing the complaint, the Seventh Circuit began by noting that the Reform Act had "raised the bar for pleading scienter."[41] Based on this theory, the court concluded that evidence of motive and opportunity may be useful, but noted that there is nothing in the statute to suggest that such evidence is sufficient. Rather, the court concluded that all the allegations and inferences drawn from the facts must be considered. In undertaking that analysis, however, the circuit court directed the district court on partial remand to "allow the complaint to survive if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent ... ."[42] With this conclusion, the court, in part, followed the lead of those circuits which concluded that all evidence must be considered. In part, however, the court created its own "reasonable person" test to evaluate inferences drawn from those facts.

The Supreme Court reversed and remanded for reconsideration in view of its holding that "plaintiff alleging fraud in a Section 10(b) action ... must plead fact rendering an inference of scienter *at least as likely* as any plausible opposing inference."[43] The test is thus one of balance: inferences supporting a "strong inference" must at least be equal to those supporting innocence.

The theme of balance is carefully threaded through the majority opinion. In the opening paragraphs, Justice Ginsburg, writing for the eight-member majority, balanced competing interests by citing the importance of private securities litigation in enforcing the securities laws, while noting that the Reform Act sought only to "check" meritless suits. The Reform Act, the court concluded, sought to provide a uniform pleading standard that reflects the "twin goals" of Congress: "to curb frivolous, lawyer-driven litigation, while preserving investor's ability to recover on meritorious claims."[44] In view of

this fact, the court established three "prescriptions" for resolving motions to dismiss securities fraud complaints: (1) the facts in the complaint must be accepted as true; (2) the complaint must be considered in its entirety; and (3) plausible opposing inferences must be considered when construing inferences drawn from the complaint.[45] The first two are standard procedure on a motion to dismiss. The third alters traditional motion to dismiss procedures by deleting the requirement that all inferences be drawn in favor of the plaintiff.

The Court went on to define "strong" by citing a standard dictionary definition under which the term means "powerful or cogent." At the same time, the Court balanced the potential impact of these terms by returning to the notion that, in the context of evaluating inferences, "powerful or cogent" means equipoise – those inferences supporting scienter must be at least equal to others which point in the opposite direction. To emphasize this point, Justice Ginsburg borrowed the jade falcon example from Justice Scalia's concurring opinion, but rewrote its meaning by saying that either inference of guilt was strong within the meaning of Section 21b(2)(d).[46] In his concurring opinion, Justice Scalia argued that neither was "strong."[47]

In discussing its equipoise inference test, the court also put to rest the debate about what type of evidence is required to support a strong inference. Without citing any Second Circuit decisions, the court stated that evidence of motive and opportunity may be important, but it is not necessary. At the same time however, "omissions and ambiguities [in the complaint] count against inferring scienter." The court emphasized that all of the facts pled must be considered, including those in documents incorporated by reference and those recognized by judicial notice.[48]

The two concurring and one dissenting opinion offered alternative tests. Justice Scalia, in his concurring opinion, chided the majority, suggesting that his jade falcon example did not really illustrate a "strong" inference. Rather, the phrase "strong inference" suggested that the inference supporting scienter had to be *more plausible* than the inference of innocence."[49] Justice Alito, concurred with the majority and Justice Scalia, but added that only inferences from facts pled with particularity should be considered.[50] In contrast, Justice Stevens argued for a probable cause standard in his dissenting opinion.[51]

Analysis

Tellabs is a balanced decision keyed to eliminating securities fraud suits which lack merit at the outset of the case and before the burdens of discovery can be imposed on defendants, while permitting those which may have merit to proceed. This approach is consistent with the goals of the Reform Act, which sought to eliminate the prospect that suits lacking in merit would re-

sult in substantial settlements because of the burdens of discovery but permit those which may be meritorious to proceed.

The decision in *Tellabs* is neither pro-business nor pro-plaintiff. Rather, the decision is pro-facts of the case. This pro-facts approach is implemented in part by redefining the rules for deciding a motion to dismiss. Under the traditional approach, a plaintiff was given every benefit of the doubt when faced with a motion to dismiss. Indeed, the approach to such motions favored permitting plaintiff to proceed with discovery. Defendants thus faced a playing field tilted heavily in favor of plaintiffs.

In contrast, following *Tellabs*, defendants in securities fraud cases will have their motions to dismiss considered on a level playing field. Under *Tellabs*, the determination on such a motion is now keyed to an evaluation of the factual basis of the claims, carefully considering the particularized facts and circumstances that must be included in the complaint. Now, all of the allegations in the complaint will be considered along with all of the competing inferences, not just those drawn in favor of the plaintiff. Indeed, *Tellabs* requires the court considering a motion to dismiss to carefully assess all the inferences which can be drawn from the facts to determine if those supporting scienter are at least as strong as those supporting an alternative explanation. This is a significant departure from prior practice.

A critical element of the new motion to dismiss process crafted by *Tellabs* may well increase the difficulty of pleading a claim for fraud in a securities fraud case. A little noticed directive by the Supreme Court requires that the court examine all allegations in the complaint, documents incorporated by reference *and* those of which the court takes judicial notice. Neither the parties nor the SEC suggested broadening the base of facts to be considered beyond those in the complaint. Under *Tellabs*, plaintiffs will have to carefully evaluate not only the allegations they choose to present, but also the full range of facts that defendants may have available to offer to the court. Thus, plaintiffs will be required to much more carefully examine the factual predicate of their claims by evaluating all available facts before filing or face dismissal. This should end pleading games in which selective portions of documents and facts are presented in the hope of propelling the case into discovery and achieving what may be an unwarranted settlement. This was a key Reform Act goal.[52]

Critical to the new *Tellabs* procedures and test is the broad discretion it vests in the district court. The Supreme Court gave district courts little specific guidance to follow when evaluating the competing inferences in a securities fraud complaint beyond the directive that all must be considered. Indeed, the only specific comments on evidence made by the Court noted that motive and opportunity—the old Second Circuit test—may support a strong

inference, but its absence is not dispositive and that omissions and ambiguous allegations may be construed against plaintiff. In some instances, such as in the Ninth Circuit, this may result in a lesser pleading burden for plaintiffs since *Silicon Graphics* may effectively have been overruled. In other jurisdictions, such as the Second and Third Circuits, the pleading burden may have been increased. The decision as to whether a complaint proceeds or is dismissed, however, is keyed to the factual basis of the claims and the sound discretion of the district court.

Conclusion

The "jade falcon" standard and its new procedures will significantly alter the way in which securities fraud cases are brought as well as the decision on whether they will proceed past initial motions. In filing a complaint, plaintiffs will now have to carefully consider not just the factual allegations they select for inclusion in the complaint, but also facts and inferences from those facts which may be in other materials the court may chose to consider in evaluating the sufficiency of the complaint. This will undoubtedly make it more difficult to bring a private securities fraud complaint.

The new *Tellabs* procedures will also give defendants added protections by eliminating the old pro-plaintiff motion to dismiss procedures with its tilted playing field. Now, in private securities fraud cases, the focus will be on the facts supporting the claims. The decision on a motion to dismiss will be made on a level playing field, not one skewed in favor of plaintiff by pleading rules.

Nevertheless, it would be inappropriate to label *Tellabs* pro-business or pro-plaintiff. The theme of the decision is balance—a balanced test for evaluating inferences, and a balanced procedure for evaluating the sufficiency of a complaint. The promise of *Tellabs* is decisions that reflect the facts of the case and not procedural gerrymandering. The promise of *Tellabs* is that it implements the theory of the Reform Act that only suits which potentially have merit will proceed past the initial stages, while those which lack merit will be terminated rather than precipitating undeserved settlements and attorney fee awards. From now on the key question at the beginning of a private securities case will be whether the "jade falcon" standard has been met.

NOTES:

1. 127 S. Ct. 2499, 2504 (2007).
2. The Private Securities Litigation Reform Act, 15 U.S.C. § 78u.
3. *See, e.g.*, H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995); S. Rep. No. 98, 104th Cong., 1st Sess. 8 (1995).
4. *Tellabs*, 127 S. Ct. at 2502.
5. *Id.* at 2509.
6. *Id.* at 2510.

7. *Id.*

8. *Id.* at 2517.

9. 15 U.S.C. § 78u-4(b)(2).

10. The Conference Report to the Reform Act notes, for example, that securities fraud suits were routinely filed "whenever there is a significant change in the issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995). The Reform Act reflects that Congress also understood that a "complaint alleging violations of the Federal securities laws is easy to craft and can be filed with little or no due diligence." S. Rep. No. 98, 104th Cong., 1st Sess. 8 (1995). *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (noting the vexatious nature of securities suits).

11. As the *Tellabs* court notes: "Congress prescribed new procedures for the appointment of lead plaintiffs and lead counsel. This innovation aimed to increase the likelihood that institutional investors – parties more likely to balance the interests of the class with the long-term interests of the company – would serve as lead plaintiffs." *Tellabs* 127 S. Ct. at 2507. In the Reform Act Congress also limited recoverable damages and attorney's fees. 15 U.S.C. §§ 78u-4(e) and 78u-4(f)(2)(B)(ii); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

12. Exchange Act Section 21D(b)(1) requires that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). Section 21D(b)(3)(B) of the Exchange Act provides for a stay of discovery while the court considers a motion to dismiss. 15 U.S.C. § 78u-4(b)(3).

13. Fed. R. Civ. P. 8(a), which generally governs pleading, requires only that the complaint contain a short and plain statement of the claim showing that plaintiff is entitled to relief. *See, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

14. 15 U.S.C. § 78u-4(b)(2).

15. *See Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992).

16. Fed. R. Civ. P. 9(b) specifies that it does not apply to pleading statements of mind.

17. *See, e.g., In re Time Warner, Inc. Sec. Litig.*, 9 F.3d 259 (2nd Cir 1993); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049 (2nd Cir 1993); *see generally*, 5A Wright & Miller, Federal Practice and Procedure, § 1301.1 at 300.

18. *In re GlenFed, Inc Sec. Litig.*, 42 F.3d 1541 (9th Cir. 1994) (en banc); *see also In re Stac Elec. Sec. Litig.*, 89 F.3d 1399 (9th Cir. 1996).

19. *See, e.g., In re HealthCare Compare Corp., Sec. Litig.*, 75 F.3d 276 (7th Cir. 1996).

20. The House Conference Report, for example, suggests that Congress intended to create a uniform pleading standard. At the same time, the Report indicates that Congress wanted to raise the pleading standards to eliminate abuse. H.R. Conf. Rep. 104-369 at 31, 41.

21. The Statement of the Managers for the bill notes that: "The Conference Committee language is based in part on the pleading standard of the Second Circuit. The standard also is specifically written to conform the language to Rule 9(b)'s notion of pleading 'with particularity.' Regarded as the most stringent pleading standard, the Second Circuit requirement is that the plaintiff state facts with particularity, and that those facts, in turn, must give rise to a 'strong inference' of the defendant's fraudulent intent. Because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit's case law interpreting this pleading standard." H.R. Conf. Rep. No. 104-369 at 41 (1995).

22. "The Committee does not intend to codify the Second Circuit's caselaw interpreting [the] pleading standard, although courts may find this body of law instructive." H.R. Conf. Rep. No. 104-369 at 15.

23. A fourth issue concerned the continued viability of the "group pleading" doctrine. Prior to the PSLRA, some Circuit Courts had permitted alleged fraudulent statements in the periodic filings

of issuers to be attributed to directors and officers. Thus, for example, in *Wool v. Tanden Computers, Inc.*, 818 F.2d 1433, 1440 (9th Cir. 1987) the court held that "[i]n cases of corporate fraud where the false or misleading information is conveyed in prospectuses, registration statements, annual reports, press releases, or other 'group-published information,' it is reasonable to presume that those are the collective actions of the officers." *See also Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 367-68 (1st Cir. 1994). In *Tellabs*, the circuit court held that although there is significant debate about this doctrine, it read the Reform Act as requiring that a "strong inference" be plead as to each defendant. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 558, 603 (7th Cir. 2006). The Supreme Court noted that it would "not disturb" this ruling since it had not been presented for review. *Tellabs*, 127 S. Ct. at 2511. Some might argue that this comment endorsed the ruling of the circuit court.

24. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). There the Court held that a claim under Exchange Act Section 10(b) and Rule 10b-5 thereunder must be based on scienter. The Court reserved the question of whether scienter included conduct based on recklessness.

25. *See Ottmann v. Hanger Orthopedic Group, Inc.*, 353 F.3d 338 (4th Cir. 2003) (collecting cases).

26. *In re Silicon Graphics Inc., Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999).

27. *Id.* at 979.

28. 166 F.3d 529 (2nd Cir. 1999).

29. *Id.* at 538 (2nd Cir. 1999); *see also In re Advanta Corp., Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999).

30. *Silicon Graphics*, 183 F.3d at 974.

31. *Id.*

32. *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 196 (1st Cir 1999).

33. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

34. *See* notes 11, 12 and 21, *supra*.

35. *Compare Aldridge v. A.T. Cross Cop.*, 284 F.3d 72 (1st Cir. 2002) (no change) *with Greebel v. FTP Software, Inc.* 194 F.3d 185, 195-196 (1st Cir. 1999).

36. *Id.* at 896.

37. *Pirraglia v. Norvell, Inc.*, 339 F.3d 1182, 1188 (10th Cir. 2003).

38. *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (6th Cir. 2001) (en banc).

39. *Tellabs* 127 S. Ct. at 2509.

40. *Makor Issues*, 437 F.3d at 601.

41. *Id.*

42. *Id.* at 599.

43. *Tellabs*, at 2510.

44. *Id.* at 2502.

45. *Id.* at 2512.

46. *Id.*

47. *Id.* at 2517.

48. *Id.* at 2509.

49. *Id.* at 2512.

50. *Id.* at 2515.

51. *Id.* at 2516.

52. Prior to the passage of the Reform Act, some courts began to consider limited material on a motion to dismiss such as the remaining portion of SEC filing quoted or cited in the complaint. *See Armbruster Prods., Inc. v. Wilson*, No. 93-2427, No. 93-2428, No. 93-2449, 1994 U.S. App. LEXIS 24796 at *5 (4th Cir. Sept. 12, 1994) ("When ruling on a motion for judgment on the pleadings, the District Court is not limited to the pleadings themselves, but may take judicial notice of the facts where appropriate").