No. 06-1341

IN THE

Supreme Court of the United States

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,
v.

MERRILL LYNCH PIERCE FENNER & SMITH, INC.; MERRILL LYNCH & COMPANY, INC.; CREDIT SUISSE FIRST BOSTON (USA), INC.; CREDIT SUISSE FIRST BOSTON LLC; PERSHING LLC; BARCLAYS PLC; BARCLAYS BANK PLC; BARCLAYS CAPITAL INC.,
Respondents.

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

BRIEF IN OPPOSITION

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June 1, 2007

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PARTIES TO THE PROCEEDING

Respondent Merrill Lynch & Company, Inc. is a publicly traded corporation. The parent corporation of respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is Merrill Lynch & Company, Inc. No publicly held corporation, other than Merrill Lynch & Company, Inc. owns 10% or more of the stock of Merrill Lynch, Pierce, Fenner & Smith, Inc. No publicly held corporation owns 10% or more of the stock of Merrill Lynch & Company, Inc.

The following entities are parent corporations or publicly held corporations that own 10% or more of the stock of respondent Credit Suisse First Boston (USA), Inc. (n/k/a Credit Suisse (USA), Inc.):

Credit Suisse Group
Credit Suisse
Credit Suisse Holdings (USA), Inc.

The following entities are parent corporations or publicly held corporations that own 10% or more of the stock of respondent Credit Suisse First Boston LLC (n/k/a Credit Suisse Securities (USA) LLC):

Credit Suisse Group
Credit Suisse
Credit Suisse Holdings (USA), Inc.
Credit Suisse (USA) Inc.

The following entities are parent corporations or publicly held corporations that own 10% or more of the stock of respondent Pershing LLC:

Pershing Group LLC
The Bank of New York Company, Inc.

Respondents Barclays Bank PLC and Barclays Capital Inc. are wholly-owned subsidiaries of Barclays PLC, which has no parent corporations. No other publicly held company owns

10% or more of the stock of Barclays PLC, Barclays Bank PLC or Barclays Capital Inc.

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BRIEF IN OPPOSITION

Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch & Co., Inc. ("Merrill Lynch"), Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston LLC and Pershing LLC ("CSFB"), and Barclays PLC, Barclays Bank PLC and Barclays Capital Inc. ("Barclays") (collectively, "respondents") hereby oppose the petition for a writ of certiorari in this case.

Petitioner's rhetoric regarding Enron cannot obscure the fact that this is a tag-along petition and an inherently flawed vehicle for review of the question presented. Because the petition has mischaracterized the record and the law, this opposition is longer than usual.

Certiorari should not be granted for three independently sufficient reasons. *First*, as framed by petitioner, the petition presents the same question as in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, No. 06-43 ("*Stoneridge*"), in which certiorari was granted on March 26, 2007. Nothing justifies the waste of the Court's resources that would follow from a duplicative grant in this case.

Second, this case is an inferior vehicle to *Stoneridge* because it brings with it the highly factbound complexities of reviewing an interlocutory denial of class certification. If certiorari were granted, the Court would be presented with briefing concerning at least four non-certworthy issues that provide alternative grounds for affirming the judgment of the court of appeals denying class certification. These alternative grounds provide a compelling reason not to grant certiorari.

Third, petitioner's strained merits arguments do not justify the extraordinary measure of granting a tag-along petition. Petitioner's recycled arguments would effectively nullify both *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A*,. 511 U.S. 164 (1994), and Congress's subsequent ratification of *Central Bank*. In holding that

respondents' alleged conduct does not fall within the ambit of § 10(b), the court of appeals properly applied *Central Bank's* holding that: "As in earlier cases considering conduct prohibited by [Section] 10(b), we again conclude that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act." *Id.* at 177. Because respondents made no material misstatement (as found by the district court), had no duty to speak that could create liability for an omission (as confirmed by the court of appeals), and have never been accused of market manipulation, the result below correctly applies *Central Bank*.

COUNTERSTATEMENT OF THE CASE

The amended consolidated complaint in this putative class action named as defendants Enron officers and directors, Enron's outside auditor Arthur Andersen and certain of its partners, two of Enron's outside law firms, and several banks, including Merrill Lynch, CSFB, and Barclays.

Respondents are alleged to have violated, among other provisions, Section 10(b) of the Securities Exchange Act of 1934 ("the 1934 Act") by participating in a "scheme to defraud" Enron investors. The alleged "scheme" is petitioner's legal contrivance that attempts to string together scores of acts by Enron and its senior officers over a more than three-year period, in which nearly one hundred defendants and non-defendants purportedly knowingly participated. Petitioner alleges that respondents participated in this "scheme" by engaging in some of the more than 60 distinct financial transactions that were allegedly part of the "scheme." For this, petitioner contends that each of those defendants is subject to joint and several liability for alleged damages that essentially equal Enron's entire market value over a three-year period.

The record on the class certification appeal alone consists of more than 39,000 pages. Although the limited space available does not permit this brief to describe the full variety

of statements, transactions, and other conduct that petitioner has alleged comprise the "scheme," petitioner alleges that all of that conduct allowed Enron to misstate its publicly filed financial statements. No bank is alleged to have participated in preparing any of those financial statements or to have provided any accounting advice to Enron. Moreover, both the district court and court of appeals found that the banks owed no duty of disclosure to Enron shareholders given the absence of any fiduciary or special relationship to those investors. Pet. App. 15a, 123a.

Respondents entered into a variety of financial transactions with Enron at different times and with varying degrees of frequency. Nevertheless, petitioner seeks to hold each respondent jointly and severally liable for approximately $40 billion of damages allegedly caused by Enron's alleged overarching "scheme," without regard to what acts each defendant allegedly performed, when during the class period each defendant transacted with Enron, what losses each defendant's conduct may have caused, or whether a defendant had any knowledge of the conduct and transactions of other alleged "scheme" participants. Put another way, petitioner uses the word "scheme" to mean a hub-and-spoke conspiracy, with Enron as the hub.

The district court certified a class of "all persons who purchased Enron securities between October 19, 1998, and November 27, 2001, and were injured thereby." Pet. App. 6a. The class certification order explicitly and wholly relied on petitioner's theory of "scheme" liability that purportedly derived from the language in Rule 10b-5(a) and (c). Pet. App. 155a-164a. The district court concluded that Rule 10b-5(a) and (c), and therefore Section 10(b), imposes liability on any counterparty where that counterparty and the issuer engaged in any transaction where "the principal purpose and effect [wa]s to create a false appearance of revenues, intended to deceive investors in the issuer's stock." Pet. App. 164a.

The district court then concluded that a classwide presumption of reliance (essential for class certification) could be applied based on petitioner's theory of "scheme" liability. Pet. App. 5a, 165a-167a. The court concluded that the fraud-on-the-market presumption of reliance applied to any "scheme" participant if a subsequent false statement by the issuer "flow[s] from" the participant's transaction, even when the market was completely unaware of the transaction and the participant. *Id.*

The district court ruled that it would be appropriate to hold each defendant who participated in this alleged "scheme" jointly and severally liable for the full losses shareholders allegedly suffered as a result of the *entire* alleged scheme. Pet. App. 194a. As a result, any defendant alleged to have participated in the "scheme" to any degree (even by way of a single transaction with a relatively minimal effect on Enron's financial statements) at any time during the class period could be held liable for all shareholders' losses over the entire class period, including losses from "conduct of other scheme participants about which it knew nothing." *Id.*

The court of appeals granted discretionary review under Fed. R. Civ. P. 23(f) and unanimously ruled that the class certification order could not stand as against the respondents. All three members of the panel recognized that respondents were not alleged to have made any misrepresentations, Pet. App. 2a, 33a, or to have participated in market manipulation, Pet. App. 26a-29a, 41a n.7, and that petitioner and the putative class were not entitled to a presumption of reliance under *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-54 (1972), because respondents owed no duty of disclosure to Enron's shareholders. Pet. App. 14a-16a, 34a n.3. The petition does not challenge these rulings.

Petitioner only challenges the panel majority's conclusion that it was improper to certify a class against respondents because the banks' alleged conduct did not amount to a "deceptive act" under Section 10(b) upon which the market

could be legally presumed to have relied. Pet. App. 17a. The court of appeals concluded that the district court's expansive theory could not be squared with *Central Bank*. Pet. App. 18a. Expressly agreeing with *In re Charter Communications, Inc. Securities Litigation*, 443 F.3d 987 (8th Cir. 2006), *cert. granted in Stoneridge*, and following the text of Section 10(b) and this Court's precedent, the court of appeals concluded that a "deceptive" act under § 10(b) requires "'either a misstatement or a failure to disclose by one who has a duty to disclose.'" Pet. App. 21a; *see generally* Pet. App. 17a-25a. Because the respondents made no misrepresentations and lacked the duty to disclose to Enron shareholders necessary to create liability based on an omission, there was no "deceptive act" by respondents upon which the market could have relied, and hence no basis to apply the fraud-on-the-market presumption of classwide reliance: "Here . . . where the plaintiffs had no expectation that the banks would provide them with information, there is no reason to expect that the plaintiffs were relying on their candor. Accordingly, it is only sensible to put plaintiffs to their proof that they individually relied on the banks' omissions." Pet. App. 16a. The majority remanded the case for further proceedings. Pet. App. 32a.

Judge Dennis's concurrence stated that class certification should be vacated on an independent ground. While he did not reject the theory of "scheme" liability adopted by the district court, Judge Dennis rejected the district court's expansive view of joint and several liability. Pet. App. 55a-57a. Judge Dennis stated that not all respondents are primarily liable to all investors, and that no respondent can be held jointly and severally liable for the losses suffered by an investor as to whom that respondent is not primarily liable. Such a limitation on joint and several liability, Judge Dennis recognized, meant that loss causation might be a predominant individual issue, and the class device might not be a superior method for adjudication. He would have remanded to the

district court to consider those issues under a narrower standard for joint and several liability. Pet. App. 57a.

REASONS FOR DENYING THE PETITION

I. THIS PETITIONER PRESENTS THE SAME ISSUE AND ARGUMENTS PRESENTED BY THE PETITIONERS IN *STONERIDGE*.

Petitioner contends that "this case should be reviewed with *Stoneridge* as a superior vehicle to resolve the scheme-liability issues." Pet. at 28. In fact, this Petition merely repeats the question presented and arguments already made in *Stoneridge* and is an inferior vehicle to *Stoneridge*. This Court apparently recognized as much when it granted certiorari in *Stoneridge* on March 26, 2007. On March 20 and 21, 2007, the Court received two letters requesting that the Court defer ruling on the *Stoneridge* petition so that an imminent petition from the Fifth Circuit's decision could be "considered concurrently."[1] The Court instead granted certiorari in *Stoneridge*. The briefs of the *Stoneridge* petitioners and supporting *amici* will be filed on June 11.

A duplicative grant of certiorari would not aid this Court because the petitioners in *Stoneridge* and this case frame substantially identical questions presented. The question presented in *Stoneridge* is:

> Whether this Court's decision in *Central Bank* . . . forecloses claims for *deceptive* conduct under § 10(b) . . . and Rule 10b-5(a) and (c) . . . , where Respondents engaged in transactions *with a public corporation* with no legitimate business or economic purpose except to inflate artificially the public

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[1] *See* Letter to the Clerk of the Court from Joseph W. Cotchett dated March 21, 2007 in *Avis Budget Group, Inc., f/k/a Cendant Corporation v. California State Teachers Retirement System*, No. 06-560 ("*Avis*"); Letter to the Clerk of the Court from William S. Lerach dated March 20, 2007. Copies of both letters are appended hereto.

> corporation's financial statements, *but where Respondents themselves made no public statement concerning those transactions*.

Stoneridge Pet. at i (emphases added). The petitioner in this case presents substantially the same question:

> Does liability exist under § 10(b) . . . and . . . Rule 10b-5, where an actor knowingly uses or employs *deceptive* devices and contrivances, as part of a scheme to defraud investors in *another public company*, *but itself makes no affirmative misrepresentations to the market*?

Pet. at i (emphases added).[2] Nowhere does the petition in this case argue that it is raising a legal issue not raised in *Stoneridge*.[3] To the contrary, petitioner states that *Stoneridge* "similarly presents the scheme-liability issue." Pet. at 6 n.11.

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[2] Each version of the question presented by the petitioners in *Stoneridge* and here is argumentative and thus contrary to Sup. Ct. R. 14.1(a). For example, each version assumes that what the petitioners have alleged falls within the proper definition of "deceptive" conduct under Section 10(b), but that is a disputed legal issue that was decided to the contrary by both the Eighth and Fifth Circuits.

This petition also violated Sup. Ct. R. 14.1(f), which requires that "statutes" be "set out verbatim." In setting out § 10(b), after emphasizing "*indirectly*," the petition *substitutes an ellipsis* for "by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange." Pet. at 2. This omission is particularly improper because, as petitioner surely knows, there is authority that "indirectly" modifies the adjacent omitted phrase, setting forth the required federal nexus, rather than modifying "deceptive," which occurs two subparts and 109 words after the omitted phrase. Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 Cal. L. Rev. 80, 94-95 n.83 (1981).

[3] Petitioner cannot belatedly raise any such purported arguments for the first time in its reply brief. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 6.38, at 462-63 (8th ed. 2002) ("Stern & Gressman") (Rules "prevent" petitioner's reply from offering an "enlargement of arguments made in the petition. If counsel knows that a

Thus, granting certiorari in this tag-along case would provide no benefit to the Court or to the development of the securities laws. Not only are the questions as framed by the petitioners the same, but so too are their legal arguments. Petitioner here, as in *Stoneridge*, proceeds only under the "deceptive" prong of Section 10(b) and does not claim market manipulation. *See* Pet. at i, 8, 15-16, 18-19; *Stoneridge Pet.* at i, 9, 14-15, 21-23. As in *Stoneridge*, petitioner concededly does not seek to impose liability for a misrepresentation made by respondents or for a breach of a duty to disclose owed by respondents based on a fiduciary or other special relationship. *See* Pet. at i, 15, 19, 22; *Stoneridge Pet.* at i.

Rather, petitioners in both cases argue that "secondary actors" can be liable for participating in "inherently deceptive" transactions that were "communicated to the market through" the public company alone. Pet. at 8, 19-20; *Stoneridge Pet.* at 13-15, 18-19, 24-25. Their arguments parrot each other:

- Both contend that *Central Bank* has no effect on the standards for primary liability of secondary actors. *Compare* Pet. at 23-24, *with Stoneridge Pet.* at 14-15; *Stoneridge Reply* at 2-3.
- Both contend that Section 10(b) covers "conduct" even in the absence of misrepresentations, a duty to disclose based on a fiduciary or special relationship, or market manipulation. *Compare* Pet. at 12, 21-22, 26, *with Stoneridge Pet.* at 11-12, 16-20; *Stoneridge Reply* at 1, 6-7, 9.
- Both contend that Section 10(b) should be construed flexibly in light of its remedial purposes, *compare* Pet. at 11, 26, *with Stoneridge Pet.* at 13, 17, and its scope is coextensive with the differently worded Rule 10b-5, rather than the

point is in the case, it should be dealt with as fully as necessary in the petition, without awaiting the opponent's treatment of the question.").

statutory text controlling. *Compare* Pet. at 12, 16-17, *with Stoneridge Pet.* at 11, 17.

- Both contend that Rule 10b-5(a) and (c) would be rendered meaningless if liability were limited to a misrepresentation by the secondary actor, omission by a defendant with a duty to disclose, or market manipulation. *Compare* Pet. at 22-23, *with Stoneridge Pet.* at 11; *Stoneridge Reply* at 6.
- Both argue for the identical construction of Section 10(b)'s language. *Compare* Pet. at 16, *with Stoneridge Pet.* at 11.
- Both contend that respondents' conduct affected the stock price of the issuer despite the absence of a public misrepresentation by or duty to disclose of the defendants at issue. *Compare* Pet. at 24-25, *with Stoneridge Pet.* at 13-14, 24-25.

Petitioners' overlapping merits contentions have been vigorously disputed in both cases, and were rejected by both courts of appeal.

The lone supporting argument presented here and missing in the *Stoneridge* petition is the assertion that the common law supports liability. Pet. at 18-19. It is not surprising that the *Stoneridge* petition omitted this argument; an asserted conflict between a federal statutory interpretation and the common law is not a traditional basis for granting certiorari. If petitioner in this case wishes to assert a legal argument that petitioners in *Stoneridge* may not emphasize, the proper vehicle is an *amicus* brief in *Stoneridge*, not a duplicative grant.[4] Moreover, as *Central Bank* held, Section 10(b) is not as broad as the common law in reaching secondary actors. *See* 511 U.S. at 184. In any event, common law fraud by concealing information – as opposed to aiding and abetting –

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[4] Petitioner recently filed an *amicus* brief in *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, No. 06-484.

has traditionally required direct dealings between plaintiff and defendant, which are absent here. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 106, at 736-37 (5th ed. 1984); *Restatement (Second) of Torts* § 550 (1977); *Moore v. Fenex, Inc.*, 809 F.2d 297, 303 n.2 (6th Cir. 1987) ("The cases illustrate, and the Restatement supports, that this claim applies between parties to a business transaction. We are aware of no case, nor has any been cited, where a party has been held liable for fraudulent nondisclosure [where it] had no direct dealings with the plaintiff."); *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1497 (8th Cir. 1997) (same).

Petitioner also notes that the respondents here are banks rather than manufacturers (as in *Stoneridge*), but the legal rule petitioner proposes is not in any way limited to banks. Indeed, at petitioner's bidding, it has been applied to lawyers, among others. *See* Pet. App. 526a-529a, 581a-612a, 670a-674a. Most important, *Central Bank* – which also involved a bank – held that the reach of Section 10(b) liability does not turn on a defendant's category. Rather, the requirements for § 10(b) private civil liability are the same for "[a]ny person or entity, including a lawyer, accountant, or bank." 511 U.S. at 191.

Petitioner does not dispute the Fifth Circuit's observation that *Stoneridge* involved "facts extraordinarily similar to the facts that are present here." Pet. App. 22a. Petitioner nonetheless alleges that "the Banks had wide-ranging involvement with Enron for years." Pet. at 29. But this is irrelevant to petitioner's question presented, which (like the district court's analysis) broadly applies to "an[y] actor" regardless of the duration of its relationship with an issuer. Similarly, petitioner's reference to statements made by securities analysts employed by some of the respondents, and to underwriting of Enron securities done by some of the respondents, *see* Pet. at 3, 29-30, is a red herring. Petitioner neglects to mention that the district court did not rely on these

purported facts as a basis for class certification because petitioner did not raise the underwriting it cites now as a reason for certification, and the district court *dismissed* the § 10(b) claims based on the statements of research analysts because petitioner did not allege that the specific employees involved with the analysts' reports acted with scienter. *See* Pet. App. 231a. Petitioner did not cross-appeal that ruling to the court of appeals, or raise the analysts' reports or underwriting as an alternative ground for class certification in the court of appeals. Consequently, the majority and concurrence in the Fifth Circuit did not refer to analysts' reports or underwriting in analyzing class certification. Moreover, any alleged statements made by respondents in analysts' reports or in underwriting would be outside the petitioner's question presented, which addresses only when a secondary actor "itself makes no affirmative misrepresentations to the market." Pet. at i.

Even assuming that petitioner's reply might argue belatedly and improperly that this case's disputed facts make a difference to the question presented by petitioners in *Stoneridge* and here, that would disfavor granting certiorari. The factual record on this class certification appeal is 39,440 pages. This Court does not grant certiorari to review voluminous factual records, a task better suited for a court of appeals. In contrast, in *Stoneridge*, there is no factual record; the Court is reviewing a Rule 12(b)(6) dismissal.

Finally, the petitioner in *McConville v. SEC*, No. 06-1382, response due June 20, 2007, has also requested that its tag-along case be heard concurrently with *Stoneridge*. These extraordinary requests for multi-case merits briefing and oral arguments are inconsistent with this Court's established practice of hearing oral argument in one case and addressing, subsequent to decision in that case, other tag-along cases that the Court is holding. Pursuant to that practice, *Avis*, *supra* p. 6, note 1, is being held for *Stoneridge*. Under that traditional practice, if this petition is likewise held, the parties

in this case will be able to file supplemental briefs to address whether, under the legal rule set forth when *Stoneridge* is decided, the Court should deny certiorari in this case or remand. *See* Sup. Ct. R. 15.8. Nothing justifies the burden that would be imposed on the Court if petitioner's duplicative petition were granted now.

II. THIS CASE PRESENTS A POOR VEHICLE BECAUSE IT SEEKS REVIEW OF AN INTERLOCUTORY DECISION DENYING CLASS CERTIFICATION.

The procedural posture, complexity, and massive record of this case would impose substantial burdens on this Court without any offsetting benefit. Indeed, even if this Court had not granted the petition in *Stoneridge*, these factors would have counseled against granting the petition.

"[A] refusal to certify a class is inherently interlocutory." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978) (action asserted § 10(b) claims). The court of appeals remanded this case to the district court for further proceedings, Pet. App. 32a, and this Court has historically been particularly reluctant to review interlocutory decisions. *See*, *e.g.*, *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("[T]his Court above all others must limit its review of interlocutory orders."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").[5] The petition does not even argue that this case satisfies any narrow exception warranting review of an interlocutory order.

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[5] In contrast, in 1998, Fed. R. Civ. P. 23(f) was promulgated and it expressly gave courts of appeals discretionary review of class certification decisions. The petition does not challenge the Fifth Circuit's exercise of discretionary review in this case.

This Court consistently prefers reviewing substantive questions of interpreting Section 10(b) in private civil cases where a district court granted a motion to dismiss, *e.g.*, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005); *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), or summary judgment, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 229-30 (1988) (reviewing decision that reversed grant of summary judgment and affirmed class certification). Petitioner points to no decision of this Court interpreting § 10(b) through review of a judgment denying class certification.

Moreover, the Court disfavors granting certiorari when there are alternative grounds for affirmance. *See* Stern & Gressman, §§ 4.4, 6.37 at 231, 457; *Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183-84 (1959) (dismissing writ as improvidently granted). There are at least four alternative grounds for denying class certification in this case, none of which presents an issue worthy of certiorari. If the Court made a duplicative grant in this case, it would be presented with extensive briefing on all these non-certworthy issues as alternative grounds for affirmance.

First, the petition ignores Judge Dennis's concurrence, which agreed that the district court's class certification ruling was erroneous on an alternative ground. Specifically, Judge Dennis recognized that the numerous defendants who allegedly engaged in various financial transactions comprising the alleged "scheme" to defraud did not participate in the supposed "scheme" at the same time. Pet. App. 55a-56a. Judge Dennis concluded that, at a minimum, it would be inconsistent with the proportionate liability provisions of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(f), as well as the uniformly accepted view that after *Central Bank* there can be no private cause of action for conspiracy to violate Section 10(b), for a defendant who joined the alleged scheme later to be held

liable for *all* losses plaintiffs attribute to the overall "scheme" from its inception (here, $40 billion). Judge Dennis' concurrence recognizes that "not every plaintiff will have been harmed by every defendant." Pet. App. 55a. Here, the breadth of over 60 transactions by different entities stretching over several years that allegedly comprise the "scheme" creates individualized issues of loss causation because there is no uniform way in which all purchasers of Enron securities were harmed by each of the various defendants. Judge Dennis would have remanded the case for the trial court to determine whether "the proposed class still satisfies the predominance and superiority requirements of Rule 23(b)(3)." Pet. App. 57a.[6] Petitioner does not challenge Judge Dennis' concurrence, much less contend that it presents an issue worthy of this Court's attention.

Second, other Fifth Circuit authority would independently require that class certification be denied here. Applying its earlier decision in *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004), the Fifth Circuit recently held that class certification in a § 10(b) action must be denied for failure to satisfy the fraud-on-the-market presumption of reliance "[w]hen multiple negative items are announced contemporaneously," and the plaintiff's expert does not provide an "empirically-based showing that" it was defendant's alleged wrong, "'and not other unrelated negative statements, that caused a significant amount of the decline.'" *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 2007 WL 1430225, at *3, 8, 9 (5th Cir. May 16, 2007) (quoting *Greenberg*, 364 F.3d at 666). Here, petitioner's experts

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[6] The panel majority did not reach this issue, but noted that only the district court's "broad theory of 'scheme' liability allow[ed] it to certify a single class of plaintiffs whose losses were caused in common by the scheme." Pet. App. 11a. The loss causation and proportionate liability provisions of the PSLRA limit each respondent's liability even further than Judge Dennis suggested. The point is that, even under Judge Dennis' view, class certification would have been vacated.

conceded that they did not make this showing. *E.g.*, 5th Cir. App. R. E. 10 at 30973, 30978, 30986. While the panel majority in this case did not reach this issue, Judge Dennis accepted that *Greenberg* would defeat class certification here. Instead, he argued that the Fifth Circuit should overrule *Greenberg*, Pet. App. 48a-49a, an argument the Fifth Circuit subsequently rejected in *Oscar Private Equity*. 2007 WL 1430225, at *10-13 (Dennis, J., dissenting). Petitioner ignores *Greenberg*.

Third, petitioner's "scheme" theory of liability fails an additional *Greenberg* requirement, which is another alternative ground supporting the ruling below. *Greenberg* held that "*actual movement* of the stock price . . . must be shown by fraud-on-the-market plaintiffs," 364 F.3d at 663, and that to satisfy this independent reliance requirement the plaintiff must demonstrate "that the negative 'truthful' information causing the decrease in price is related to an allegedly false, *non-confirmatory* positive statement." *Id.* at 666 (emphasis added). *Oscar Private Equity* also reaffirmed *Greenberg's* holding that to establish the fraud-on-the-market presumption of reliance, the plaintiff must show "'an allegedly false, non-confirmatory positive statement.'" 2007 WL 1430225, at *3 (quoting *Greenberg*, 364 F.3d at 666). *Greenberg* stated that the classic example of a "confirmatory" statement that would *not* support a fraud-on-the-market presumption of reliance is when the "market expect[s a company] to report a certain level of earnings," and the reported results meet those expectations. 364 F.3d at 668 n.16. Here, petitioner failed to satisfy *Greenberg* when it alleged that transactions involving respondents that were part of the "scheme" merely enabled Enron to report earnings that met market expectations. *E.g.*, 5th Cir. App. D. E. 1388 ¶ 742.16; R. E. 5 at 18049; R. E. 10 at 30979.

Fourth, the majority below "decline[d] to address whether, had defendants' actions been misrepresentations on which the market was presumed to rely, they would have been

appropriately grouped together," as well as whether this case actually presents "a unitary scheme giving rise to common issues." Pet. App. 32a. Petitioner's "scheme" theory treats *any* defendant who allegedly engaged in any transaction as liable not only for any losses attributable to that transaction, but also for "conduct of other scheme participants about which [a particular defendant] knew nothing." Pet. App. 194a. This is a staggeringly broad conspiracy theory masquerading as "scheme" liability. Every circuit court to consider the issue has concluded that *Central Bank* precludes conspiracy liability under Section 10(b). *See*, *e.g.*, *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 842 (2d Cir. 1998); *Glazer v. Enzo Biochem, Inc.*, 126 F. App'x 593, 599 (4th Cir. 2005), *cert. denied*, 127 S. Ct. 1876 (2007); *In re Glen Fed, Inc. Sec. Litig.*, 60 F.3d 591, 592 (9th Cir. 1995). There is a substantial issue whether the dissimilarities in type, timing, knowledge, and participants among the more than 60 challenged transactions would preclude class certification. This factbound issue is not worthy of review.

III. THE FIFTH CIRCUIT CORRECTLY APPLIED *CENTRAL BANK*.

The Court need not consider the merits arguments raised by the petition because, as noted above, they will soon be briefed fully in *Stoneridge*. Nevertheless, we summarily address certain deficiencies in petitioner's merits arguments because those arguments are so strained that they raise a third reason not to grant certiorari for this tag-along petition.

A. Petitioner's Theory Of "Scheme" Liability Would Nullify *Central Bank*.

Petitioner seeks an end run around *Central Bank*, which held that Section 10(b) "prohibits only the *making* of a material misstatement (or omission) or the *commission* of a manipulative act," and "does not include giving aid to a person who commits a manipulative or deceptive act." 511

U.S. at 177 (emphases added). Petitioner's theory of "scheme" liability would yield precisely the result foreclosed by *Central Bank*. Petitioner merely repackages arguments made and rejected both in *Central Bank* and before Congress when it ratified *Central Bank* a year later.

1. Petitioner's Theory Of Liability Was Rejected In *Central Bank*.

Petitioner's theory of liability, if accepted, would render *Central Bank* a practical nullity. In fact, petitioner's arguments were made and rejected in *Central Bank*.

Petitioner would limit *Central Bank* so drastically that it could be avoided through artful pleading in any Section 10(b) case. It argues that "*Central Bank* clearly – but merely – stands for the proposition that no aiding-and-abetting liability exists under the 1934 Act because neither § 10(b) nor Rule 10b-5 contain 'aiding and abetting' language" and "is *quite narrow*." Pet. at 26. In fact, *Central Bank* was based on the words used by Section 10(b), not the words omitted. The Court concluded:

> As in earlier cases considering *conduct* prohibited by § 10(b), we again conclude that *the statute* prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act.

Central Bank, 511 U.S. at 177 (emphases added). This holding cannot be limited only to claims expressly denominated as aiding-and-abetting, while allowing the exact same type of allegations to be relabeled as "scheme" liability.

The Court in *Central Bank* further explained that every private action "for recovery under Rule 10b-5" requires defendant-by-defendant reliance:

> [R]espondents' argument would impose 10b-5 aiding and abetting liability when at least one element critical for recovery under 10b-5 is absent: reliance. A plaintiff must show reliance on *the defendant's* misstatement or

> omission to recover under 10b-5. Were we to allow the aiding and abetting action proposed in this case, *the defendant* could be liable without any showing that the plaintiff relied upon *the aider and abettor's* statements or actions. *See also Chiarella*, 445 U.S. at 228 . . . (omission actionable only where duty to disclose arises from *specific relationship between two parties*). Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.

Id. at 180 (emphases added; citation omitted).

As *Dura* recently reconfirmed, reliance is a necessary element in *every* private damages action under the statute "and Rule." 544 U.S. at 341-42. The absence of the defendant-by-defendant reliance required by *Central Bank* is by itself a dispositive flaw in petitioner's theory. Under that theory, alleging an undisclosed "scheme" eliminates the need to establish reliance on any secondary defendant. Instead, petitioner would satisfy reliance on a group basis against all defendants simply by relying on the *issuer's* financial statements. Indeed, under the district court's ruling, pleading a "scheme" would enable plaintiffs to argue as well that other critical elements of a Section 10(b) claim – such as loss causation and damages – need not be pleaded and proven as to each defendant, but also are satisfied against all defendants entirely from the alleged effect of the *issuer's* conduct. *See* Pet. App. 127a-136a, 164a-166a, 176a-177a, 191a-196a, 232a-235a. This is precisely contrary to *Central Bank*: "Any 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 *all* of the requirements for primary liability under Rule 10b-5 are met." *Central Bank*, 511 U.S. at 191.

Central Bank reached these holdings after rejecting the very arguments now recycled by the petitioner. In particular,

relying on the "scheme" and "course of business" language of Rule 10b-5(a) and (c) and the "indirectly" language of Section 10(b), as petitioner does here, the National Association of Securities and Commercial Law Attorneys ("NASCAT"), as *amicus curiae* represented by petitioner's counsel of record in this case, argued that "'[a]ll members' of such a scheme are responsible" for "knowingly participat[ing] in such a fraudulent practice or course of conduct." *See* Brief for *Amicus Curiae* NASCAT in Support of Respondents at 4, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). NASCAT argued that under "§ 10b's broad proscription of deceptive practices," the statute and rule went "far beyond imposing liability for individual misrepresentations or omissions," and that "[e]veryone possesses a duty not to perpetrate, or to assist in the perpetration of, securities fraud." *Id.* at 4-5, 22 (emphasis omitted). Although NASCAT's arguments were rejected by *Central Bank*, they were erroneously accepted here by the district court, which found a "duty not to engage in a Rule 10b-5 scheme, practice or course of conduct to defraud . . . owed to the investing public generally." Pet. App. 123a.

Petitioner's theory would even require a different result on the facts of *Central Bank* itself. The defendant in *Central Bank*, as here, was a bank that did business with the issuer (as indenture trustee for a municipal bond issue). The bank, despite its expressed doubts, "agreed to delay independent review" of an appraisal on the collateral for the bonds until after the closing, thus enabling the municipal authority to issue otherwise unmarketable bonds. 511 U.S. at 167-68. A plaintiff easily could relabel that bank's agreement to use the outdated appraisal as a "deceptive" transaction with the purpose and effect of deceiving investors as part of a "scheme." Indeed, the Tenth Circuit opinion reversed in *Central Bank* itself stated that the bank acted "as part of a fraudulent scheme." *First Interstate Bank of Denver, N.A.* v.

Pring, 969 F.2d 891, 895 (10th Cir. 1992); *see also In re Parmalat Sec. Litig.*, 414 F. Supp. 2d 428, 434-35 (S.D.N.Y. 2006) (finding "scheme" claim for bank's knowing use of outdated valuation). Under petitioner's approach, *Central Bank* would be rendered meaningless because defendants formerly sued as aiders and abettors would now simply be relabeled as "scheme participants" (*i.e.*, conspirators). For all practical purposes, *Central Bank* would become a historical relic.

2. Congress Ratified *Central Bank*.

After *Central Bank*, both the SEC and the private plaintiffs' bar asked Congress to overrule the decision and extend private civil liability under Section 10(b) to secondary actors. Congress thereafter decided to provide the SEC, but *not* private plaintiffs, with the ability to pursue secondary actors. Petitioner's position vitiates this legislative determination.

In enacting the PSLRA in 1995, Congress granted the SEC authority to bring actions in federal district court for aiding and abetting violations of Section 10(b). Congress provided that, in actions brought by the SEC, "any person that *knowingly provides substantial assistance* to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision *to the same extent as the person to whom such assistance is provided*." 15 U.S.C. § 78t(e) (emphases added).[7]

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[7] This special provision for SEC actions belies petitioner's protestations that this case is critical to SEC enforcement efforts. *See* Pet. at 6, 13. Moreover, the SEC also retained express statutory authority to pursue, among others, administrative actions against registered broker-dealers and their "associated persons" who aided and abetted violations of the securities laws. *See* 15 U.S.C. § 78*o*(b)(4)(E); *id.* § 78u-2(a)(2); *see Central Bank*, 511 U.S. at 183. Since 2002, the SEC has used its aiding-and-abetting and other enforcement authority, including in Enron-related matters, to recover approximately $8 billion for distribution to investors. SEC, *2006 Performance and Accountability Report* 23 (Nov. 2006),

At the same time, Congress concluded that allowing similar claims by private plaintiffs would defeat the PSLRA's goal of reducing meritless lawsuits. *See* H.R. Conf. Rep. No. 104-369 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730; 141 Cong. Rec. S9109-11 (daily ed. June 27, 1995) (statement of Sen. D'Amato) ("[A]iding and abetting liability under section 10(b) would be contrary to the goals of this legislation.").[8] The Senate Report summarized the resolution that was codified:

> The Committee considered testimony endorsing the result in *Central Bank* and testimony seeking to overturn this decision. The Committee believes that *amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation*. The Committee does, however, grant the SEC express authority to bring actions seeking injunctive relief or money damages against persons who knowingly aid and abet primary violators of the securities laws.

S. Rep. No. 104-98, at 19 (1995) (emphasis added), *reprinted in* 1995 U.S.C.C.A.N. 679, 698.

This Court has emphasized that any decision to expand § 10(b) private civil liability must be left to Congress. *Central Bank*, 511 U.S. at 176-78, 188-90; *Santa Fe Indus.*, 430 U.S. at 479-80. "The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a

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available at http://www.sec.gov/about/secpar2006.shtml; 15 U.S.C. § 7246(a).

[8] Congress held multiple hearings, including a hearing less than a month after *Central Bank* explicitly devoted to the decision's impact on the liability of secondary actors. *See Abandonment of the Private Right of Action For Aiding and Abetting Securities Fraud: Hearing On The Recent Securities Law Decisions By The U.S. Supreme Court, Central Bank of Denver vs. First Interstate Bank of Denver Before The Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 103d Cong. (1994).

deliberate congressional choice with which the courts should not interfere." *Central Bank*, 511 U.S. at 184. This Court should not accept petitioner's invitation to interfere with Congress's ratification of *Central Bank* for private actions.

B. This Court Has Consistently Defined "Deceptive" Conduct Under Section 10(b) To Require A Misrepresentation Or A Duty To Disclose.

The court of appeals below, in agreement with the Eighth Circuit in *Stoneridge*, concluded that a private civil plaintiff may sue a secondary actor defendant if it violates Section 10(b) in any of three ways: (1) through the "deceptive" act of making a false statement; (2) through the "deceptive" act of a material omission where the defendant had a special relationship with the plaintiff that created a duty to disclose; and (3) through the "manipulative" act of engaging in market transactions that directly manipulated the price of the relevant security. This analysis is faithful to the text of Section 10(b) and multiple decisions of this Court. Petitioner ignores this authority in the hope of creating a new, open-ended category of "scheme" liability that would not be subject to the settled limits on Section 10(b) private civil liability.

1. The Statutory Text Of Section 10(b) Controls The Meaning Of Rule 10b-5.

The Petition incorrectly treats the words "scheme" and "course of business" as if they were part of Section 10(b). *See* Pet. at 3, 13, 26-27. This Court has repeatedly held that words appearing in the Rule but not the statute cannot be the basis for private civil liability.

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, 214 (1976), held that Section 10(b) requires scienter, even though the express terms of Rule 10b-5(b) and 10b-5(c) "*could be read* as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not." *Id.* at 212 (emphasis added). The

Court held that "[t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. . . . Thus, despite the broad view of the Rule advanced by the [SEC] in this case, *its scope cannot exceed the power granted the [SEC] by Congress under § 10(b)*." *Id*. at 213-14 (emphasis added).

Similarly, *Santa Fe Industries v. Green*, 430 U.S. 462 (1977), held that claims under Rule 10b-5(a) and (c) are actionable only if they satisfy Section 10(b)'s requirements:

> The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception. . . . Thus the . . . complaint states a cause of action *under any part of Rule 10b-5* only if the conduct alleged can be fairly viewed as *"manipulative or deceptive" within the meaning of the statute*.

Id. at 473-74 (emphases added).[9]

Petitioner nonetheless argues that Rule 10b-5's use of the words "scheme" and "course of business" are independently significant because a footnote in this Court's decision in *SEC v. Zandford* states that "'[t]he scope of Rule 10b-5 is coextensive with the coverage of § 10(b).'" Pet. at 12 (quoting *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002)). This meant merely that the Rule is to be construed so as not to reach beyond the scope of the statute. Indeed, *Zandford* cited as support both *Ernst* and *United States v. O'Hagan*, which

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[9] *Santa Fe* thus rejected the Second Circuit's view that in 10b-5(a) and (c) cases, unlike Rule 10b-5(b) cases, "no allegation or proof of misrepresentation or nondisclosure is necessary." *Green v. Santa Fe Indus.*, 533 F.2d 1283, 1285-87 (2d Cir. 1976). Similarly, in *Chiarella v. United States*, the Court reversed a conviction under Rule 10b-5(a) and (c) where the jury instructions tracked the language of those Rule subsections but did not discuss the duty to disclose that this Court held the statute required. *See* 445 U.S. 222, 236 (1980).

stated that "[l]iability under Rule 10b-5, our precedent indicates, does not extend beyond conduct encompassed by § 10(b)'s prohibition." 521 U.S. 642, 651 (1997).

2. This Court Has Held That In The Absence Of A Misrepresentation, "Deceptive" Conduct Requires A Duty To Disclose.

Petitioner argues (incorrectly) that the court of appeals' decision improperly ignores that § 10(b) applies to "conduct" and therefore that decision "would collapse [Rule 10b-5] (a) and (c) into Rule 10b-5(b)'s rule against misleading statements and omissions." Pet. at 22-23. Petitioner's quarrel actually is with *Central Bank*, which expressly addressed the issue of the extent of the "*conduct* prohibited by § 10(b)." 511 U.S. at 177 (emphasis added). *Central Bank* properly applied this Court's precedent, which held that § 10(b) covers conduct in addition to misstatements, but *if and only if the defendant violated a duty to disclose in connection with that conduct*. *See id.* at 174.

On three separate occasions before *Central Bank*, this Court rejected liability under Rule 10b-5(a) and (c) for conduct where the defendant made no misrepresentation and owed no duty to disclose. In *Santa Fe*, the plaintiffs challenged a merger that resulted in a "gross undervaluation by defendants of the shares the [plaintiff] minority shareholders are forced to sell." *Green v. Santa Fe Indus.*, 533 F.2d 1283, 1285 (2d Cir. 1976). The Second Circuit held that liability existed under Rule 10b-5(a) and (c):

> An[] erroneous assumption is that in order to allege a claim under Rule 10b-5 there must be some showing of misrepresentation or lack of disclosure. . . . But only subdivision [b] of 10b-5 deals with nondisclosure and misrepresentation. The Rule contains two other subdivisions which state explicitly that fraud other than and in addition to a failure to disclose or truthfully represent is also actionable . . . .

Id. at 1286-87. This Court reversed because the plaintiffs "failed to allege a material misrepresentation or material failure to disclose." *Santa Fe Indus.,* 430 U.S. at 473-74.

Chiarella reversed an insider trading conviction under Rule 10b-5(a) and (c), construing the scope of "deceptive" under § 10(b) to hold that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak" and that "such liability is *premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction*." *Chiarella v. United States*, 445 U.S. 222, 230, 235 (1980) (emphasis added). In *Dirks v. SEC*, 463 U.S. 646, 665-67 (1983), the Court also reversed a finding of insider trading under Rule 10b-5(a) and (c) for the lack of a duty to disclose.[10]

Recognizing that the financial institution defendants did not owe the putative class members the necessary duty of disclosure, petitioner attempts to distinguish *Chiarella* and *O'Hagan* as cases involving "silence" as opposed to "deceptive conduct." Pet. at 21-22. However, both of these insider trading cases involved conduct – trading in the market to reap substantial profits at the expense of unsuspecting investors. Each held that such conduct violated Section 10(b) only if a duty to disclose was violated:

> Deception through nondisclosure is central to the theory of liability for which the Government seeks recognition. . . .

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[10] The Court's precedents do not collapse Rule 10b-5(a) and (c) into Rule 10b-5(b)'s prohibition on false statements. For example, Rule 10b-5(a) and (c) carry out Section 10(b)'s prohibition of market manipulation. The term "manipulative" in Section 10(b) is "'virtually a term of art when used in connection with securities markets.' . . . [which] refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Indus.*, 430 U.S. at 476 (quoting *Ernst*, 425 U.S. at 199). Here, the petition does not challenge the Fifth Circuit's unanimous holding that petitioner has not alleged "manipulative" conduct.

> . . . [F]ull disclosure forecloses liability under the misappropriation theory: Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no § 10(b) violation – although the fiduciary-turned-trader may remain liable under state law for breach of a duty of loyalty. . . .
>
> . . . "[I]t [was O'Hagan's] failure to disclose his personal trading to [his client and law firm], *in breach of his duty to do so*, that made his *conduct* 'deceptive' within the meaning of [§] 10(b)."

O'Hagan, 521 U.S. at 654-55, 660 (emphases added; brackets in original; quotations, alteration, and citation omitted).

Petitioner also incorrectly argues that the necessary "duty to disclose" is not based on a fiduciary or other special relationship, but rather arises from a generalized "duty not to engage in conduct that violates the statute." Pet. at 22 n.23. But this Court rejected even less sweeping and circular duties in *Chiarella*, where the alleged duty rested on the defendant's status as a "market insider," *United States v. Chiarella*, 588 F.2d 1358, 1364-66 (2d Cir. 1978), and in *Dirks*, where the alleged duty rested both on the broker's access to the issuer and on the role of "securities industry professionals." *Dirks v. SEC*, 681 F.2d 824, 839, 841-42 (D.C. Cir. 1982). As *Chiarella* held:

> We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty, which departs radically from *the established doctrine that duty arises from a specific relationship between two parties*, should not be undertaken absent some explicit evidence of congressional intent.

445 U.S. at 233 (emphasis added; citation omitted). Here, there is no such "specific relationship" between respondents and the putative class, as both the district court and the Fifth Circuit recognized.

3. Petitioner Miscites A Series Of This Court's Cases.

Petitioner incorrectly argues that *SEC v. Zandford*, 535 U.S. 813 (2002), "supports liability for knowingly engaging in a fraudulent scheme, even if no affirmative misstatement is made." Pet. at 12, 14, 25-26. The stockbroker in *Zandford* secretly sold his client's securities in order to steal the proceeds. 535 U.S. at 815-16. *Zandford* premised liability on the broker's fiduciary duty to disclose:

> [E]ach [sale] was deceptive because it was neither authorized by, nor disclosed to, the [customers]. . . .
>
> . . . *[A]ny distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients*. *See Chiarella v. United States*, 445 U.S. 222, 230 . . . (1980) (noting that "silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)" when there is "a *duty to disclose* arising from a *relationship of trust and confidence between parties to a transaction*").

Id. at 820-21, 823 (emphases added).

Petitioner also miscites *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53 (1972). The Court held that the defendants, market makers who purchased securities from unsophisticated investors *in face-to-face transactions*, "possessed the *affirmative duty . . . to disclose* . . . to the . . . sellers." *Id.* at 153 (emphasis added). No such transactions or relationships are alleged here.

Finally, petitioner's assertion that *Superintendent of Insurance of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6

(1971), "upheld a complaint involving a 'fraudulent scheme' involving the sale of securities where *no* false statement was alleged," Pet. at 25, is wrong. *Bankers Life* found an affirmative misrepresentation because the corporation's "Board of Directors was allegedly deceived into authorizing this sale [of bonds] *by the misrepresentation* that the proceeds would be exchanged for a certificate of deposit of equal value." 404 U.S. at 8 n.1 (emphasis added). The Court expressly declined to rule on the liability of secondary actor defendant Bankers Life. *Id*. at 13 & n.10.

C. Petitioner's Theory Of "Scheme" Liability Would Subject Countless Business Transactions To Unworkable Uncertainty.

The theory urged by petitioner would create a vague and unprincipled standard of liability easily manipulated by plaintiffs through the lens of hindsight. In every commercial or service transaction, every counterparty would face the prospect that its transaction with an issuer might later be labeled a "sham" or "deceptive," subjecting that counterparty to a § 10(b) civil class action for the issuer's financial statements over which the counterparty has no control.

Central Bank held that liability under § 10(b) is "'an area that demands certainty and predictability.'" 511 U.S. at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). Under petitioner's theory, however, hindsight allegations of scienter, here relabeled "purpose," Pet. at 7-8, when attached to any participant in any commercial or service transaction would suffice to plead a § 10(b) claim. That means that every case of secondary liability would turn on post-hoc allegations of scienter. As *Central Bank* recognized, this kind of uncertainty drives up the costs of numerous legitimate transactions, and eliminates some altogether. *See* 511 U.S. at 188-89. Courts that have attempted to follow the "scheme" theory of liability urged by petitioner have ended up applying the characterizations of "sham" or "deceptive" in inconsistent, subjective, and unpredictable ways. *See Simpson v. AOL*

Time Warner Inc., 452 F.3d 1040, 1055 (9th Cir. 2006) (conceding that even "'the drafting of a cognizable complaint can be a matter of trial and error'") (citation omitted), *pet. for cert. pending in Avis*; *In re Parmalat Secs. Litig.*, 376 F. Supp. 2d 472, 504 n.160 (S.D.N.Y. 2005) (deceptive act allegation sustained even though bank merely may have accepted "valid receivables"); *Parmalat*, 414 F. Supp. 2d at 435 n.31 (deceptive act allegation sustained even though the put agreement legitimately may have exposed bank to "significant risk"). Indeed, petitioner conceded below that "scheme" liability would cover transactions that are "arguably *legitimate*, so long as defendants' conduct had the principal purpose and effect to deceive." Appellees' Brief at 55 (emphasis added).

The record of this case illustrates that petitioner's "scheme" theory inevitably creates "decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services." *Central Bank*, 511 U.S. at 188 (quoting *Pinter*, 486 U.S. at 652). For example, the claims against Barclays in this case initially were upheld, then were dismissed, and then the district court granted petitioner leave to replead (subject to potential dismissal at the summary judgment stage), with each change of decision explicitly attributed to the difficulty of assessing "scheme" liability for secondary actors. Pet. App. 678a; *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 439 F. Supp. 2d 692, 724 (S.D. Tex. 2006); Pet. App. 315a, 320a. Similarly, the district court first dismissed, then reinstated and then dismissed again petitioner's claims against Deutsche Bank, another financial institution that allegedly participated in the "scheme." Pet. App. 578a-581a, 670a; Pet. App. 333a, 344a-364a; *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 2005 WL 1798423, at *1-3 (S.D. Tex. July 26, 2005); Pet. App. 284a-294a. Yet the transactions involving Deutsche Bank remain part of the "scheme" asserted against respondents. The difficulties the district court had in applying its own theory of "scheme" liability in a

consistent and predictable manner illustrate why the vague and overbroad theory of "scheme" liability could never provide the "certainty and predictability" required by *Central Bank*.

CONCLUSION

This petition for writ of certiorari should not be granted. At most, it should be held pending this Court's decision in *Stoneridge*.

Respectfully submitted,

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June 1, 2007

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March 21, 2007

William K. Suter, Clerk of the Court
Supreme Court of the United States
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543-0001

Re: ***Avis Budget Group, Inc. fka Cendant Corporation v. California State Teachers' Retirement System, et al.*, No. 06-560**

Dear Mr. Suter:

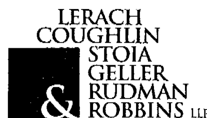
We are counsel for the California State Teachers' Retirement System in Case No. 06-560. We believe that the ***Avis Budget Group, Inc. fka Cendant Corporation v. California State Teachers' Retirement System, et al.*, No. 06-560** and ***Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, No. 06-43** are scheduled for a conference this Friday, March 23.

On March 19, 2007, the Fifth Circuit issued its decision in ***Regents of the University of California, et al. v. Credit Suisse First Boston (USA), Inc., et al., ("Enron")***. The Fifth Circuit's ***Enron*** decision raises issues very similar to those being presented to the Court in ***Avis Budget Group*** and ***Stoneridge Investment Partners***. Lead Plaintiff for The Regents of the University of California in ***Enron*** intends to promptly file a petition for ***certiorari*** to review the Fifth Circuit's decision. I respectfully request that the Court defer the conference decision on ***Avis Budget Group*** and ***Stoneridge Investment Partners*** until the ***Enron*** petition can be considered concurrently.

Respectfully submitted,

JOSEPH W. COTCHETT

cc: Counsel in ***Avis Budget Group*** 06-560
Nancy L. Fineman
Steven N. Williams



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March 20, 2007

VIA UPS OVERNIGHT

William K. Suter, Clerk of the Court
Supreme Court of the United States
Office of the Clerk
1 First Street N.E.
Washington, DC 20543-0001

Re: *Avis Budget Group, Inc. fka Cendant Corporation v. California State Teachers' Retirement System, et al.*, No. 06-560
Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., No. 06-43

Dear Mr. Suter:

I write to request that you bring to the attention of the Court the ruling in *Regents of the University of California, et al. v. Credit Suisse First Boston (USA), Inc., et al.* ("*Enron*"). I enclose herewith a copy of the Fifth Circuit's March 19, 2007 decision reversing the district court decision in *Enron* certifying a class of purchasers of Enron securities alleging violations of §10(b) and Rule 10b-5 against various banks. The decision discusses the banks' potential liability for participation in a scheme to defraud under §10(b) and Rule 10b-5, concluding that because no such liability exists, no class should have been certified.

This decision raises issues very similar to those being presented to the Court in the certiorari petitions in *Avis Budget Group, Inc. fka Cendant Corporation v. California State Teachers' Retirement System, et al.* (No. 06-560) and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* (No. 06-43). In fact, the Fifth Circuit noted that in those cases "the Eighth and Ninth Circuits have split with respect to the scope of primary liability for secondary actors" and that petitions for certiorari are pending. *Regents of the University of California, et al. v. Credit Suisse First Boston (USA), Inc., et al.*, No. 06-20856, slip op. at 12 (5th Cir. Mar. 19, 2007).

Please be advised that Lead Plaintiff, The Regents of the University of California, in *Enron* intends to promptly file a petition for certiorari to review the Fifth Circuit's decision reversing class certification in the *Enron* litigation on the ground that scheme liability does exist under §10(b) and Rule 10b-5. We anticipate that this certiorari petition will be filed in the next 10 days.

William K. Suter, Clerk of the Court
March 20, 2007
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We understand that the *Avis Budget* and *Stoneridge* cases are scheduled for conference this Friday, March 23. We want to inform the Court of the anticipated petition for certiorari in *Enron* in the event the Court may wish to consider the *Enron* petition along with those in *Avis Budget* and *Stoneridge*.

Respectfully submitted,

WILLIAM S. LERACH

cc: John Roberts, Chief Justice of the United States
All Counsel in *Regents* via ESL 3624 Website

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