STONERIDGE INVESTMENT PARTNERS V. SCIENTIFIC-ATLANTA: RETHINKING THE FRAUD-ON-THE-MARKET PRESUMPTION AND THE POLICY CONSIDERATIONS PERMEATING THE COURT'S DECISION

INTRODUCTION

Recent corporate scandals have led many Americans to demand accountability for fraud in the securities markets.[1] After losing billions in the wake of the Enron and Worldcom scandals, investors started questioning the integrity of the securities in which they invested.[2] This, however, was not the first time American investors and policy makers entertained concerns over the safety of the securities markets.[3] Outraged by corporate deception and unfair trade practices in the early 1930s, Congress enacted § 10(b) of the Securities Exchange Act of 1934 to ensure effective punishment of fraudulent practices in the securities markets.[4] For over fifty years, the Supreme Court's decisions reflected that, under § 10(b), fraud would not be tolerated.[5] Recently, however, the Court has made it increasingly difficult for injured investors to maintain § 10(b) claims against persons defrauding the market.[6]

Part I of this Comment explains pertinent case law, economic theory, and legislation prior to *Stoneridge*. Part II summarizes the holding in *Stoneridge*. Part III analyzes *Stoneridge*, criticizes the Court's holding, and provides suggestions for a more appropriate rule. This Comment concludes that the recent holding in *Stoneridge* unnecessarily raises the hurdle for primary actor liability by further limiting the fraud-on-the-market presumption of reliance in contravention of the economic principles supporting that presumption. In the end, the Court's decision is a reflection of pro-business policy considerations that degrade the integrity of U.S. securities markets.

1. *See* Celia R. Taylor, *Breaking the Bank: Reconsidering* Central Bank of Denver *After Enron and Sarbanes-Oxley*, 71 MO. L. REV. 367, 384 (2006).
2. *See id.* at 375, 384.
3. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 779-80 (2008) (Stevens, J., dissenting).
4. *See* Securities Exchange Act of 1934 § 10(b), 48 Stat. 881 (1934) (current version at 15 U.S.C.A. § 78(j) (West 2008)); *see also* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 195 (1994).
5. *See Cent. Bank of Denver,* 511 U.S. at 192-94 (Stevens, J., dissenting).
6. *See id.*; *see also Stoneridge*, 128 S. Ct. at 768.

I. BACKGROUND

A. *Section 10(b) of the Securities Act of 1934 and Rule 10b-5*

In response to public outcry following manipulative trading practices leading up to the Great Depression, Congress enacted § 10(b) making it:

> unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [T]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[7]

With the express authority of Congress as embodied in § 10(b), the Securities and Exchange Commission (SEC) propounded Rule 10b-5 to combat fraudulent activities in the markets by making it unlawful:

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[8]

Not surprisingly, the intent of Congress in enacting § 10(b) was to promote honest securities markets and rebuild investor confidence after the stock market crash of 1929.[9] Congress designed the broad scope of § 10(b)'s language as a "catchall" provision to prevent fraudulent activities in securities markets.[10] Moreover, the purpose of the 1934 Act was to ensure fairness in the impersonal securities markets where, traditionally, common-law remedies had failed defrauded investors.[11] In sum, Congress enacted § 10(b) to preserve fairness and integrity in America's securities markets.[12]

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7. 15 U.S.C.A. § 78(j) (West 2008).

8. 17 C.F.R. § 240.10b-5 (2008). Rule 10b-5 is the SEC's implementation of § 10(b). *See* United States v. O'Hagan, 521 U.S. 642, 651 (1997). Accordingly, for purposes of this Comment, use of the term "a § 10(b) claim" refers to both the statutory provision and the SEC Rule 10b-5.

9. *See O'Hagan*, 521 U.S. at 658.

10. *See* Chiarella v. United States, 445 U.S. 222, 246 (1980) (Blackmun, J., dissenting).

11. *Id.* at 248.

12. *Id.*; *see also* H.R. REP. NO. 94-229, at 91 (1975) (Conf. Rep.), *as reprinted in* 1975 U.S.C.C.A.N. 321, 322.

1. The Elements of a § 10(b) Claim

During eighty years of jurisprudence, the Court has established that to maintain a claim under § 10(b), a plaintiff must generally prove: (1) a material misrepresentation or omission; (2) scienter;[13] (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation.[14] The Court, however, noted that deceptive conduct[15] could also satisfy the first element.[16]

B. Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Company[17]

In *Superintendent of Insurance of the State of New York v. Bankers Life and Casualty Company*, the Supreme Court recognized that § 10(b) carried an implied right of action for private plaintiffs.[18] In *Bankers Life*, respondent Bankers Life agreed to sell all of the stock of Manhattan Casualty Company to a third party for $5,000,000.[19] However, the buyer conspired to pay for the stock using Manhattan's own assets.[20] Manhattan investors were deceived into believing that the assets were being used to fund the purchase of government bonds.[21] Importantly, the statutory text of § 10(b) does not explicitly confer the right for private parties to maintain suits.[22] Yet, the Court interpreted § 10(b)'s broad remedial language to implicitly confer a private right of action.[23] Thereafter, defrauded investors had a powerful remedy under § 10(b) to disgorge persons engaging in securities fraud of their ill-gotten gains.

C. Chiaralla v. United States[24]

In *Chiaralla v. United States*, the Court expanded upon the rule that a misrepresentation stemming from nondisclosure of material information under Rule 10b-5 is not actionable unless the actor had a duty to

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13. Scienter, to put it succinctly, is a wrongful state of mind. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, 197 (1976).

14. Dura Pharms, Inc. v. Broudo, 544 U.S. 336, 341 (2005).

15. "Deceptive act" is an ever-changing term. Prior to *Stoneridge*, the prevailing definition included only a misrepresentation or an omission by one with a duty to disclose. *See infra* notes 81-83. In *Stoneridge*, however, the Court recognized that a "deceptive act" included not just misrepresentations and omissions, but other unspecified "deceptive conduct." *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769-70 (2008).

16. *See Stoneridge*, 128 S. Ct. at 769 (holding that it was erroneous for the circuit court to conclude that only misstatements or omissions by one with a duty to disclose are deceptive under § 10(b). The Court noted that a deceptive act does not require a specific written or oral statement for liability to attach).

17. 404 U.S. 6 (1971).

18. *Id.* at 13 n.9.

19. *Id.* at 7.

20. *Id.*

21. *Id.* at 8-9.

22. *See* 15 U.S.C.A. § 78(j) (West 2008) (conferring power only to the SEC to promulgate appropriate regulation).

23. *Bankers Life*, 404 U.S. at 12-13, 13 n.9.

24. 445 U.S. 222 (1980).

disclose the information to investors.[25] In *Chiaralla*, the defendant worked for a financial printer that frequently handled corporate takeover bids.[26] The defendant would decipher insider information regarding takeovers and subsequently buy stock in those companies.[27] When the information was released to the public, the defendant sold his shares and made a significant profit.[28] The crux of the case concerned whether a defendant's silence could be considered a manipulative or deceptive device under § 10(b).[29] Using corporate insider trading and fiduciary relationships as its guide, the Court concluded that § 10(b) liability does not attach to a defendant's silence in the absence of a duty to disclose the information stemming from a position of trust.[30]

D. *The "Efficient Market" Theory*

The efficient market theory is an economic hypothesis relied upon by the Court,[31] as well as lower federal courts,[32] and is the backbone of the fraud-on-the-market presumption.[33] In short, the theory proposes that well-developed markets are "informationally efficient."[34] In particular, the theory holds that within well-developed impersonal trading markets any public information regarding a particular security is quickly seized upon by investors and therefore reflected in the market price.[35] For example, misinformation about a company's increased earnings that reaches the efficient market will very quickly be acted upon by investors. In light of the earnings information, some investors will buy or sell the stock of that company. The buying and selling, based in part upon the misinformation about earnings, will lead to an increase in trading activity and therefore an increase or decrease in the stock's price. In sum, the efficient market theory holds that in well-developed markets, all public information, good or bad, is reflected in a security's market price.[36]

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25. *Id.* at 228.
26. *Id.* at 224.
27. *Id.*
28. *Id.*
29. *Id.* at 226.
30. *Id.* at 235.
31. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 248-49 (1987) (applying the efficient market theory).
32. *See, e.g.*, *In re* PolyMedica Corp. Sec. Litig. v. PolyMedica Corp., 432 F.3d 1, 14-17 (1st Cir. 2005) (applying the efficient market theory).
33. *See* William O. Fisher, *Does the Efficient Market Theory Help Us Do Justice in a Time of Madness?*, 54 EMORY L.J. 843, 847-49 (2005).
34. *See In re* PolyMedica, 432 F.3d at 14-17.
35. *See* Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1240-41 (1990).
36. *See* Roger J. Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 25 WM. & MARY L. REV. 373, 374-81 (1984); *see also* Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970); *see also In re* LTV Sec. Litig., 88 F.R.D. 134, 142-47 (N.D. Tex. 1980) (providing detailed descriptions of the history of the efficient market hypothesis and its application to the fraud-on-the-market presumption).

There are actually three distinct forms of the efficient market theory: the weak form, the semi-strong form, and the strong form.[37] The weak form simply states that past information has no bearing on a security's future market price.[38] The weak form is largely ignored by the courts.[39] In contrast, the strong form dictates that both public and private information is already reflected in a security's market price.[40] Similar to the weak form, the strong theory has also been uniformly rejected by the courts.[41] However, the semi-strong form states that a security's market price reflects all public information.[42] It is the semi-strong form that has been generally accepted by the courts and forms the basis for the fraud-on-the-market presumption of reliance.[43]

Eventually, the efficient market theory was used to support the "random walk" investing theory which states that markets are so efficient it is impossible for any investor to "beat" the market using information that is available to the rest of the investing public.[44] The basis of the random walk theory is that any public information an investor obtained would already be reflected in the market price thereby offsetting that investor's ability to use the information to his tactical advantage.[45]

To be sure, the efficient market theory has come under fire for some of its limitations.[46] In general, however, the concept that all public information has the ability to influence a security's market price is fairly well accepted.[47]

E. Basic Incorporated v. Levinson[48]

In *Basic Incorporated v. Levinson*, the Court established the standard that a plaintiff (or class of plaintiffs) can satisfy the reliance re-

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37. *See* Nathaniel Carden, *Implications of the Private Securities Litigation Reform Act of 1995 for Judicial Presumptions of Market Efficiency*, 65 U. CHI. L. REV. 879, 883-41 (explaining three forms of the efficient market theory).

38. *Id.* at 883.

39. *See id.*

40. *See id.*

41. *Id.*

42. *Id.*

43. *See id.* at 883-84. As the courts have generally adopted the semi-strong form of the efficient market theory, use of the term "the efficient market theory" within this Comment refers to the semi-strong form.

44. *See* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET 100 (W.W. Norton & Company Inc. 2007) (1973) (providing brief overview of the random walk theory and the efficiency of capital markets).

45. *See id.*

46. *See* Frederick C. Dunbar and Dana Heller, *Fraud on the Market Meets Behavioral Finance*, 31 DEL J. CORP. L. 455, 531 (2006) (concluding that the efficient market is not efficient during market bubbles); *see also* Note, *Securities law—Fraud-on-the-Market—First Circuit Defines An Efficient Market for Fraud-On-The-Market Purposes.—In re* Polymedica Corp. Securities Litigation, *432 F.3d 1 (1st Cir. 2005)*, 119 HARV. L. REV. 2284, 2289-90 (2006) (stating that an efficient market may respond to all information, but it does not respond to all information with an equal effect on market price).

47. *See* Carden, *supra* note 37, at 883-84.

48. 485 U.S. 224 (1988).

quirement of § 10(b) by virtue of a defendant's "fraud on the market."[49] In that case, petitioner Basic, Inc., entertained offers to merge but concurrently issued three public announcements stating that it was not considering a merger.[50] Plaintiffs as a class alleged that they sold their stock after Basic, Inc., made its first denial and that Basic, Inc.'s misrepresentations regarding the merger artificially depressed the value of the company's stock.[51] Because plaintiffs were a class, determining each individual's reliance on Basic, Inc.'s statements would overwhelm the common elements of the case.[52]

To remedy this problem, the Court fashioned the fraud-on-the-market rebuttable presumption of reliance, which is based in large part on the economic principles and scholarship surrounding the efficient market theory.[53] In creating the presumption, the Court reasoned that in modern impersonal securities markets, the market itself performs a valuation function by transmitting information regarding the market price of a security.[54] The Court adopted the views of the Third Circuit's opinion in *Peil v. Speiser*,[55] by reciting that:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements . . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.[56]

In *Basic*, the Court established that purchasers of stock rely on the integrity of the price of a stock as a reflection of its value.[57] In reaching this position, the Court noted that a significant body of empirical data suggested that market prices are affected by *all available* public information.[58] Accordingly, public misstatements are necessarily reflected in a security's market price.[59] Since no person would "knowingly roll the dice

49. *Id.* at 247.
50. *Id.* at 227.
51. *Id.* at 228.
52. *Id.* at 242.
53. *Id.* at 241-49.
54. *Id.* at 244.
55. 806 F.2d 1154, 1160-61 (3d Cir. 1986).
56. *Basic*, 485 U.S. at 244 (quoting *Peil*, 806 F.2d at 1161).
57. *Id.* at 242.
58. *Id.* at 246 (stating that empirical evidence supports that the market price of shares traded within well-developed markets is a reflection of "all publicly available information, and, hence, any material misrepresentations.").
59. *Id.*

in a crooked crap game," the Court held that all purchasers of securities rely on the integrity of the market.[60]

To invoke the presumption, the Court adopted the same test applied by the circuit court in that case: (1) the defendant made public misrepresentations; (2) the misrepresentations were material; (3) the securities were traded in an efficient market; (4) the misrepresentations would lead a reasonable investor to misinterpret the value of the securities; and (5) the securities were traded in the time period between when the defendant made the misrepresentations and when the truth was revealed to the public.[61] The Court also noted that the second and fourth elements could collapse into a single element.[62]

However, the Court expressly stated that the presumption of § 10(b) reliance under the fraud-on-the-market theory was rebuttable.[63] In an abundance of caution, the Court warned that "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[64]

F. Central Bank of Denver v. First Interstate Bank of Denver[65]

In *Central Bank of Denver v. First Interstate Bank of Denver*, the Court overruled more than thirty years of precedent by holding that an actor's aiding and abetting another's fraudulent conduct was not actionable under § 10(b).[66] In 1986, a public building authority issued bonds to fund a planned residential area.[67] The bonds were secured by land owner assessment liens, which required that the value of the land be at least 160 percent of the bonds.[68] The value of the land was to be assessed annually.[69] In 1988, the developer of the land provided an assessment to the Central Bank of Denver that remained largely unchanged from 1986 despite a significant downturn in the real estate market.[70] In response, the Central Bank of Denver demanded a reassessment of the land, but worked with the developer to delay the reassessment until after a bond issue.[71] Prior to the reassessment but after the bond issue, the public building authority defaulted on the bonds.[72] Purchasers of the bonds

60. *Id.* at 247 (quoting Schlanger v. Four-Phase Sys., Inc., 555 F. Supp. 535, 538 (S.D.N.Y. 1982)).
61. *Id.* at 248 n.27.
62. *Id.*
63. *Id.* at 248.
64. *Id.*
65. 511 U.S. 164 (1994).
66. *Id.* at 191.
67. *Id.* at 167.
68. *Id.*
69. *Id.*
70. *Id.* at 167.
71. *Id.* at 167-68.
72. *Id.* at 168.

brought an action under § 10(b) alleging that the Central Bank of Denver aided and abetted the Authority's fraudulent conduct by tacitly agreeing to stay the reassessment until after the bond issue.[73]

In eliminating aider and abettor liability, the Court once again paid close attention to the statutory text of § 10(b).[74] Importantly, the text of the statute only prohibits the use or employment of a manipulative or deceptive act.[75] The Court focused on this language and reasoned that an actor must actually "make" a manipulative or deceptive act in order to be within the purview of § 10(b).[76] In sum, the Court held that an actor does not "use or employ" a manipulative or deceptive act as proscribed by § 10(b) unless that actor "makes" a manipulative or deceptive act such as a material misrepresentation or omission.[77]

Central to its holding, the Court noted that aiders and abettors do not make statements at all, but rather, facilitate the statements of others.[78] Accordingly, the Court reasoned that aiding and abetting was not conduct prohibited by the text of § 10(b) since aiders and abettors do not use or employ (make) a manipulative or deceptive act.[79] The Court was concerned that, were the rule otherwise, aiding and abetting could extend to include actors that did not engage in the conduct Congress intended to proscribe in § 10(b).[80] Another rationale to support the Court's holding was that allowing liability against aiders and abettors circumvented the reliance requirement of a § 10(b) claim.[81] That is, how can a plaintiff rely on a misstatement that is never "made" by the defendant?[82]

However, the Court was not without reservation and at the end of its opinion noted that:

> The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities acts. Any person or entity, in 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 *all* of the requirements for primary liability under Rule 10b-5 are met.[83]

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73. *Id.*
74. *Id.* at 175.
75. *Id.*; *see also* 15 U.S.C.A § 78(j) (West 2008).
76. *Cent. Bank*, 511 U.S. at 176.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 180.
82. *Id.*
83. *Id.* at 191.

In reserving this caveat, the Court made no mention of the language permeating its opinion beforehand, namely, that an actor must use or employ a manipulative *or deceptive act*.[84] Instead, the Court held that a "deceptive act" as mentioned in § 10(b) only includes making a material misstatement or omission.[85] This small textual difference was later found to be erroneous in *Stoneridge*,[86] but nevertheless greatly reduced the perceived scope of conduct encompassed by the term "deceptive act."[87] Indeed, a normal reading of the above caveat seems to suggest that the only conduct prohibited by § 10(b) are manipulative acts or material misstatements or omissions.[88] The text of § 10(b), however, broadly proscribes deceptive acts, which, as plainly evident, encompasses conduct more expansive than merely misstatements and omissions.[89] It was not until *Stoneridge* that the Court acknowledged that a deceptive act could include deceptive *conduct*, not just misstatements and omissions.[90]

1. Chaos After the Storm: § 10(b) Litigation Following *Central Bank*

The Court's opinion in *Central Bank* caused an upheaval in the securities world.[91] Shortly after the Court issued the opinion, Congress enacted the Private Securities Litigation Reform Act of 1995[92] (PSLRA). PSLRA changed the pleading requirements of § 10(b) actions and granted the SEC additional authority in prosecuting aiding and abetting in the securities markets.[93] Originally, the proponents of PSLRA sought a Congressional declaration that aiders and abettors are liable under § 10(b). However, in a legislative compromise,[94] Congress only extended a right of action to the SEC.[95]

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84. *Id.*

85. *See id.* The Court relied on *Santa Fe Industries v. Green*, 430 U.S. 462, 473-74 (1977) to conclude that the term "deceptive act" as it is used in § 10(b) only prohibits the making of a material misstatement or an omission by one with a duty to disclose. This finding, however, was held as erroneous in *Stoneridge*. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).

86. *Stoneridge*, 128 S. Ct. at 769 (stating that it was error for the circuit court to conclude that only misstatements, omissions by one with a duty to disclose, and manipulative trading are "deceptive acts" as proscribed in § 10(b)).

87. Following *Central Bank*, many lower courts interpreted that the only deceptive acts for which § 10(b) liability could attach were material misstatements and omissions by persons with a duty to disclose. *See, e.g.*, Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 384 (5th Cir. 2007).

88. *See id.*

89. 15 U.S.C.A. § 78(j) (West 2008); *see also Stoneridge*, 128 S. Ct. at 775 (Stevens, J., dissenting).

90. *See Stoneridge*, 128 S. Ct. at 769.

91. *See* Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 667 (2004).

92. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (1995).

93. *Id.*

94. *Stoneridge*, 128 S. Ct. at 778-79 (Stevens, J., dissenting).

95. *Id.*; *see also id.* at 771.

In the aftermath, lower courts struggled over the implications of *Central Bank*'s holding.[96] Specifically, while *Central Bank* required that an actor "make" a statement in order for liability to attach, it did not define what actions would suffice for a statement to be considered "made."[97] As a result, three standards developed in the lower courts.[98]

a. The "Bright Line" Test

Jurisdictions subscribing to the bright line test recognize a primary § 10(b) violation only if an actor actually makes a material misstatement attributable to the actor at the time of public dissemination.[99] In order for a misstatement to be attributable to an actor, it must be communicated by that actor directly to the investing public or the actor must have known or should have known that the misstatement would reach the public.[100] According to the bright line rule, an absence of attribution of the deceptive act to the defendant at the time a plaintiff's investment decision was made would circumvent the reliance requirements of § 10(b) and the Court's decision in *Central Bank*.[101] In sum, the bright line test equated "making" a misstatement with attribution of the misstatement to the speaker.[102] The justification for the bright line test is aptly described in *In re MTC Electronic Technologies Shareholders Litigation*:

> [I]f Central Bank is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).[103]

Not all courts, however, interpreted *Central Bank* as requiring attribution of a misstatement to a speaker in order for that speaker to have used or employed the misstatement.

b. The "Participation" Test

Under the participation test it is not necessary that an actor actually make a statement (let alone one attributable to him) to be primarily liable under § 10(b).[104] Rather, an actor must only substantially participate in

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96. *See* Cecil C. Kuhne, III, *Expanding the Scope of Securities Fraud? The Shifting Sands of Central Bank*, 52 DRAKE L. REV. 25, 33 (2004).

97. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

98. *See* Kuhne, *supra* note 96, at 33 (describing the "bright-line" test and the "participation" test); *see also In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 439 F. Supp. 2d 692, 723 (S.D. Tex. 2006) (describing the "scheme" test).

99. *See, e.g.*, Regents of Univ. of Cal. v. Credit Suisse First Boston, Inc. (USA), 482 F.3d 372, 385-86 (5th Cir. 2007); *see also* Gold, *supra* note 91, at 676-78.

100. *See* Kuhne, *supra* note 96, at 34.

101. *Id.*

102. *Id.* at 33.

103. *In re* MTC Elec. Techs. S'holders Litig., 898 F. Supp. 974, 987 (E.D.N.Y. 1995); *see also* Kuhne, *supra* note 96, at 33.

104. *See* Simpson v. AOL Time Warner, Inc., 452 F.3d 1040 (9th Cir. 2006).

the creation of fraud.[105] In effect, the participation test equates *creating* a misrepresentation with *making* a misrepresentation.[106] Under the participation test, conduct such as involvement in the creation of false documents, or overstating revenues without public attribution have been held to be primary § 10(b) violations.[107]

c. Hybrid "Scheme" Liability

Litigation stemming from the Enron scandal created a new standard of liability combining pertinent portions of both the bright line and participation tests.[108] Under "scheme" liability, an actor can be liable for a misrepresentation if it was created with the purpose and effect of furthering a scheme to defraud.[109] In essence, misrepresentations in furtherance of a scheme are considered deceptive acts directly prohibited by the text of § 10(b).[110] That is, misrepresentations in furtherance of a scheme to defraud are primary violations of § 10(b), not aiding and abetting.[111] The Supreme Court rejected scheme liability in *Stoneridge*.[112]

II. STONERIDGE INVESTMENT PARTNERS V. SCIENTIFIC-ATLANTA[113]

A. *Facts*

In late 2000, executives from the cable service provider Charter Communications (Charter) realized Charter's revenue would fall short of Wall Street's projections to the tune of fifteen to twenty million dollars.[114] To cover up the deficit, Charter engaged in a series of deceptive acts with the suppliers of its cable boxes, Scientific-Atlanta and Motorola (Respondents).[115] Particularly, Charter entered into sham deals whereby Charter would overpay a sum of twenty dollars for each cable box and in return, the box providers would use the overpayment to purchase advertising from Charter.[116] Charter would then record the advertising as revenue.[117] All parties were aware that the agreements had no economic substance, yet respondents still agreed to the arrangement.[118]

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105. *See id.* at 1048-50.
106. *Id.* at 1048; *see also* Kuhne, *supra* note 96, at 37-42.
107. *See* Kuhne, *supra* note 96, at 38-39.
108. *See In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 439 F. Supp. 2d 692, 723 (S.D. Tex. 2006).
109. *See id.* at 723-24.
110. *See id.*
111. *See id.* at 724.
112. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 770-72 (2008) (finding that deceptive acts of Respondents engaged in with the purpose and effect of defrauding investors could not satisfy the reliance and causation elements of a § 10(b) claim absent a public disclosure).
113. 128 S. Ct. 761 (2008).
114. *Id.* at 766.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

In order to deceive Charter's auditor, respondent Scientific-Atlanta authored and submitted a false letter to Charter stating that it had increased production costs by twenty dollars per cable box.[119] Similarly, respondent Motorola entered into a contract serving no useful business purpose whereby Charter agreed to purchase a specific number of cable boxes and would pay liquidated damages to respondent Motorola in the amount of twenty dollars per cable box that it did not purchase, with the expectation that Charter would not buy all of the cable boxes and would have to pay the damages.[120] The monies paid in liquidated damages would then be used by respondent Motorola to purchase advertising from Charter.[121] The letters and contracts were backdated to appear as separate transactions from the purchase of advertising in order to not raise any suspicions with Charter's auditor.[122] In total, Charter overpaid Respondents seventeen million dollars that was subsequently used to purchase advertising.[123] As known to all involved, Charter reported the seventeen million as revenue on its financial statements filed with the SEC and disseminated to the investing public.[124]

B. *Procedural History*

When the scheme was uncovered, injured investors brought a class action lawsuit against Charter and certain of its executives, Charter's auditor, and Respondents. The class alleged that by engaging in the fraudulent transactions and affirmatively drafting false backdated documents, both Respondents were liable under § 10(b) as primary actors.[125] Petitioners Stoneridge Investment Partners, L.L.C. (Petitioners) acted as the lead plaintiff.[126] To prove their claim, Petitioners sought to invoke "scheme" liability, alleging that Respondents engaged in deceptive conduct with the purpose and effect of furthering a scheme to make a misrepresentation to investors.[127]

The district court granted Respondents' motion to dismiss for failure to state a claim on which relief could be granted.[128] The Eighth Circuit affirmed the district court's dismissal, reasoning that Respondents did not make misstatements that were relied upon by the class, and therefore, primary § 10(b) liability could not attach.[129] In short, the district and circuit courts ruled that Respondents' conduct did not fit squarely into the caveat reserved by the Court's holding in *Central Bank*; that is,

119. *Id.* at 767.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *See id.*
126. *Id.*
127. *Id.* at 770.
128. *Id.* at 767.
129. *Id.*

Respondents did not make a misstatement that independently satisfied all of the elements of § 10(b). Therefore, Respondents were merely aiding and abetting Charter's deceptive conduct and could not be liable under the precepts established in *Central Bank*.[130]

C. *Majority Opinion*

Justice Kennedy delivered the opinion of the Court, holding that Respondents only aided and abetted Charter and therefore could not be found liable under § 10(b).[131] The Court reasoned that unless Respondents' conduct satisfied all of the elements of a § 10(b) action, Respondents could not be considered primary actors and would be excluded from liability under the rule set forth in *Central Bank*.[132] In determining whether Respondents met each element, the Court acknowledged that the conduct of Respondents would be considered a "deceptive act" as that term is used in § 10(b).[133] In doing so, the Court resolved the ambiguity permeating its earlier decisions and held that a deceptive act included not only misstatements and omissions, but also deceptive *conduct*.[134]

Nevertheless, the Court held that the class could not prove the necessary element of reliance.[135] In rejecting Petitioner's fraud-on-the-market argument, the Court reasoned that Respondents did not make a public statement to the investing public and Charter's filing with the SEC did not mention Respondents.[136] In other words, Respondents' deceptive conduct was not publicly attributable to Respondents.[137] The Court reasoned that Respondents' conduct did not make it "necessary or inevitable" that Charter file the transactions as fraudulent revenue with the SEC.[138] Ultimately, the majority concluded that the investing public had no way of knowing, and therefore no way of relying on, Respondents' deceptive acts.[139]

The majority rejected Petitioners' contention that Respondents should be liable under the hybrid "scheme" liability theory that evolved during the Enron cases after *Central Bank*.[140] Specifically, Petitioners asserted, "in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect."[141] Therefore, Petitioners argued that since Respondents engaged in deceptive conduct with the purpose and effect of de-

130. *Id.*
131. *See id.* at 768.
132. *Id.* at 769.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 770.
139. *Id.* at 769.
140. *Id.* at 770.
141. *Id.*

frauding Charter's investors, Respondents were liable as primary violators of § 10(b) under the "scheme" liability framework.[142] The majority, however, noted that the elements of reliance and causation under the "scheme" theory were too remote for liability to attach.[143] On this point, the Court felt that it would be too tenuous to find that Petitioners relied upon Respondents' deceptive acts when those acts were not directly communicated to the market by Respondents and Petitioners had no way of attributing the acts to Respondents.[144]

The Court reasoned that Petitioners' theory would extend liability beyond the realm of the securities markets (and therefore § 10(b)) and into the realm of day-to-day business.[145] Costs associated with being a publicly traded company would increase and foreign companies would be deterred from entering America's securities markets.[146] Expanding the scope of liability, according to the majority, was not within the statutory language of § 10(b) or the power of the Court.[147]

To buttress its holding, the majority relied on Congress' enactment of the PSLRA after *Central Bank*.[148] Importantly, when enacting the PSLRA, Congress entertained the notion of extending aiding and abetting liability to private citizens under § 10(b) but it ultimately chose not to do so.[149] The majority stated:

> And in accord with the nature of the cause of action at issue here, we give weight to Congress' amendment to the Act restoring aiding and abetting liability in certain cases but not others. The amendment, in our view, supports the conclusion that there is no liability.[150]

D. *Dissenting Opinion*

Justice Stevens, joined by Justices Souter and Ginsburg, dissented based on their view that Respondents' fraud was itself a deceptive act satisfying all of the elements for § 10(b) liability.[151] That is, Respondents conduct was a primary violation of the statute and therefore amounted to more than aiding and abetting.[152] The dissent argued that

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142. *Id.*
143. *Id.*
144. *Id.* at 769.
145. *Id.* at 770.
146. *Id.* at 772.
147. *Id.* at 771.
148. *Id.*
149. *Id.* In fact, SEC Chairman Arthur Levitt suggested extending a private right of action in his testimony and report to Congress. *See Aiding and Abetting Liability Under the Federal Securities Laws: Hearings on the Impact of the Supreme Court's Decision in Central Bank Before the Subcomm. on Securities Comm. on Banking, Housing, and Urban Affairs of the S.*, 103d Cong., 2d Sess. (1994), *available at* 1994 WL 233142; *see also Stoneridge*, 128 S. Ct. at 768-69 (citing S. Hearing No. 103-759, at 13-14) (1994)).
150. *Stoneridge*, 128 S. Ct. at 772.
151. *Id.* at 774 (Stevens, J., dissenting).
152. *Id.*

Stoneridge was distinguishable from *Central Bank* because the Respondents in that case did not actually commit a deceptive act.[153] The dissent believed the majority's view encompassed an overly broad interpretation of *Central Bank* and imposed an inappropriate "super causation" view of reliance unsupported by authority.[154] Specifically, the dissent stated that reliance is not meant to be a difficult hurdle to cross, but traditionally has only required transaction causation.[155] To prove transaction causation, a plaintiff need only show that "but for" the deceptive act, he or she would not have purchased or sold securities.[156] Further, the dissent asserted that the rebuttable presumption of reliance under the fraud-on-the-market theory was created precisely for this type of situation, where investors cannot prove that they relied on the defendant's misrepresentations, but instead relied on the market and were thereafter defrauded.[157]

The dissent noted that Petitioners' theory of liability would not extend to the entire market but only to those persons and entities engaging in fraudulent conduct.[158] In closing, the dissent commented that the 1934 Act was created to prevent fraud and that every wrong deserves a remedy.[159]

III. ANALYSIS

A. *Rethinking the Scope of the Fraud-on-the-Market Presumption of Reliance: The Court Should have Expanded the Applicability of the Presumption when it Held that a "Deceptive Act" Included More than Just Statements and Omissions*

In *Stoneridge*, the Court held that Petitioners could not use the fraud-on-the-market presumption of reliance because Respondents did not make a public misrepresentation as required by *Basic*.[160] Unable to prove reliance, Petitioners could not satisfy all of the elements of a § 10(b) claim and could therefore only be considered aiders and abettors based on the rule set forth in *Central Bank*.[161] The Court, however, applied the elements of the fraud-on-the-market presumption without considering that, at the time *Basic* was decided, and indeed, from the *Santa Fe* decision in 1977 until *Stoneridge* in 2008, the prevailing rule of law was that a deceptive act only included misrepresentations or omissions

153. *Id.*
154. *Id.* at 774-75.
155. *Id.* at 775.
156. *Id.* at 776 (citing Lentell v. Merrill Lynch & Co., 396 F.3d 161, 172 (2d Cir. 2005); Binder v. Gillespie, 184 F.3d 1059, 1065-66, (9th Cir. 1999)).
157. *Id.*
158. *Id.* at 779.
159. *Id.* at 779-82.
160. *Id.* at 769-70 (finding that Respondents' deceptive acts were not communicated to the public and therefore the public did not have any knowledge of those acts).
161. *See id.*

by one with a duty to disclose.[162] When the *Stoneridge* Court overturned this precedent by acknowledging that a deceptive act could include conduct other than a misrepresentation or omission,[163] it should have also considered how this expansion would affect the fraud-on-the-market presumption.

1. Reliance Under the Fraud-on-the-Market Theory Should Not be Limited Solely to a Defendant that Makes a "Public Misrepresentation," but Should Apply to Any Defendant Engaging in a Deceptive Act the Substance of which Becomes Public

The economic principles permeating the fraud-on-the-market theory are equally applicable to information contained in a public misrepresentation as to information contained in a nonpublic deceptive act that is later disseminated to the public.[164] Accordingly, although *Basic* requires that the defendant make a public misrepresentation,[165] the precepts of the efficient market theory underlying *Basic's* holding dictate that any material information that becomes public will influence a security's market price in the same manner as a direct public misrepresentation.[166] In the wake of *Stoneridge*, it has become clear that the Court needs to reconsider whether the fraud-on-the-market presumption applies to deceptive acts other than misstatements. This Comment proposes that, even though *Basic* requires that a defendant speak a misrepresentation to the market, that rule was created when a deceptive act only included misstatements or omissions by persons with a duty to disclose.[167] As an omission inherently cannot be spoken, the *Basic* rule was designed to apply solely to misrepresentations.[168]

In *Stoneridge*, when the Court expanded the scope of conduct amounting to a deceptive act proscribed by § 10(b) it should have recon-

162. *See id.* In *Santa Fe*, the Court inferred that an act is not "deceptive," as that term is used in § 10(b), absent a misstatement or an omission by one with a duty to disclose. *See* Santa Fe Indus. v. Green, 430 U.S. 462, 473-74 (1977). The Court affirmed this rule in *Central Bank*. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994). Generally, in the thirty-one years between *Santa Fe* and *Stoneridge*, the prevailing rule among lower courts reflected that a deceptive act only included misstatements and omissions. *See* Fidel v. Farley, 392 F.3d 220, 235 (6th Cir. 2004); *accord* Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1204-06 (11th Cir. 2001); Wright v. Ernst & Young L.L.P., 152 F.3d 169, 175 (2d Cir. 1998); Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1225-27 (10th Cir. 1996); *In re* Software Toolworks, Inc. Sec. Litig., 50 F.3d 615, 628 n.3 (9th Cir. 1994); *In re* Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804, 914-16 (S.D. Tex. 2004); *In re* Homestore.com, Inc. Sec. Litig., 252 F. Supp. 2d 1018, 1040-41 (C.D. Cal. 2003). Indeed, even the Eighth Circuit applied that test in the lower proceedings of *Stoneridge*. *In re* Charter Commc'ns, Inc., Sec. Litig., 443 F.3d 987, 992 (8th Cir. 2006).

163. *Stoneridge*, 128 S. Ct. at 769.

164. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 244-48 (1987) (stating that empirical studies have shown that a security's market price is a composite of all available public information, and therefore, all public misrepresentations); *see also supra* Part I.D.

165. *See Basic*, 485 U.S. at 247.

166. *See supra* Part I.D.

167. *See Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting).

168. *See supra* Part I.E.

sidered the applicability of the fraud-on-the-market presumption of reliance to deceptive acts other than just misrepresentations instead of determining that the presumption was inapplicable. Notably, the same result is achieved upon a security's market price whether a defendant makes a public misrepresentation or whether that defendant, like in *Stoneridge*, commits a deceptive act in secrecy and the substance of that act later reaches the public through other means.[169] Misinformation that becomes public is not less fraudulent, and does not abstain from influencing a security's market price, simply because the defendant does not communicate it directly to the market.[170]

As the Court noted in *Basic*, the fraud-on-the-market theory is premised on the notion that investors rely on the market price when purchasing or selling a security and that price is affected by all available public information.[171] Importantly, the efficient market theory notes that after information becomes public, it is reflected in the market price.[172] At that point, if the information is false, investors have been defrauded because the market price they are relying upon is not genuine.[173] Surely, if fraudulent information becomes public and is reflected in the market price, then under the efficient market theory it is of little consequence how that information came to the public eye.

Thus, on one hand, the Court in *Basic* noted that all public information is reflected in a security's price,[174] but on the other hand, the Court only allowed the presumption to apply if the defendant made a public misrepresentation.[175] One possible explanation for this inconsistency is that when *Basic* was decided a misrepresentation was the only type of "deceptive act" proscribed by § 10(b) that could be communicated to the public.[176] Thus, the *Basic* court had no occasion to consider whether the fraud-on-the-market presumption could apply to other forms of conduct or communication.[177] As a result, when the *Stoneridge* court acknowledged at the outset of its decision that a "deceptive act" encompassed

169. *See Basic*, 485 U.S. at 243-47; *see also supra* Part I.D. If the efficient market theory and the Court's reasoning in *Basic* hold that a security's market price is affected by *all* public information, then that market price has the potential to be affected by *any* form of information that reaches the public. In this sense, the market price does not distinguish between a public misrepresentation, or a misrepresentation or other deceptive act that is not directly communicated to the public but *becomes* public at a later date through any means.

170. *See Basic*, 485 U.S. at 241-47; *see also supra* Part I.D.

171. *Basic*, 485 U.S. at 241-47.

172. *Id.*; *supra* Part I.D.

173. *See Basic*, 485 U.S. at 241-47; *see also supra* Part I.D.

174. *See Basic*, 485 U.S. at 244-48.

175. *Id.* at 248.

176. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 776 (2008) (Stevens, J., dissenting).

177. *Compare* Santa Fe Indus. v. Green, 430 U.S. 462, 473-77 (1977) (establishing that the term "deceptive conduct" only includes misstatements and omissions by one with a duty to disclose), *with Basic*, 485 U.S. at 248 (holding that the fraud-on-the-market theory only applies to public misrepresentations). *See also Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting).

more than just misrepresentations and omissions, it should not have summarily dismissed the applicability of the fraud-on-the-market presumption of reliance because Respondents had not made a "public misrepresentation."[178] Had the Court considered how expanding the scope of prohibited deceptive acts would affect the fraud-on-the-market presumption, it would have also had to address that the rationale supporting the fraud-on-the-market presumption does not distinguish between information that is directly communicated to the public or arrives there via some other means.[179] To an efficient market, information is information—regardless of its source.[180]

In determining that the fraud-on-the-market presumption did not apply, the Court found it fatal that "no member of the investing public had knowledge, either actual or presumed, of Respondents' deceptive acts."[181] The Court relied on *Basic* for this assertion.[182] However, affirmative knowledge of the defendant's acts appears nowhere in *Basic* and runs contrary to the rationale permeating that decision.[183] Rather, the efficient market theory and the Court's rationale for the fraud-on-the-market presumption in *Basic* speak about how *information* influences the price of a security when it infiltrates the market.[184] It is the mere presence of that information, not the identity of the person supplying that information, that affects a security's market price.[185] Moreover, it is the plaintiff's reliance on the integrity of that price, as opposed to the identity and nature of defendant's actions, that forms the basis for the fraud-on-the-market presumption.[186] If anything, *Basic* holds that a plaintiff using the fraud-on-the-market presumption does *not* need to have knowledge of the defendant's deceptive acts so long as those acts somehow become public and influence the market price of a security.[187]

However, the Court reasoned in *Stoneridge* that knowledge of the Respondents' deceptive acts, by means of attribution of the acts to the Respondents in a public statement, served a vital causation function.[188] Without a clear public statement, the Court felt that it was impossible for the Petitioners to rely on the "Respondents' own deceptive conduct."[189] This reasoning, however, eschews the principles underlying the fraud-on-

178. *See Stoneridge*, 128 S. Ct. at 769.
179. *See Basic*, 485 U.S. at 241-47; *see also supra* Part I.D.
180. *See supra* Part I.D.
181. *Stoneridge*, 128 S. Ct. at 769.
182. *See id.*
183. *See Basic*, 485 U.S. 224.
184. *See id.* at 241-47; *see also supra* Part I.D.
185. *See Basic*, 485 U.S. at 246-47; *see also supra* Part I.D.
186. *See Basic*, 485 U.S. at 246-47 (holding that traders of securities in well-developed markets rely on the integrity a security's market price).
187. *See id.* at 244-49; *see also Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting).
188. *See Stoneridge*, 128 S. Ct. at 769 (stating that a plaintiff's reliance upon a defendant's deceptive act is essential because it ensures a causal connection between the defendant's conduct and the plaintiff's injury).
189. *Id.* at 770.

the-market presumption, which dictate that the fraud-on-the-market plaintiff relies on the integrity of the market's price instead of having to rely on the defendant's own deceptive conduct.[190] The Court circumvented this reasoning by preemptively stating that the fraud-on-the-market presumption was inapplicable.[191] However, as mentioned, this should not have been the case. The dissent stated that the majority applied the wrong standard for causation and used that standard to assert that the fraud-on-the-market presumption did not apply.[192] Instead, the dissent argued that the majority should have looked at causation first, using the correct standard, and it would have found that the fraud-on-the-market presumption sufficed for the Petitioners to at least plead reliance.[193]

This Comment agrees with the dissent's causation and reliance views but also asserts that a causation analysis for a plaintiff using the fraud-on-the-market theory should reflect the market's role, and the Court should have considered this. Notably, the theory of causation applicable to a plaintiff who must prove actual reliance is not perfectly interchangeable with a plaintiff using the fraud-on-the-market theory to establish reliance.[194] The difference lies in the nature of each plaintiff's injury and how each defendant's deceptive acts influenced those injuries.[195]

Take, for example, a plaintiff bringing a traditional § 10(b) claim against a defendant who made a misrepresentation during face-to-face negotiations. In this example, the plaintiff must prove actual reliance on the defendant's misrepresentation and that his or her reliance on that misrepresentation caused economic loss.[196] Here, the plaintiff's injury shares a direct link with the defendant's conduct. There is no middleman. In this hypothetical, if the plaintiff relied on the defendant's misrepresentations and that reliance caused the plaintiff's injury, then the plaintiff has successfully pleaded the reliance and causation elements of

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190. *See Basic*, 485 U.S. at 246-47.

191. *See Stoneridge*, 128 S. Ct. at 769.

192. *See id.* at 776-77 (Stevens, J., dissenting).

193. *See id.* (noting that traditionally, reliance only requires transactional causation, meaning that but for the deceptive act, the plaintiff would not have entered into the securities transaction). In the alternative, the dissent argued that Petitioner had successfully alleged that Respondents' acts proximately caused Charter's misstatement of income and knew that their acts would enter those statements and thereafter the market. *Id.*

194. *Compare Basic*, 485 U.S. at 244-47 (holding that a plaintiff using the fraud-on-the-market presumption relies on the market's integrity and is injured when the defendant's public misrepresentation affects that integrity), *with Stoneridge*, 128 S. Ct. at 769 (holding that a plaintiff not pleading a presumption must prove that he or she directly relied on the defendant's deceptive act). Essentially, a central theme of this Comment is that the Court required Petitioner to show direct reliance on Respondents' deceptive acts and that those acts directly caused Petitioner's injury, when it should have adopted the fraud-on-the-market presumption and allowed Petitioner to rely upon the market.

195. *See Stoneridge*, 128 S. Ct. at 769.

196. *See Stoneridge*, 128 S. Ct. at 769 (inferring that if a presumption of reliance is inapplicable, a plaintiff must prove actual reliance upon the defendant's deceptive act and that the defendant's deceptive act caused plaintiff's injury).

his § 10(b) claim. Because of the direct link between the injury and the defendant's conduct, attribution of the deceptive conduct to the defendant is necessary to prevent circumventing the reliance and causation elements. In sum, a plaintiff who must prove actual reliance is unable to do so absent knowledge of the defendant's identity and deceptive act. Actual reliance is a test with two parties where one person made a statement and the other directly relied on it.

On the other hand, a plaintiff using the fraud-on-the-market presumption is pleading an injury that came to fruition by a different means.[197] Particularly, such a plaintiff is alleging that he or she specifically *did not* rely directly on the defendant's misrepresentation.[198] Instead, he or she relied on the integrity of the market and its reflection of the value of a security as represented by that security's price.[199] The market, in this case, performs a valuation function that is not present in a face-to-face negotiation.[200] Here it is possible for the plaintiff to rely on the price of a security and suffer an injury when that price is affected by misinformation as a result of the defendant's deceptive acts without actually discovering the identity of that defendant or his or her deceptive acts.[201] Accordingly, the plaintiff can suffer an economic loss that is caused by the defendant's deceptive act by virtue of that act infiltrating the market and affecting the market price and, in turn, the plaintiff's reliance upon that price.[202] Causation, in this instance, should reflect that the plaintiff relies on the market instead of the deceptive actor. The introduction of the market changes the nature of plaintiff's reliance as well as how the defendant's conduct causes the plaintiff's injury.[203] Specifically, if reliance is designed to ensure a sufficient causal connection between the plaintiff's injury and the defendant's deceptive act, changing the nature of that plaintiff's reliance should necessarily change the nature of causation.[204] Therefore, in *Stoneridge*, the Court should have found that Petitioners relied on the market's integrity, and that Respondents influenced that market.

The Court declined to follow this reasoning by applying, as aptly put in the dissent, a "super-causation"[205] theory that requires attribution of the deceptive act to the defendant within a public communication.[206] The Court noted that, allowing anything less than public attribution

197. *Basic*, 485 U.S. at 242-49 (noting that a plaintiff proving reliance under the fraud-on-the-market presumption is injured by virtue of the defendant's deceptive act infiltrating the market with misinformation that degrades the integrity of the market price upon which the plaintiff is relying).
198. *Id.* at 241-42.
199. *Id.* at 245-46.
200. *Id.* at 244-45.
201. *See supra* Part I.D.
202. *See Basic*, 485 U.S. at 246-47.
203. *Id.* at 243-45.
204. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).
205. *Id.* at 774.
206. *Id.* at 769-70; *see also id.* at 774-76 (Stevens, J., dissenting).

would result in causation that is too remote.[207] However, this really is not the case. Rather, the causation element has one extra proxy because of the market's role.[208] A causation analysis under the fraud-on-the-market presumption should reflect that it has an additional actor, the market, and that the plaintiff relies on the market.[209] Thus, causation under the fraud-on-the-market presumption should be a test involving three parties: the defendant, the market, and the plaintiff. Specifically, if a defendant's deceptive acts influenced the market, and the plaintiff relied on the integrity of that market, a sufficient causal connection should exist.[210]

There is no question that Respondents used or employed (made) a deceptive act as defined in *Central Bank*.[211] In fact, the Court concedes that Respondents' conduct would be considered a deceptive act under the language of § 10(b).[212] Yet, the Court rests its opinion on the fact that it was Charter, not Respondents, who reported the false revenue to investors.[213] It is inherently contradictory for the Court to state that on the one hand, Respondents committed a deceptive act; while on the other hand, investors could not have relied on that act under the fraud-on-the-market presumption when the substance of it became public and affected the market price. The Court failed to see that Respondents' deceptive act was not just the making of sham contracts; rather, the Respondents were making sham contracts for the sole purpose of inflating Charter's revenue in a statement they knew would be distributed to the public. When that revenue was disseminated to the market[214] and when its falsities surfaced and affected the price of Charter's stock, it is difficult to see how the requisite causal connection was not met under the rationale supporting the fraud-on-the-market theory.

The Court rested its holding on the notion that the securities industry needs a clear and predictable standard with which to conform.[215] *Stoneridge* provides that standard, but for the wrong reasons.

B. *Policy Considerations Underlying Stoneridge*

The explanation for the Court's holding in *Stoneridge* likely comes from policy considerations. Interested parties filed nearly thirty Amicus

207. *Id.* at 769.
208. *Basic*, 485 U.S. at 243-47.
209. *Id.*
210. *See Stoneridge*, 128 S. Ct. at 776 (Stevens, J., dissenting) (arguing that a correct view of causation coupled with the fraud-on-the-market theory should have allowed Petitioners to plead reliance).
211. *See id.* at 769.
212. *Id.*
213. *Id.* at 770.
214. Charter, as a publicly-traded company, was required to disclose its revenue to the SEC for publication. *See, e.g.*, 17 C.F.R. § 229.301(c)2 (2008). Presumably, Respondents were not ignorant of this fact.
215. *Stoneridge*, 128 S. Ct. at 770-72.

briefs in the case.[216] Many of those briefs urged the Court to take the Respondents' position and affirm the circuit court's decision. The Court

216. Amici Curiae Brief of Charles W. Adams and William Von Glahn in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701932; Brief for Amici Curiae States of Arkansas et al. in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701934; Brief for Attorneys' Liab. Assurance Soc'y, Inc. as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363261; Brief for Bus. Roundtable as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363259; Brief for Change to Win and the CtW Inv. Group as Amici Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. 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Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2958946; Brief for the United States as Amicus Curiae Supporting Affirmance, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329639; Brief of AARP et al. as Amici Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701939; Brief of Amici Curiae Am. Ins. Ass'n and Prop. Cas. Insurers Ass'n of Am. in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 3068882; Brief of Cal. State Teachers' Ret. Sys. as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701937; Brief of Council of Institutional Investors as Amicus Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. 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Ct. 761 (2008) (No. 06-43), 2007 WL 2329637; Brief of the Chamber of Commerce of the U.S. as Amicus Curiae in Support of Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363260; Brief of the Def. Research Inst. in Support of Respondents Amicus Curiae for Respondents, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329636; Brief of the Los Angeles County Employees Ret. Ass'n et al. as Amici Curiae in Support of Petitioners, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701940; Brief of the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Respondents , Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363258; Brief of the N.Y. State Teachers' Ret. Sys. et al. as Amici Curiae in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. 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picked up on several general concerns permeating the arguments of Respondents' Amici and those arguments are reflected in the Court's holding.

1. Snowballing Litigation and Keeping Up with the Joneses: Policy Considerations Important to the Court

Sixteen Amici filed briefs in support of Respondents' position, and, while each had its own advice for the Court, several themes emerged. First, Respondents' Amici argued that Petitioners' theory would lead to an explosion of expensive class-action litigation that would in turn make U.S. financial markets less competitive with foreign markets that either do not allow, or significantly limit, class action lawsuits.[217] A second theme alleged that adopting Petitioners' theory would not provide a rule that was "clear and predictable" enough to be administered in the economy at large.[218] Third, Respondents' Amici contended that there are adequate safeguards and deterrents in place to protect against fraud and compensate its victims without the need of a private right of action against aiders and abettors.[219]

a. Class-Action Lawsuits Make U.S. Markets Uncompetitive

As succinctly put by one of Respondents' Amici:

> There is a widely acknowledged perception, backed by empirical evidence, that a hostile U.S. litigation environment materially increased the costs and risks associated with raising capital in the U.S. markets. Several recent studies demonstrated that this environment is a driving force behind the precipitous decline in the U.S. capital market activity.[220]

This argument asserted that class-action lawsuits greatly increase the cost of doing business in U.S. markets and this cost is not present in foreign markets.[221] The main fuel for this argument came from three

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ridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363255.

217. *See, e.g.*, Brief for Attorneys' Liab. Assurance Soc'y, Inc. as Amicus Curiae in Support of Respondents, *supra* note 216, at *9; Brief for Former SEC Comm'rs and Officials and Law and Fin. Professors as Amici Curiae Supporting Respondents, *supra* note 216, at *14-15; Brief for the Am. Inst. of Certified Pub. Accountants as Amicus Curiae in Support of Respondents, *supra* note 216, at *21-22; Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *11.

218. *See, e.g.*, Brief for Bus. Roundtable as Amicus Curiae in Support of Respondents, *supra* note 216, at *17-18; Brief for Richard I. Beattie et al. as Amici Curiae Supporting Respondents, *supra* note 216, at *28; Brief of Merrill Lynch & Co., Inc. as Amicus Curiae in Support of Respondents , *supra* note 216, at 16-19.

219. Brief of the Sec. Indus. and Fin. Mkts. Ass'n and Futures Indus. Ass'n as Amici Curiae in Support of Respondents, *supra* note 216, at *21-23; Brief of the Wash. Legal Found. as Amicus Curiae in Support of Respondents, *supra* note 216, at *12-16.

220. Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *11.

221. *See, e.g.*, *id.*

reports concluding that foreign companies feared entering U.S. markets because of the possibility of class-action lawsuits against them, and that such fears played an important role in the recent decline in U.S. market share.[222] Therefore, allowing § 10(b) liability without public attribution of a misrepresentation to a defendant would lead to a huge increase in the amount of class-action lawsuits resulting in further erosion of U.S. market share.[223] In short, the chilling effect would get colder, encouraging "[f]light to [f]oreign [e]quity [m]arkets, [w]hich [o]ffer [i]ncreasingly [c]ompetitive [a]lternatives."[224]

b. Petitioner's Theory is Not "Clear and Predictable"

Another theme surfaced among Respondents' Amici alleging that if § 10(b) liability was extended to persons who engaged in conduct with the purpose and effect of creating fraud, business transactions would effectively be created on an "ad hoc" basis without the guidance of a clear and predictable rule.[225] This would come as a disadvantage to an area that demands predictability.[226] Importantly, Amici argued that the purpose and effect (the liability theory advanced by Petitioner) of a business transaction is completely subjective, so that persons engaged in legitimate transactions have no clear way of guarding against liability.[227] That is, discerning the purpose and effect of a particular transaction involves a subjective analysis that is of little predictive value. Indeed, Amici feared that conduct that was legitimate during the transaction could later be artfully pleaded to appear as being entered into with the purpose and effect of creating fraud. As stated: "[T]his Court should not create an amorphous and subjective theory of potentially catastrophic liability that would impede the important functions of banks and other financial institutions in providing the financial fuel that drives our Nation's economy."[228] In sum, the parties to business transactions need to know what they can and cannot do in order to avoid § 10(b) liability.

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222. U.S. CHAMBER OF COMMERCE, COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY: REPORT AND RECOMMENDATIONS 30 (2007), *available at* http://www.uschamber.com/publications/reports/0703capmarketscomm.htm; MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 78 (2007), *available at* http://www.schumer.senate.gov/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf; COMM. ON CAPITAL MKTS., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 34 (2006), *available at* http://www.capmktsreg.org/pdfs/11.30 Committee_Interim_ReportREV2.pdf.

223. *See* Brief of Org. for Int'l Inv. et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *14-15.

224. Brief for the Nasdaq Stock Mkt., Inc. & NYSE Euronext as Amici Curiae in Support of Respondents, *supra* note 216, at *12-15.

225. *See, e.g.*, Brief of the Am. Bankers Ass'n et al. as Amici Curiae in Support of Respondents, *supra* note 216, at *15.

226. *See id.*

227. *See id.*

228. *Id.* at *14.

c. Adequate Remedies Already Exist, and Those Remedies Deter Fraud

A third theme advanced by Respondents' Amici argued that adequate remedies are already in place to guard against aiding and abetting without the need for creating a private right of action.[229] Indeed, Amici asserted that aiders and abettors already face significant deterrents under the current rule of law.[230] For example, the SEC can bring actions against aiders and abettors and return ill-gotten profits to injured investors.[231] In fact, Amici reminded the Court that the SEC returned many billions of dollars to investors between 2002 and 2006.[232] Moreover, the Department of Justice is able to bring criminal charges against aiders and abettors.[233] One Amici alleged that criminal prosecution for aiding and abetting had the possibility to not only stigmatize a violator's business prospects, but effectively bankrupt the company.[234] The Securities Industry and Financial Markets Association argued that criminal penalties have the potential to end a career or shut down a company.[235] Lastly, Amici alleged that state law remedies are also in place to guard against fraud.[236]

2. The Court Adopts the Views of Respondents' Amici

Even a cursory review of *Stoneridge* reveals that the views of Respondents' Amici struck a note with the Court. Indeed, the concerns of Respondents' Amici are peppered throughout the Court's opinion, with an entire section devoted to those concerns.[237] The Court touched upon how, if the Petitioner's theory was accepted, "the implied cause of action would reach the whole marketplace in which the issuing company does business."[238] Moreover, the Court noted that Petitioners sought to apply § 10(b) "beyond the securities markets into [the realm of financing business-to-purchase and supply contracts] the realm of ordinary business operations . . . [The latter realm is governed], for the most part, by state law."[239] Additionally, the Court noted that "[s]econdary actors are subject to criminal penalties and civil enforcement by the SEC," and that "both parties agree that criminal penalties are a strong deterrent."[240] Peti-

229. *See, e.g.*, Brief of Former SEC Comm'rs & Officials & Law & Fin. Professors as Amici Curiae Supporting Respondents, *supra* note 216, at *18-19.
230. *Id.* at *18.
231. *Id.*
232. *Id.*
233. *Id.*
234. Brief of the Sec. Indus. & Fin. Mkts. Ass'n & Futures Ind. Ass'n as Amici Curiae in Support of Respondents, *supra* note 216, at *22-24.
235. *Id.*
236. *Id.* at *28.
237. Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 772-74 (2008).
238. *Id.* at 764.
239. *Id.*
240. *Id.* at 773.

tioners' Amici refuted some of Respondents' Amici's arguments; however, none of those arguments appear in the Court's opinion.

3. A Response: Policy Considerations the Court Should Have Noticed

The Court's *Stoneridge* opinion makes it clear that only deceptive acts either (1) communicated to the public by the actor, or (2) identified to the public at the time a security is bought or sold will face liability under § 10(b).[241] Unfortunately, the rule is equally clear to persons seeking to defraud the market: make sure your name stays out of public releases and let someone else do the talking. Fraud in the market is not likely to stop and defrauders are consistently coming up with new ways to cheat investors.[242] To such persons, *Stoneridge* poses no obstacle.

In support for its "clear and predicable" rule, the Court reasons that uncertainty and the increased cost of business under any other rule would not only hinder existing businesses, but deter foreign corporations from entering the American market.[243] Yet, the sanctity of our securities markets does not balance upon either premise. Instead, a single factor binds the market: investor confidence.[244] Simply put, if investors do not believe that the markets are secure, they will invest their money elsewhere. This confidence is derived from investor perception of market integrity.[245] Surely, investors both local and foreign are attracted to the U.S. securities markets because they are the largest and safest in the world.[246] These accolades are not mutually exclusive. To be sure, the U.S. markets are the largest *because* they are the safest.[247]

Concededly, foreign investors and institutions may be somewhat deterred by an increase in the cost of business or capital. However, the financial uncompetitiveness of U.S. markets as envisioned by Respondents' Amici is not solely a result of an increased cost of business secondary to an increase in the amount of class-action litigation.[248] In fact,

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241. *Id.* at 769.

242. *See* Taylor, *supra* note 1, at 389.

243. *Stoneridge*, 128 S. Ct. at 772.

244. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 244-47 (1988); *see also* Taylor, *supra* note 1, at 388.

245. *See Basic, Inc.*, 485 U.S. at 244-47 (1988); *see also* Taylor, *supra* note 1, at 388.

246. See Cheryl Nichols, *H.R. 2179, The Securities Fraud Deterrence and Investor Restitution Act of 2004: A Testament to Selective Federal Preemption*, 31 SUFFOLK TRANSNAT'L L. REV. 533, 537-38 (2008) (explaining that U.S. securities markets are the largest in the world due in part to investor confidence secondary to regulatory framework); *see also* W. Carson McLean, *The Sarbanes-Oxley Act: A Detriment to Market Globalization & International Securities Regulation*, 33 SYRACUSE J. INT'L. L. & COM. 319, 324-25 (2005) (noting that U.S. securities markets are the largest in the world).

247. *See* Nichols, *supra* note 246, at 539-40.

248. *See* Elizabeth F. Brown, *The Tyranny of the Multitude is a Multiplied Tyranny: Is the United States Financial Regulatory Structure Undermining U.S. Competitiveness?*, 2 BROOK. J. CORP. FIN. & COM. L. 369, 376 (2008) (suggesting that, in addition to an increase in class action litigation, expanding the number of regulatory agencies decreases competiveness).

at least one commentator has opined that fear of class actions is but a small facet in the decline of U.S. competiveness in the financial services industry.[249] For example, the initial fee for being listed on the NASDAQ (which, ironically, filed an Amicus brief arguing that class-action litigation is to blame for the decrease in U.S. competitiveness) is approximately $100,000 with a subsequent yearly fee of between $25,000 and $75,000 to maintain the listing.[250] Comparatively, the cost for listing on competitor foreign markets was approximately $7,500 for an initial fee and the same amount yearly to maintain the listing.[251] The fact that listing fees on the NASDAQ are approximately ten times as dear surely undermines the competitiveness of U.S. financial services, along with a myriad of other social and economic factors.[252]

Instead, entering a market is likely a balancing of several pros and cons for any foreign entity. This Comment proposes that such entities do not enter a market solely because it is has the lowest cost of business. If this were true, the U.S. markets would likely be a lot less populated. Rather, entities both local and foreign enter the U.S. markets because of the enormous amount of investors trading and the amount of capital such investors make available for funding new opportunities.[253] However, this market rests on a foundation based upon its integrity, and each chip the Court takes out of that foundation brings the house closer to tumbling down. Congress recognized this when it enacted the 1934 Act. The Court recognized this when it created the fraud-on-the-market presumption. Unfortunately, *Stoneridge* marches to the beat of a different drummer.

Primarily, the Court's unwavering reliance on *Central Bank* was misplaced. The conduct of the defendants in *Central Bank* was considerably more benign than that of Respondents in *Stoneridge*.[254] In *Central Bank*, the defendants merely postponed a land reassessment until a bond issue was complete.[255] In fact, the *Central Bank* Court concluded that such actions did not amount to a deceptive act within the meaning of § 10(b).[256] However, in *Stoneridge*, Respondents not only agreed to engage in a fraudulent scheme, they actively participated by drafting, back-

249. *See id.* at 390.
250. *Id.* at 400.
251. *Id.*
252. *See id.* at 376.
253. *See* McLean, *supra* note 246, at 324-25 (suggesting that U.S. securities markets have the largest amounts of investors and capital available for investment and these attributes make it attractive to foreign companies).
254. *Compare* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 167-68 (1994) (noting that respondent's conduct was delaying a land reassessment until after a bond issue), *with* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc. 128 S. Ct. 761, 766-67 (2008) (explaining that Respondents drafted false contracts and correspondence and backdated those documents to engage in a circular transaction to artificially boost Charter's revenue).
255. *Cent. Bank of Denver*, 511 U.S. at 167-68.
256. *See id.* at 177-78.

dating, and then signing contracts with the sole purpose of defrauding the market.[257] The Court concluded that such actions amounted to "making" a deceptive act as defined in *Central Bank*.[258] In light of this significant factual difference, the Court should have used caution in relying so heavily on *Central Bank*'s precepts.

The dissent implied that since Respondents "made" a deceptive act they should have been considered primary actors under the strictures of *Central Bank*.[259] Applying this reasoning, the Court was not even presented with the issue of aiding and abetting, and, accordingly, its reliance upon the precedent and policy considerations applicable to aiding and abetting are inapposite to the factual scenario presented by the *Stoneridge* Respondents' conduct. As a result of this interpretation, plaintiffs will seize upon the dissent's reasoning and lower courts will likely continue to develop confusing law as to what conduct amounts to primary liability and what is merely aiding and abetting.

Likewise, the Court's rationale that adequate remedies and deterrents are in place falls short of the mark. Specifically, the Court states that the SEC's enforcement is not "toothless," having collected more than $10 billion in disgorgement since 2002.[260] Recently, however, the SEC has pleaded for additional help in the form of a private right of action.[261] While the SEC's efforts may not be entirely toothless, the SEC is an agency of limited resources.[262] In the words of several former SEC commissioners who submitted an Amicus brief in support of Petitioners:

> The SEC's disgorgement and civil money penalty powers, although enhanced by the Sarbanes-Oxley Act, are limited, and will generally cover only a fraction of the damage done to investors by serious securities fraud. "Moreover, the SEC with limited resources cannot possibly undertake to bring actions in every one or even most of the financial fraud cases that have proliferated of the past few years."[263]

The same Amicus proffered that, while the SEC has disgorgement authority, its efforts are not as effective as a private right of action in compensating the victims of fraud.[264] For example, the SEC was only able to disgorge and return approximately $440 million of the nearly $40 billion of claimed losses as a result of Enron.[265] So, while the SEC's

257. *Stoneridge*, 128 S. Ct. at 767.
258. *Id.* at 769.
259. *Id.* at 775 (Stevens, J., dissenting).
260. *Id.* at 773.
261. *See, e.g.*, Simpson v. AOL Time Warner, Inc., 452 F.3d 1040, 1048 (9th Cir. 2006).
262. *See* Taylor, *supra* note 1, at 385.
263. Motion for Leave to File Brief Out of Time & Brief Amici Curiae of Former SEC Comm'rs in Support of Petitioner, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2065260, at *8.
264. *Id.* at 7-8.
265. *Id.* at 8.

authority may not be "toothless," it certainly does not have the bite the Court suggested. At the end of the day, the Court may not be required to defer to the SEC's judgment, however, that does not mean it should ignore it completely.

Perhaps most misguided of all are the Court's continuing efforts to guarantee a "clear and predictable" rule for the business world. In creating such a rule, the Court in *Stoneridge* gives businesses engaging in shady transactions a shield, when the legislative intent behind § 10(b) mandates that it should be giving plaintiffs injured by those transactions a sword.

Respondents (and their Amici) asserted that they did not break any laws and that the contracts they entered into with Charter were completely legitimate.[266] However, when Charter approached Respondents with the revenue-inflating deal, Respondents had to make a decision of whether to participate. On the one hand, Respondents and their numerous counsel presumably knew the current state of the law regarding § 10(b) liability. Indeed, the law was clear and predictable. As the law then existed, Respondents knew that if they did not speak to the public or have a duty to speak they could not be found liable in a private suit for engaging in the sham transactions.[267]

On the other hand, however, Respondents also certainly knew that their dealings with Charter had no economic value and did not serve any decent economic purpose. While those transactions may have been "legitimate" according to the law as it then existed, they definitely did not serve a legitimate purpose.

The question then becomes, what sort of predictable rule most accurately reflects Congress's intent as reflected in §10(b)? As one Senate report noted, §10(b) is designed to prohibit "those manipulative and deceptive practices which have been demonstrated to fulfill no useful function."[268] The Court has departed from the legislative intent it purports to follow by creating a clear and predictable rule that fosters and protects shady business transactions negatively affecting the securities markets. Instead, the Court should seek to create a rule of law that attempts to mend the gap between what is ethical and what is "legitimate."

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266. *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 767 (2008) (stating that Respondents booked the sham "transactions as a wash, under generally accepted accounting principles"); *see, e.g.*, Brief of the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Respondents, *supra* note 216, at *15 (noting that under the rule applied by the Eighth Circuit an entity can only be held liable for violating § 10(b) it makes an affirmative misrepresentation or omits facts it had a duty to disclose).

267. *See Cent. Bank of Denver*, 511 U.S. at 180 (refusing to consider reliance to be met when one does not make a misstatement or omission when there is a duty to disclose).

268. FLETCHER, FEDERAL SECURITIES EXCHANGE ACT OF 1934, S. REP. NO. 73-792, at 6 (1934).

CONCLUSION

The Supreme Court's recent decision in *Stoneridge* is a win for persons engaging in fraud in the securities markets. The Court incorrectly determined that fraud-on-the-market theory did not apply and foreclosed Petitioners from asserting that they relied on the integrity of the market instead of on Respondents ' deceptive acts. The Court should have considered how expanding the scope of conduct encompassed by the term "deceptive act" would affect the applicability of the fraud-on-the-market presumption of reliance. This, along with a correct view of causation, would have allowed Petitioners to at least plead that Respondents' deceptive acts caused their injuries.

The Court should have noticed that, as in this case, a misrepresentation communicated directly to the public by the defendant has the same result in the market as a deceptive act committed in secrecy and later disseminated to the public. In both instances the market price is affected. Since all investors are presumed to rely on the price of a security[269] when making a trading decision, it should not matter whether that price was influenced by a direct public misrepresentation or a deception that became public at a later date. As the results are the same, the fraud-on-the-market presumption of reliance should be available under either scenario, not just for direct public misrepresentations.

Further, the chain of causation for a plaintiff applying the fraud-on-the-market presumption should no longer be compared to a standard of actual reliance. The Court should recognize that the market is an additional actor in the chain of causation for plaintiffs using the fraud-on-the-market presumption. As in this case, if the defendant committed a deceptive act, and the substance of that act reached the market, and the plaintiff was relying on the integrity of that market, a sufficient causal nexus should exist.

Instead, it appears that the Court's decision was based largely upon pro-business policy considerations proffered by Respondents and their Amici. These considerations, however, are lack-luster. The competitive edge of U.S. securities markets is influenced by a myriad of social and economic factors other than just its cost of doing business. In fact, the most significant competitive advantage of our securities markets is that their size enables an enormous amount of capital to fund the businesses that need it. However, the size of our markets is secondary to their safety. Simply put, more money is available in U.S. securities markets because investors feel comfortable leaving it there. The Court's decision in *Stoneridge* should cause those investors to question the depth of that safety.

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269. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 247 (1988).

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