No. 07-1384

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellant,

v.

JAMES TAMBONE; ROBERT HUSSEY,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts

SUPPLEMENTAL BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION ON REHEARING *EN BANC*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

DISCUSSION 4

A. The Supreme Court Has Expressly Reiterated the Longstanding Principle That, in a Commission Enforcement Action, Section 10(b) Should Be Construed Not Technically and Restrictively, but Flexibly to Effectuate Its Remedial Purposes; the Policy Considerations for Limiting Judicially Implied Private Actions Are Not Present in a Commission Case 4

B. Rule 10b-5(b) Should Properly Be Construed to Prohibit the Defendants' Use of the Misleading Prospectuses to Sell Shares . . . 9

C. The Implied Representation Theory Is a Vital Component of the Commission's Regulation of Securities Professionals; the Commission's Interpretation of Rule 10b-5(b) to Include Implied Representations Is Entitled to Deference 15

D. Tambone's Assertion That the Panel's Aiding and Abetting Decision Depended on the Implied Representation Theory Is Without Merit 18

CONCLUSION 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

Cases **Page**

Affiliated Ute Citizens of Utah v. United States,
406 U.S. 128 (1972) 6, 9

Auer v. Robbins,
519 U.S. 452 (1997) 17

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 7,8

In re Cabletron Systems, Inc.,
311 F.3d 11 (1st Cir. 2002) 14

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) . . . . 5, 7, 8 *passim*

Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,
480 F.2d 341 (2d Cir. 1973) 13

Cleary v. Perfectune, Inc.,
700 F.2d 774 (1st Cir. 1983) 19

Dirks v. SEC,
681 F.2d 824 (D.C. Cir. 1982), *rev'd on other grounds*,
463 U.S. 646 (1983) 6

Duker & Duker,
6 S.E.C. 386 (1939) 16

Elkind v. Liggett & Myers, Inc.,
635 F.2d 156 (2d Cir. 1980) 14

TABLE OF AUTHORITIES (Cont'd)

Cases (Cont'd) **Page**

Massachusetts v. United States,
522 F.3d 115 (1st Cir. 2008) 17

Merrill Lynch, Pierce, Fenner & Smith v. Dabit,
547 U.S. 71 (2006) 5, 6, 7

Reass v. United States,
99 F.2d 752 (4th Cir. 1938) 12

Schaffer v. Timberland Co.,
924 F. Supp. 1298 (D. N.H. 1996) 14

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1972) 6

SEC v. First Jersey Securities, Inc.,
101 F.3d 1450 (2d Cir. 1996) 16

SEC v. Tambone,
550 F.3d 106 (1st Cir. 2008), *reh'g en banc granted, opinion withdrawn by* SEC v. Tambone, 573 F.3d 54 (1st Cir. 2009) . . . . 3, 11, 14 *passim*

SEC v. Zandford,
535 U.S. 813 (2002) 5, 6

State v. O'Neil,
24 Idaho 582, 135 P. 60 (1913) 12, 13

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148, 128 S. Ct. 761 (2008) 7, 13, 15

TABLE OF AUTHORITIES (Cont'd)

Cases (Cont'd) **Page**

United States v. O'Hagan,
521 U.S. 642, 664 (1997) 7, 8

United States v. Szur,
289 F.3d 200 (2d Cir. 2002) 16

Wright v. Ernst & Young LLP,
152 F.3d 169 (2d Cir. 1998) 15

Statutes and Rules

Securities Act of 1933, 15 U.S.C. 77a, et seq.

Section 17(a)(2), 15 U.S.C. 77q(a)(2) 1, 11

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.

Section 10(b), 15 U.S.C. 78j(b) . . . . 2, 4, 5 *passim*

Investment Company Act of 1940, 15 U.S.C. 80a, et seq.

Section 2(a)(29), 15 U.S.C. 80a-2(a)(29) 10

Rule under the Securities Exchange Act of 1934, 17 C.F.R. 240.0-1, et seq.

Rule 10b-5, 17 C.F.R. 240.10b-5 . . . . 1, 2, 3 *passim*

Miscellaneous

Ezra Weiss, *Registration and Regulation of Brokers and Dealers*
172, 181-82 (1965) 16

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SUPPLEMENTAL BRIEF OF THE
SECURITIES AND EXCHANGE COMMISSION
ON REHEARING *EN BANC*

PRELIMINARY STATEMENT

In its order entered July 22, 2009, this Court, although denying rehearing of the panel's Section 17(a)(2) ruling, granted rehearing *en banc* with respect to the Rule 10b-5(b) issues raised in this case. The Court permitted the parties to file simultaneous supplemental briefs "limited to the Rule 10b-5(b) issues." The Securities and Exchange Commission submits this supplemental brief to address several such issues.

First, as a threshold matter, the Commission addresses the critical distinction, clearly drawn by the Supreme Court, between government law enforcement actions under Section 10(b), which are expressly provided for in the statute, and private rights of action which have been implied by the courts. Policy concerns about the latter cannot narrow the scope of primary liability under Section 10(b) and Rule 10b-5(b) in a Commission enforcement action.

Second, although the panel's ruling on the issue of primary liability under Rule 10b-5(b) was based on an implied representation theory, which the Commission discussed at length in its Rehearing Brief and its Rehearing Reply Brief,[1] the Commission addresses its alternative ground for primary liability under Rule 10b-5(b) which the panel did not reach given its conclusion that the defendants made implied statements of their own. The Commission argued that, by disseminating the prospectuses and referring clients and potential clients to them for information on the funds, the defendants, as top officials of the underwriter, were responsible for the truthfulness and completeness of the key representations made in those prospectuses. If they knew, or were reckless in not

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[1] "Rehearing Brief" refers to the Commission's Brief Regarding Rehearing *En Banc*; "Rehearing Reply Brief" refers to the Commission's Reply Brief Regarding Rehearing *En Banc*, "Panel Brief" refers to the Commission's opening brief before the panel; and "Panel Reply Brief" refers to the Commission's reply brief before the panel.

knowing, that the prospectuses contained untrue statements of material facts, they would be liable under Rule 10b-5(b) as primary violators. *See* Panel Brief at 25, Panel Reply Brief at 4. As the panel characterized the argument, "Tambone and Hussey also made false statements within the purview of Rule 10b-5(b) by adopting the statements of others when they distributed the prospectuses containing false statements." *SEC v. Tambone*, 550 F.3d 106, 131 (1st Cir. 2008), *reh'g en banc granted, opinion withdrawn by SEC v. Tambone*, 573 F.3d 54 (1st Cir. 2009). If this Court determines that the implied representation theory adopted by the panel is insufficient to support a finding of primary liability under Rule 10b-5(b), the Commission believes that the Court is required to consider this alternative ground for reversing the district court's dismissal of its claim.

Third, the Commission addresses briefly the importance of the implied representation theory to the Commission's overall regulation of securities professionals. As we argued in our Rehearing Brief at 16-19, the Commission's long-standing interpretation of underwriters' responsibilities under the antifraud provisions—that is, that an underwriter makes an implied representation regarding the truthfulness and completeness of the disclosure documents—is entitled to substantial deference and must be accepted unless it is plainly erroneous or inconsistent with the regulation.

Fourth, with respect to its aiding and abetting claims, the Commission addresses Tambone's erroneous assertion in his petition for *en banc* review that the panel's decision on the issue of aiding and abetting liability depended on the panel's Rule 10b-5(b) primary liability holding. It did not so depend. Further, in light of the Court's order that supplemental briefing is limited to Rule 10b-5(b) issues, the Commission does not address its aiding and abetting claims under other provisions of the securities laws, but reminds the Court that those claims were also erroneously dismissed by the district court and should be reinstated.

DISCUSSION

A. THE SUPREME COURT HAS EXPRESSLY REITERATED THE LONGSTANDING PRINCIPLE THAT, IN A COMMISSION ENFORCEMENT ACTION, SECTION 10(b) SHOULD BE CONSTRUED NOT TECHNICALLY AND RESTRICTIVELY, BUT FLEXIBLY TO EFFECTUATE ITS REMEDIAL PURPOSES; THE POLICY CONSIDERATIONS FOR LIMITING JUDICIALLY IMPLIED PRIVATE ACTIONS ARE NOT PRESENT IN A COMMISSION CASE.

The Commission believes it is important for this Court to draw a distinction between government law enforcement actions under Section 10(b), which are expressly provided for in the statute, and private rights of action which have been implied by the courts. Hussey and many of the *amici* warn of a flood of *private* litigation if the defendants are held primarily liable under Section 10(b) in this case. But concerns about possible abusive litigation under the implied private

right of action should not be allowed to restrict the scope of the express right of action Congress provided for law enforcement. The Supreme Court has clearly stated, and has expressly reiterated, that in a Commission action the statute should be construed broadly to effectuate its purpose. *See*, *e.g.*, *SEC v. Zandford*, 535 U.S. 813 (2002). Policy considerations concerning private litigation can have no relevance in defining the scope of primary liability under Section 10(b) in a Commission enforcement action.

Since its decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Supreme Court has repeatedly recognized the distinction between the government's express right of action under Section 10(b) and the implied private right. "The 'judicial oak which ha[d] grown from little more than a legislative acorn,' as then-Justice Rehnquist described the rules governing private Rule 10b-5 actions, had [] developed differently from the law defining what constituted a substantive violation of Rule 10b-5," the Court explained in *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 80 (2006) (citation omitted). While the coverage of the Rule had been construed broadly, the Court had imposed limitations on *private* actions because of "policy considerations," the Court said. *Id*.

The Supreme Court's legal analysis in *Dabit* began with the statement: "The

magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." 547 U.S. at 78. The Court then emphasized the importance of the Commission's "*express* statutory authority to enforce [Rule 10b-5]." *Id*. at 79 (emphasis added). As the Court had reiterated in 2002 in *SEC v. Zandford*, Congress in adopting the Exchange Act "sought to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *Zandford* at 819 (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972)). Consequently, the Court said, "we have explained that the statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *Zandford* at 819 (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1972)). This is particularly apt in cases like this one involving alleged misconduct of securities professionals, since "[t]here is no identifiable segment of the securities industry whose ethical conduct is more crucial to the attainment of Congress' goals than the ethical conduct of broker-dealers." *Dirks v. SEC*, 681 F.2d 824, 841 (D.C. Cir. 1982), *rev'd on other grounds*, 463 U.S. 646 (1983).

In contrast to expressly authorized law enforcement actions, the Supreme Court has said that it must give "narrow dimensions" to the *implied* private right of

action, a "right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 128 S. Ct. 761, 774 (2008). "[I]n explicating [this] judicially crafted remedy," the Court has found it appropriate to rely on "policy considerations." *Dabit*, 547 U.S. at 80. The Court explained, for example, that when it limited private actions under Section 10(b) to purchasers and sellers in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the main policy consideration was "the widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Dabit*, 547 U.S. at 80 (internal quotation marks omitted). The limitation, however, as the Court was quick to point out, "had no application in Government enforcement actions brought pursuant to Rule 10b-5." *Id*. at 81.

The Supreme Court also drew the distinction between government actions and private actions in *United States v. O'Hagan*, 521 U.S. 642, 664 (1997). The Court noted that the appeals court had misinterpreted its statement in *Central Bank*, 511 U.S. at 191, that "[a]ny person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) *on which a purchaser or seller of securities relies* may be liable as a

primary violator under 10b-5, assuming . . . the requirements for primary liability under Rule 10b-5 are met." The appeals court drew from that statement the conclusion that Section 10(b) covered only purchasers and sellers, as in *Blue Chip Stamps*, even though *O'Hagan* was not a private action. *O'Hagan*, 521 U.S. at 664. But "*Central Bank*'s discussion concerned only private civil litigation under § 10(b) and Rule 10b-5, not criminal liability," the Supreme Court pointed out. *Id*. "Criminal prosecutions do not present the dangers the Court addressed in *Blue Chip Stamps*, so that decision is 'inapplicable' to indictments for violations of § 10(b) and Rule 10b-5," the Court said. *Id*. at 665.

It would be anomalous for this Court to restrict the scope of the express right of action in this case because of policy concerns about the implied private right. As the Supreme Court pointed out in *O'Hagan*, Section 10(b) reaches "*any* deceptive device used 'in connection with the purchase or sale of any security.'" 521 U.S. at 651 (emphasis added). Where, as here, the Commission has alleged deceptive conduct by the defendants themselves—not merely that they gave "aid to [another] person who commits a [] deceptive act," *Central Bank*, 511 U.S. at 177)—the Commission has properly alleged primary liability as required by *Central Bank*. Any further limitation on the scope of primary liability would be unwarranted.

B. RULE 10B-5(b) SHOULD PROPERLY BE CONSTRUED TO PROHIBIT THE DEFENDANTS' USE OF THE MISLEADING PROSPECTUSES TO SELL SHARES.

Rule 10b-5(b) makes it unlawful for any person, directly or indirectly, to "make" any untrue statement or omission in connection with the purchase or sale of a security. Although the proscriptions of Section 10(b) and Rule 10b-5 "are broad and, by repeated use of the word 'any,' are obviously meant to be inclusive," *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. at 151, the defendants and the dissent urge a narrow construction of the word "make" as used in Rule 10b-5(b). They would limit liability for making a statement to the drafting of the statement. But drafting the statement is only part of the process. Here, Tambone and Hussey, by directing the dissemination of the misleading prospectuses in order to induce investors to buy the fund shares, and by referring clients and potential clients to the prospectuses for information on the funds, *did* make the untrue statements, albeit in conjunction with others. "In any complex securities fraud, * * * there are likely to be multiple violators." *Central Bank*, 511 U.S. at 191.

It seems self-evident that any statute or rule that prohibits making a false statement in connection with the sale of property would cover a seller who knowingly uses misleading sales materials, even though the sales materials may

have been prepared by someone else. If, for example, the seller provided prospective purchasers with an out-of-date description of the property that had been prepared by a previous owner and was now no longer accurate, no one would think that the seller was not, in this context, the maker of the untrue statement, much less that he was only an aider and abetter of the previous owner. Even if the seller told prospective purchasers that the description had been prepared by the previous owner, unless he also said that it was no longer accurate, the clear implication would be that it was still correct.

Where sellers of securities, particularly securities professionals such as Tambone and Hussey, market and sell securities by means of false and misleading offering materials, their liability for their own deceptive conduct should not depend on who authored the misleading statements they disseminate.[2] Indeed, the

[2] It should be noted that the shares offered and sold by underwriters are often shares purchased by the underwriters from the issuer and held in their own account. In such cases, the underwriters are not acting merely as agents of the issuer. The "principal underwriter" for a mutual fund is defined in Section 2(a)(29) of the Investment Company Act of 1940, 15 U.S.C. 80a-2(a)(29), as an underwriter who *as principal purchases or has the right to purchase shares from the mutual fund for distribution*, or who as agent for the mutual fund sells or has the right to sell mutual fund shares to dealers or to the public. In his Responsive Brief in Support of Petition for Rehearing *En Banc*, Tambone explained (p. 9) that "[t]he principal underwriter typically purchases shares of the mutual fund, which shares are sold to the investing public by the principal underwriter itself or through broker-dealers retained by the principal underwriter on behalf of the (continued...)

author may not even have known (or been reckless in not knowing) that the statements were false when he wrote them. Although Columbia Advisors, the author of the prospectuses in this case, did in fact know about the market timing arrangements that Tambone and Hussey had entered into, it is easy to imagine a case in which the adviser would be unaware of such arrangements, and would innocently prepare prospectuses stating that no such arrangements were permitted. An underwriter who used such prospectuses knowing them to be false would not be aiding and abetting the adviser's fraud—the adviser would have committed no fraud—but either would be primarily liable under Section 10(b) for his own deceptive conduct in disseminating the misleading prospectuses, or would be free from any liability under Section 10(b) whatsoever.[3] The latter cannot have been the intent of Congress (or of the Supreme Court in *Central Bank*).

Although the dissent did not believe that the word "make" could be interpreted broadly to include the dissemination of the prospectuses, 550 F.3d at 150, other courts in analogous cases have had no trouble interpreting "make" to

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[2](...continued)
mutual fund."

[3] Of course, in this example the underwriter would still be liable under Section 17(a). However, Section 17(a) covers only sales of securities, not purchases, so it may not be available to the Commission in many instances.

include the dissemination of misleading statements. In a decision four years before Rule 10b-5 was adopted, the Fourth Circuit considered what it meant to "make" a false statement in the context of a statute that made it a crime to "make[] any statement, knowing it be false, for the purpose of influencing in any way the action of a Federal Home Loan Bank upon any application for loan." *Reass v. United States*, 99 F.2d 752 (4th Cir. 1938). The question in the case involved identifying where the false statement could be said to have been made for purposes of jurisdiction: the place where it was composed or the place where it was delivered to the Federal Home Loan Bank. The court of appeals held it to be the latter, noting that it was the communication of the false statements, not merely their drafting, that completes the crime. "The gist of the offense is the attempt to influence the [bank]." 99 F.2d at 755. The bank could not be influenced until the false statements were communicated to it. The Fourth Circuit noted that an "accepted definition of the word 'make' in the Century Dictionary is to put forth; give out; deliver; as to make a speech." *Id.* at n.4. The court also cited an illustrative decision of the Idaho Supreme Court in *State v. O'Neil*, 24 Idaho 582, 135 P. 60 (1913), which considered a statute that made it an offense for any person knowingly to make a report concerning the financial condition of a bank that contained a false statement. The Fourth Circuit quoted the Idaho court:

> The word "makes" as used in that section, has a meaning broad enough to cover the complete commission of the crime defined in said section. It does not have the strained and technical meaning which counsel for appellant would attribute to it. It does not mean the physical or manual act of writing or transcribing the report * * *. The making of the report is the issuance of the report.

Id. (quoting *State v. O'Neil*, 135 P. at 63). The same logic applies in this case. Indeed, in *Stoneridge*, 128 S. Ct. at 767 (emphasis added), the Supreme Court found it significant that "Respondents had no role in preparing *or disseminating* Charter's financial statements."

It is also important to remember that Tambone and Hussey had their own professional responsibilities in connection with the marketing and sale of the fund shares. As underwriters, they placed their imprimatur on the offering:

> The investing public properly relies upon the underwriter to check the accuracy of the statements and the soundness of the offer; when the underwriter does not speak out, the investor reasonably assumes that there are no undisclosed material deficiencies. The representations in the registration statement are those of the underwriter as much as they are those of the issuer. * * * Prospective investors look to the underwriter – a fact well known to all concerned and especially to the underwriter – to pass on the soundness of the security and the correctness of the registration statement and prospectus.

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 370 (2d Cir.

1973).[4] In an analogous case, this Court recognized that a person can be primarily liable under Rule 10b-5 for statements authored by a third party under the "entanglement" test articulated by the Second Circuit in *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980). This Court held in *In re Cabletron Systems, Inc.*, 311 F.3d 11 (1st Cir. 2002), that liability may attach to the third party's statements "where the defendants have expressly or impliedly adopted the statements, *placed their imprimatur on the statements*, or have otherwise entangled themselves with [the third party] to a significant degree." 311 F.3d at 37-38 (quoting *Schaffer v. Timberland Co.*, 924 F. Supp. 1298, 1310 (D. N.H. 1996) (emphasis added). It is precisely the role of an underwriter to place his imprimatur on the statements made in the prospectus. Although *Cabletron* and *Elkind* involved the obligation of an issuer to correct statements made by analysts, the reasoning of those cases is equally applicable here.

There is no justification for holding the drafter of a misleading statement primarily liable, but letting the distributor off the hook. Tambone and Hussey were directly involved in the process of deceiving potential investors through the

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[4] The dissent takes issue with our citation of pre-*Central Bank* cases such as *Chris-Craft*, saying they "have no continuing vitality." *Tambone*, 550 F.3d at 152 n.53. But nothing in *Central Bank* affected the role played by underwriters, or the courts of appeals' identification of the duties owed by underwriters to the investing public.

use of the false prospectuses. They knew (or were reckless in not knowing) that the prospectuses were misleading, but they went ahead and used them as their marketing materials. As alleged in the amended complaint, Tambone and Hussey not only disseminated the prospectuses but "referr[ed] clients and potential clients to them for information on the funds." JA-9[¶9]. This conduct was itself deceptive as required by *Central Bank* for primary liability. And, unlike in *Stoneridge*, this deceptive conduct was not attenuated, part of an "indirect chain that [was] too remote for liability." 128 S.Ct. at 769. Nor was their role "clearly tangential" to the fraud, as in *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998). Quite the contrary. As underwriters, they were the direct link to investors, and their dissemination of the misleading prospectuses was a necessary step in the sale of the fund shares. As underwriters, Tambone and Hussey were legally prohibited from selling the securities without providing prospectuses to investors. *See* Panel Brief at 8-9.

C. THE IMPLIED REPRESENTATION THEORY IS A VITAL COMPONENT OF THE COMMISSION'S REGULATION OF SECURITIES PROFESSIONALS; THE COMMISSION'S INTERPRETATION OF RULE 10B-5(b) TO INCLUDE IMPLIED REPRESENTATIONS IS ENTITLED TO DEFERENCE.

In addition to the discussion in all four of our prior briefs specifically about the implied representation that an underwriter makes, we also pointed out in our

Rehearing Reply Brief (6-7) the Commission's longstanding use of an implied representation theory in connection with the Commission's *overall* regulation of broker-dealers. Since 1939, the Commission has said repeatedly that by hanging out its professional shingle a broker-dealer makes an implied representation that it will treat customers "fairly, and in accordance with the standards of the profession." *Duker & Duker*, 6 S.E.C. 386, 388-89 (1939). This theory has been endorsed by the courts, both before and after *Central Bank*, in various contexts. *See*, *e.g.*, *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996) ("Sales of securities by broker-dealers to their customers carry with them an implied representation that the prices charged in those transactions are reasonably related to the prices charged in an open and competitive market. Hence, a broker-dealer who charges customers retail prices that include an undisclosed, excessive markup violates § 17(a) and § 10(b) of the securities laws." (citations omitted)); *United States v. Szur*, 289 F.3d 200, 212 (2d Cir. 2002) (same).

It is no substitute in these cases for the Commission to charge aiding and abetting. Cases based on the shingle theory typically involve excessive markups, the hypothecation of securities held in customers' accounts, the failure to make timely delivery of securities purchased and paid for by a customer, and the like. *See* Ezra Weiss, *Registration and Regulation of Brokers and Dealers* 172, 181-82

(1965). By their nature, these cases cannot be recast as aiding and abetting cases; it is the broker-dealer's own deceptive conduct that is at issue. Absent primary liability based on the broker-dealer's implied representation, the deceptive conduct would in many cases escape any liability under the securities laws. Thus, a determination by this Court that an implied representation is not sufficient for primary liability under Rule 10b-5(b) would undermine a vital historical component of the Commission's regulatory arsenal.

The Court should not reject an implied representation theory as applied to securities underwriters. As we pointed out in our Rehearing Brief at 16-19, the Commission has long interpreted Rule 10b-5 to cover, as here, an underwriter's implied representation that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in offering documents. This interpretation is entitled to "substantial deference" and must be accepted unless it is plainly erroneous or inconsistent with the regulation. *Massachusetts v. United States*, 522 F.3d 115, 127 (1st Cir. 2008) (citing *Auer v. Robbins,* 519 U.S. 452, 461 (1997)). The Commission's interpretation plainly is not inconsistent with the regulation, and it is difficult to see how the Commission's interpretation could be plainly erroneous. As we demonstrated in our Rehearing Brief at 10-15, and our Rehearing Reply Brief at 6-9, the

Commission's interpretation is consistent with both the common law of fraud and deceit, and the decisions of every court of appeals that has considered the matter, both before and after *Central Bank*. The Supreme Court said nothing in *Central Bank* that would justify this Court in rejecting the Commission's view. None of the briefs filed by the defendants or the *amici* that support them point to any language from *Central Bank* or any other Supreme Court case that dictates such a narrow view in a Commission enforcement action.

D. TAMBONE'S ASSERTION THAT THE PANEL'S AIDING AND ABETTING DECISION DEPENDED ON THE IMPLIED REPRESENTATION THEORY IS WITHOUT MERIT.

As this Court's order granting rehearing *en banc* notes, Tambone asserts in his Petition for Rehearing and Rehearing *En Banc* (at 10) that the panel's decision upholding the Commission's claims against him for aiding and abetting was erroneous because it depended on the panel's 10b-5(b) primary liability holding. This assertion is unsupported and without merit. Tambone raised several arguments before the panel in favor of dismissing the Commission's aiding and abetting claims,[5] but not the argument that there had been no primary violation of Section 10(b) by Columbia Advisors. Since Columbia Advisors' liability was

[5] The Commission addressed these arguments in its Panel Brief (44-47) and its Reply Brief (22-27); the panel discussed them at 550 F.3d at 144-46.

uncontested, the panel's decision with respect to Tambone's aiding and abetting liability could not, as Tambone asserts, have "suffer[ed] from the same flawed analysis that underlies its § 10(b) holding."

As the panel pointed out, to establish a claim of aiding and abetting, the Commission must prove:

> (1) the commission of a violation by the primary party;
>
> (2) the defendant's general awareness that his role was part of an overall activity that is improper; and
>
> (3) knowing and substantial assistance of the primary violation by the defendant.

550 F.3d at 144 (citing *Cleary v. Perfectune, Inc.*, 700 F.2d 774, 777 (1st Cir. 1983). As to the first element, the panel found that the Commission sufficiently alleged that Columbia Advisors was "primarily responsible for writing all statements made in the fund prospectuses." *Id.* The panel did not base its decision with respect to the primary violation by Columbia Advisors on an implied representation theory or any other allegedly "flawed analysis" of primary liability.

With respect to the second element, the panel concluded that Tambone "knew or should have known that the prospectuses contained false and misleading statements regarding market timing practices." 550 F.3d at 145. In this regard, the panel found it significant that Tambone had "a duty to review the accuracy of

the prospectus disclosures." *Id*. Likewise, with respect to the third element, the panel found that Tambone's "failure to correct the misleading disclosures in the prospectuses, given [his] duties as [an] underwriter[], as well as [his] use of those prospectuses to sell the funds to investors, substantially assisted Columbia Advisors in its own primary violations." *Id*. These elements do not depend on an analysis, flawed or otherwise, of primary liability under Section 10(b). Rather, the panel's holding properly recognizes the duties owed by an underwriter to his clients, duties that the courts have uniformly acknowledged. Although the dissent did not think that such duties gave rise to an implied representation sufficient for primary liability under Rule 10b-5(b), no one on the panel thought that an underwriter had no such duties. Judge Selya "fully agree[d] that underwriter-executives owe a duty to their clients and those who purchase securities." 550 F.3d at 153 (Selya, J., dissenting). Although Tambone claims that the panel's reasoning was flawed, he gives no support for such a conclusion. The aiding and abetting claims dismissed by the district court should be reinstated.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Commission's Panel Brief, Panel Reply Brief, Rehearing Brief, and Rehearing Reply Brief, the order of the district court dismissing this case should be reversed, and the case remanded to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2009, I caused two copies of the Supplemental Brief of the Securities and Exchange Commission On Rehearing *En Banc* to be served on counsel for the Appellees and the *Amici*, by overnight courier for next day delivery, as follows; and delivered the requisite copies of such brief to the clerk by overnight courier:

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