

# The Proverbial Axe to the Judicial Oak: The Impact of *Stoneridge* on Plaintiff's Actions Under § 10(b)

LAURA D. MRUK\*

I.	INTRODUCTION .....	281
II.	HISTORY .....	283
	A. SECTION 10(B) AND RULE 10B-5 .....	283
	B. CASE LAW .....	285
	1. <i>Basic, Inc. v. Levinson and the Fraud-on-the-Market Theory</i> .....	285
	2. <i>Santa Fe Industries, Inc. v. Green</i> .....	286
	3. <i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> .....	287
	4. <i>Post-Central Bank and the Birth of Scheme Liability</i> .....	288
III.	FACTS .....	291
	A. THE PARTIES .....	291
	B. THE ALLEGED SCHEME .....	292
IV.	THE ANALYSIS .....	293
	A. THE REPORT .....	293
	B. THE ANALYSIS .....	296
	1. <i>Plain Language</i> .....	296
	i. <i>Section 10(b)</i> .....	296
	ii. <i>Rule 10b-5</i> .....	298
	2. <i>The Court's Overly Broad Reading of Central Bank</i> .....	299
	3. <i>Reliance and the Court's Reading of the Fraud-on-the-Market Theory</i> .....	300
	4. <i>Primary Fraud and Scheme Liability</i> .....	303
	C. THE PRACTICAL IMPACT .....	306
V.	CONCLUSION .....	308

## I. INTRODUCTION

The substantial body of § 10(b) and rule 10b-5 jurisprudence represents a “judicial oak which has grown from little more than a legislative

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\* J.D., 2008 Northern Illinois University College of Law; B.A., 2005 Cedarville University. Laura D. Mruk is an associate at WilliamsMcCarthy LLP in Rockford, Illinois. She would like to thank Professor Kathleen L. Coles for her helpful discussions and her insight into the topic of this article.

acorn.”<sup>1</sup> Section 10(b) and rule 10b-5 have a compelling history steeped in mystery. Their original purpose was simply to stop fraud involving the sale of securities.<sup>2</sup> Although § 10(b) provided the Securities and Exchange Commission (SEC) authority to prosecute § 10(b) violators, it is rule 10b-5 that actually implements the prohibitions against fraudulent acts.<sup>3</sup> As recounted by the “Father” of rule 10b-5, rule 10b-5 came about in May 1942 in response to a specific situation involving a company president purchasing sales from his own shareholders without notifying the shareholders of much-improved earnings.<sup>4</sup> In deciding to implement this rule, one Commission member summed it all up by stating: “Well, we’re against fraud, aren’t we?”<sup>5</sup> Soon thereafter, the private right of action under § 10(b) and rule 10b-5 was first implied by the *Kardon v. National Gypsum* case<sup>6</sup> in 1947 and gained official Supreme Court acquiescence.<sup>7</sup> The once small legislative acorn proposed by Mr. Freeman, the father of rule 10b-5, quickly grew into a massive oak tree with deep roots in civil liability.

This article discusses a recent Supreme Court decision, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta*,<sup>8</sup> and its lasting impact. Part II traces the historical evolution of § 10(b) and rule 10b-5 through the language of the statutes and case law interpreting them. Part III provides a detailed account of the facts of *Stoneridge*. Part IV explains the holding of the Court and also includes an in-depth examination of the Court’s reasoning and the overall practical impact the decision will have on securities fraud jurisprudence. After exploring the Court’s decision in *Stoneridge*, this article advances the analytical conclusion that the Court’s holding will effectively nullify subsections (a) and (c) of rule 10b-5 and will leave many injured investor plaintiffs without recourse under the rule intended to provide such remedies.<sup>9</sup>

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1. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

2. *See* Colloquium, *Forward*, 61 *FORDHAM L. REV.* S1, S1 (1993). This colloquium was authored by Milton Freeman, who wrote rule 10b-5.

3. WILLIAM A. KLEIN ET AL., *BUSINESS ASSOCIATIONS, CASES & MATERIALS ON AGENCY, PARTNERSHIPS, & CORPORATIONS* 449 (6th ed. 2006).

4. *Forward*, *supra* note 2, at S1.

5. *Id.* at S2.

6. 73 F. Supp. 798, 800 (E.D. Pa. 1947).

7. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (recognizing that thirty-five years of accumulated lower court decisions implying a private cause of action under §10(b) and rule 10b-5 rendered its existence “simply beyond peradventure”).

8. 128 S. Ct. 761 (2008).

9. *See Forward*, *supra* note 2, at S5 (discussing the investor protection focus of rule 10b-5).

## II. HISTORY

Private litigants' use of § 10(b) and rule 10b-5 reaches back to the infancy of the statute itself. In order to understand the framework of plaintiff actions using § 10(b) and rule 10b-5, it is imperative to first examine the controversial history of § 10(b) and rule 10b-5. It is also critical to examine some recent case law that will provide the backdrop to the Supreme Court's decision in *Stoneridge v. Scientific-Atlanta*.

### A. SECTION 10(B) AND RULE 10B-5

The history of § 10(b)<sup>10</sup> and rule 10b-5<sup>11</sup> is anything but straightforward. In a series of cases, the Supreme Court has articulated the prevailing conception of § 10(b), finding certain activities not actionable under rule 10b-5.<sup>12</sup> However, the Supreme Court's interpretation of § 10(b) and rule 10b-5 is viewed by some as questionable.<sup>13</sup>

A working understanding of the language of these sections is critical to any § 10(b) analysis. Section 10(b), titled "Manipulative and Deceptive Devices," states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may pre-

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10. 15 U.S.C. § 78j (2006); *see also* The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (2006).

11. 17 C.F.R. § 240.10b-5 (2008).

12. *See* *Aaron v. SEC*, 446 U.S. 680 (1980); *Santa Fe Indus. v. Green*, 430 U.S. 462 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *cf.* *Schreiber v. Burlington N., Inc.*, 472 U.S. 1 (1985) (interpreting similar language in § 14(e) of the Exchange Act); *Chiarella v. United States*, 445 U.S. 222 (1980) (finding that a failure to provide information does not violate § 10(b) unless a duty exists).

13. *See, e.g.,* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385 (1990).

scribe as necessary or appropriate in the public interest or for the protection of investors.<sup>14</sup>

It is important to note that § 10(b) is not self-executing and does not prohibit any acts without the SEC rule implementing it.<sup>15</sup>

The SEC rule implementing § 10(b) is rule 10b-5, entitled “Employment of Manipulative and Deceptive Devices.”<sup>16</sup> It states:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(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.<sup>17</sup>

The language of the rule is substantively taken verbatim from § 17(a) of the Securities Act of 1933.<sup>18</sup> Section 17(a) uses the language “in the offer or sale of any securities,”<sup>19</sup> whereas rule 10b-5 uses “in connection with the purchase or sale of a security.”<sup>20</sup> Professor James Cox finds this language “completely understandable,” believing that rule 10b-5’s original purpose was to enhance the SEC’s scope of enforcement under § 17(a).<sup>21</sup> Despite infighting among legal scholars regarding the history and scope of rule 10b-5,

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14. 15 U.S.C. § 78j (2006).

15. KLEIN ET AL., *supra* note 3, at 449.

16. 17 C.F.R. § 240.10b-5 (2008).

17. *Id.*

18. 15 U.S.C. § 77q (2006); *see* JAMES D. COX ET AL., *SECURITIES REGULATION, CASES & MATERIALS* 653 (5th ed. 2006).

19. 15 U.S.C. § 77q(c) (2006).

20. 17 C.F.R. § 240.10b-5(c) (2008).

21. COX ET AL., *supra* note 18, at 653 (discussing the original reasoning behind the language of rule 10b-5 addressing a particular issue, a corporate official buying shares of stock and simultaneously releasing negative statements about the company, not addressed by § 17(a) (citing Colloquium, *Forward*, 61 *FORDHAM L. REV.* S1 (1993))).

it has come to be accepted as enforceable publicly through an implied right of action.<sup>22</sup>

## B. CASE LAW

Section 10(b) and rule 10b-5 are not strangers to plaintiff litigations regarding securities transactions. However, the various interpretations of § 10(b) and rule 10b-5's applications have caused much disturbance and remain unsettled. In a case from the early 1970s, while analyzing the "in connection with" language of § 10(b), the Supreme Court held that "[s]ection 10(b) must be read flexibly, not technically and restrictively."<sup>23</sup> Yet, the Court has viewed § 10(b) claims both flexibly and restrictively. In *Basic, Inc. v. Levinson*, for example, the Court applied the fraud-on-the-market theory, thus easing plaintiffs' burden of showing reliance.<sup>24</sup> But the elasticity in the purported flexibility of § 10(b) eventually lost its give. In *Santa Fe Industries, Inc. v. Green*, the Court found that the language of rule 10b-5 did not determine what actions could be brought under § 10(b); in other words, rule 10b-5 does not expand § 10(b), it merely explains it.<sup>25</sup> *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* further applied the Court's restrictive approach to the language of rule 10b-5 and turned private securities litigation on its head by suddenly disallowing actions for aiding and abetting.<sup>26</sup> The following sections briefly describe the history of these decisions leading up to the *Stoneridge* case.

### 1. *Basic, Inc. v. Levinson* and the *Fraud-on-the-Market Theory*

The Supreme Court provided some elasticity to § 10(b) in *Basic, Inc.* by allowing reliance to be proven by a fraud-on-the-market theory. In *Basic, Inc.*, the Supreme Court adopted the fraud-on-the-market theory, providing a rebuttable presumption of reliance.<sup>27</sup> In order to prove reliance,

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22. *Id.* at 654.

23. *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971). See generally Barbara Black, Commentary, *The Second Circuit's Approach to the "In Connection With" Requirement of Rule 10b-5*, 53 BROOK. L. REV. 539 (1987) (discussing the seemingly conflicting descriptions of the "in connection with language" as both broad and stringent).

24. 485 U.S. 224, 247 (1988).

25. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977).

26. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173-74, 191(1994); see also Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135 (2006) (recounting the history of aiding and abetting liability pre-*Central Bank* and assessing the limitations of the *Central Bank* decision).

27. *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988). Some courts have used the term "transaction causation" interchangeably with "fraud-on-the-market." See, e.g., *Dura*

plaintiffs in a securities fraud action under rule 10b-5 “[t]raditionally . . . were required to establish that they were aware of, and directly misled by, an alleged misrepresentation.”<sup>28</sup> The Court noted that absent a presumption of reliance, “[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action.”<sup>29</sup> In response, the Supreme Court adopted the fraud-on-the-market theory for proving reliance, explaining the theory as follows:

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.<sup>30</sup>

This theory holds that investors purchasing stock in an organized securities market at the market price do so in reliance upon that price’s integrity, and “because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a rule 10b-5 action.”<sup>31</sup> Misleading information impacts price integrity because the market relies on all available information.

## 2. Santa Fe Industries, Inc. v. Green

Unlike *Basic, Inc.*, the Court in *Santa Fe Industries, Inc.* tightened its grip on the scope of § 10(b). In the *Santa Fe Industries, Inc.* case, the Second Circuit’s ruling, and the plaintiff’s argument, was that because of rule 10b-5’s use of such broad language as “scheme,” a defendant could be liable for securities fraud without ever having made a material misstatement or omission.<sup>32</sup> In interpreting the language of § 10(b) and rule 10b-5, the

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Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005); see also *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447-48 (11th Cir. 1997).

28. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 178 (3d Cir. 2000).

29. *Basic Inc.*, 485 U.S. at 242.

30. *Id.* at 241-42 (internal citation omitted) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

31. *Id.* at 247.

32. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 471-74 (1977).

Second Circuit deduced that “only subdivision (2) of 10b-5 deals with non-disclosure and misrepresentation” and the “two other subdivisions . . . state explicitly that fraud other than and in addition to a failure to disclose or truthfully represent is also actionable.”<sup>33</sup>

Holding that claims under § 10(b) and rule 10b-5 must be based on allegations of misrepresentation, nondisclosure, or manipulation, the Supreme Court reversed the decision of the Second Circuit in *Santa Fe Industries, Inc.*<sup>34</sup> The Supreme Court explained that the subdivisions of rule 10b-5 and its accompanying language are not instructive on the scope of § 10(b).<sup>35</sup> Thus, rule 10b-5 cannot impose liability for conduct that is not expressly prohibited by § 10(b).<sup>36</sup> Therefore, the Supreme Court held that § 10(b) and rule 10b-5 are violated only where “the conduct alleged can be fairly viewed as ‘manipulative or deceptive’ within the meaning of [that] statute.”<sup>37</sup> The Supreme Court found “manipulation” to be a term of art applicable only to very specific acts.<sup>38</sup> If the plaintiffs cannot show manipulation, as defined by the Court, the plaintiffs must allege deception through misrepresentation or omission.<sup>39</sup>

### 3. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.

In *Central Bank*, the Court’s grip continued to tighten and the Court eliminated a much used action, aiding and abetting, under § 10(b). Prior to *Central Bank*, “the path of least resistance” for plaintiffs alleging fraud under an aiding and abetting liability theory was to plead that one defendant had made a material misrepresentation or omission and the remaining defendants had aided and abetted the making of that misrepresentation or omission.<sup>40</sup> Before *Central Bank*, the distinction outlined in *Santa Fe Industries, Inc.* between the misconduct prohibited by subsection (b) of rule 10b-5 (i.e., material misstatements and omissions) and the conduct prohibited by subsections (a) and (c) went unnoticed for the most part.<sup>41</sup>

In *Central Bank*, however, the Supreme Court reiterated its holding in *Santa Fe Industries, Inc.* that § 10(b)’s language is axiomatic as to what is

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33. *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1289 (2d Cir. 1976), *rev’d*, 430 U.S. 462 (1977).

34. *Santa Fe Indus., Inc.*, 430 U.S. at 471-74.

35. *Id.* at 472-73.

36. *Id.*

37. *Id.* at 474, 476-77.

38. *Id.* at 476 (referring to wash sales, matched orders, or rigged practices).

39. *Id.*

40. *See In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 497 (S.D.N.Y. 2005).

41. Matthew L. Mustokoff, “Scheme” Liability Under Rule 10b-5: The New Battleground in Securities Fraud Litigation, FED. LAW., June 2006, at 20.

prohibited, not language from rule 10b-5.<sup>42</sup> Finding no mention of aiding and abetting in either rule 10b-5 or § 10(b) itself, the Court ruled that “a private plaintiff may not maintain an aiding and abetting suit under § 10(b).”<sup>43</sup> The Court noted: “As in earlier cases considering conduct prohibit[ed] 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.”<sup>44</sup> However, the *Central Bank* Court also stated that

[t]he 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 . . . 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.<sup>45</sup>

The Court’s holding and later statement regarding continued liability for secondary actors have caused much controversy in the lower courts as to the scope of liability under § 10(b).

#### 4. *Post-Central Bank and the Birth of Scheme Liability*

Because of the seeming death grip the Court has placed on § 10(b) causes of action, post-*Central Bank* plaintiffs seek refuge in subsections (a) and (c) of rule 10b-5 when attempting to avoid dismissal under the holding of *Central Bank*.<sup>46</sup> In the wake of the Supreme Court’s decision in *Central Bank*, so-called “scheme liability” claims have sprouted up all over the country invoking subsections (a) and (c) of rule 10b-5 in the hopes of eluding the defendant-friendly trap of aiding and abetting.<sup>47</sup> In response to ever grow-

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42. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173-74 (1994) (citing *Santa Fe Indus., Inc.*, 430 U.S. at 473); *see also* Thomas O. Gorman, *Who Does the Catch-All Antifraud Provision Catch? Central Bank, Stoneridge, and Scheme Liability in the Supreme Court*, in *SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2007*, at 189 (PLI Corp. L. & Practice, 2007) (presenting the Court’s holding in *Central Bank* and discussing its impact on subsequent case law).

43. *Cent. Bank*, 511 U.S. at 191 (1994); *see also* Jill E. Fisch, *The Scope of Private Securities Litigation: In Search of Liability Standards for Secondary Defendants*, 99 COLUM. L. REV. 1293 (1999) (discussing the Court’s holding in *Central Bank* and the unwarranted restrictions the holding placed on finding secondary defendants liable).

44. *Cent. Bank*, 511 U.S. at 177 (1994) (emphasis added) (citing *Santa Fe Indus., Inc.*, 430 U.S. at 473).

45. *Id.* at 191.

46. *Id.*

47. *See* Allan Horwich, *The Origin, Application, Validity, and Potential Misuse of Rule 10b5-1*, 62 BUS. LAW. 913 (2007) (suggesting that liability for secondary actors is not

ing plaintiff claims of scheme liability, courts all over the country have begun addressing the viability of § 10(b) claims under rule 10b-5(a) and (c).<sup>48</sup> Two general approaches have emerged: the “bright-line” test<sup>49</sup> and the “substantial participation” test.<sup>50</sup>

Under the bright-line test, “a secondary actor is liable [only] if it makes a misstatement that is attributable to the defendant at the time the

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easily imposed and further discussing whether applying rule 10b5-1 would eliminate scienter as an element of an insider trading violation); Gregory A. Markel & Gregory G. Ballard, *Scheme Liability for Secondary Actors: Stoneridge and Central Bank*, in PARALLEL PROCEEDINGS IN SECURITIES CASES 327 (PLI Corp. L. & Practice, 2008); Gregory A. Markel & Gregory G. Ballard, *The Evolution of “Scheme” Liability Under Section 10(b)*, in 238TH ANNUAL INSTITUTE ON SECURITIES REGULATION 208 (PLI Corp. L. & Practice, 2006) (analyzing the impact of *Central Bank* on recent and upcoming case law); Gregory A. Markel & Gregory G. Ballard, *The Importance of Stoneridge*, in 239TH ANNUAL INSTITUTE ON SECURITIES REGULATION 879, 892-96 (PLI Corp. L. & Practice, 2007) (discussing the various interpretations the district courts have had on scheme liability); Taavi Annus, Note, *Scheme Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 72 MO. L. REV. 855 (2007) (analyzing the scope of scheme liability and how it relates to the language of § 10(b)); see also Tracy A. Nichols & Stephen P. Warren, *Gatekeepers Under Fire from Securities Plaintiffs and Regulators When Doing Your Job Can Amount to “Scheme Liability” Under Rule 10b-5(a) and (c) or Constitute Aiding and Abetting According to the SEC*, in DIRECTORS’ INSTITUTE ON CORPORATE GOVERNANCE 616 (PLI Corp. L. & Practice, 2006) (explaining the bright-line test and the substantial participation test).

48. See Nicholas Fortune Schanbaum, Note, *Scheme Liability: Rule 10b-5(a) and Secondary Actor Liability After Central Bank*, 26 REV. LITIG. 183, 207 (2007) (discussing the new interest in the forgotten rule 10b-5(a) and (c)).

49. See, e.g., *Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996); see also John Gibeaut, *An Outside Shot at Securities Fraud: It’s Not Too Late for Enron Defendants, as Plaintiffs Pursue “Scheme Liability”*, ABA J., June 2007, available at [http://abajournal.com/magazine/an\\_outside\\_shot\\_at\\_securities\\_fraud/](http://abajournal.com/magazine/an_outside_shot_at_securities_fraud/) (providing a cursory overview of the various tests for scheme liability).

50. See, e.g., *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 (9th Cir. 2000); *In re Software Toolworks, Inc.*, 50 F.3d 615, 628 (9th Cir. 1994); see also Celia R. Taylor, *Breaking the Bank: Reconsidering Central Bank of Denver after Enron and Sarbanes-Oxley*, 71 MO. L. REV. 367, 375 (2006); Mark D. Wood, *Liability for Securities Law Violations*, in UNDERSTANDING THE SECURITIES LAWS 2007, at 587, 614-15 (PLI Corp. L. & Practice, 2007) (explaining the two approaches of the bright-line test and the substantial participation test).

A third test, the creator or coauthor test, has been advanced by the SEC in an amicus brief filed in *In re Enron Corp. Securities Derivative & ERISA Litigation*. This test does not seem to be substantively different than the substantial participation test. The creator test seems to argue that a secondary actor is liable if the party, acting with others, “creates a misrepresentation.” *In re Enron Corp. Sec. Deriv. & ERISA Litig.*, 235 F. Supp. 2d 549, 587-88 (S.D. Tex. 2002); see also Kimberly Brame, Comment, *Beyond Misrepresentations: Defining Primary and Secondary Liability Under Subsections (a) and (c) of Rule 10b-5*, 67 LA. L. REV. 935, 940 (2007).

statement is publicly disseminated.”<sup>51</sup> The Tenth Circuit stated that with the bright-line test “[t]he critical element separating primary from aiding and abetting violations is the existence of a representation . . . made by the defendant, that is relied upon by the plaintiff.”<sup>52</sup> The Second Circuit further noted that “[a]llegations of ‘assisting,’ ‘participating in,’ ‘complicity in’ and similar synonyms . . . all fall within the prohibitive bar of *Central Bank*.”<sup>53</sup>

Under a more expansive view of primary liability adopted by the Ninth Circuit, a secondary actor is liable if it played a “‘significant role’ or had ‘intricate involvement’ in the creation of a misstatement.”<sup>54</sup> The Ninth Circuit later articulated this so-called “substantial participation” test as holding a primary violator of § 10(b) liable for participation in a “scheme to defraud” where the defendant has engaged in conduct that had “the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme.”<sup>55</sup> In this holding, the Ninth Circuit thus accepted a theory of liability that would apply to active participation in a fraudulent scheme by defendants who do not make a misstatement or omission, or engage in a manipulative securities trade. According to one commentator, “[t]he plaintiffs are arguing that, even though these secondary actors may not themselves have, either by misstatement or omission, made actionable representations, they are nevertheless liable for primary violations of § 10(b) through their manipulative or deceptive *acts*.”<sup>56</sup>

Although the holding in *Central Bank* seems simple enough, courts have continued to battle over the scope of § 10(b), and this issue rears its ugly head in the Supreme Court’s decision in *Stoneridge*.

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51. Mustokoff, *supra* note 41, at 20.

52. *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996).

53. *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997).

54. Mustokoff, *supra* note 41, at 20-21 (footnote omitted) (quoting *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *In re Software Toolworks*, 50 F.3d 615, 628 n.3 (9th Cir. 1994)).

55. *Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006); *see also* Patricia M. Hynes & Todd S. Fishman, *Developments in Private Securities Litigation*, in 2 39TH ANNUAL INSTITUTE ON SECURITIES REGULATION 903, 914 (PLI Corp. L. & Practice, 2007) (discussing scheme liability and the holding in *Simpson*).

56. Mustokoff, *supra* note 41, at 20; *see also* Donald Gentile, *Corporate Law—Primary-Violator Liability Under 10(b) Applies to Outside Business Partners in Suits Brought by Shareholders—Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040 (9th Cir. 2006), 41 SUFFOLK U. L. REV. 287, 289-90 (2007) (explaining the various tests for scheme liability).

### III. FACTS

#### A. THE PARTIES

The plaintiffs in *Stoneridge* consisted of a class of investors, with the lead plaintiff being Stoneridge Investment Partners, LLC (Stoneridge) investment group.<sup>57</sup> The defendants consisted of several individuals and businesses.<sup>58</sup> The lead defendant was Charter Communications, Inc. (Charter).<sup>59</sup> Charter was described by the Court as

a cable operator that provides video, data, interactive and private business network services to customers in forty states through the company's broadband network of coaxial and fiber optic cable. The company offers traditional analog cable as well as . . . advanced products and services such as high-speed Internet access, interactive video programming and video-on-demand.<sup>60</sup>

Senior executives of Charter, as well as Arthur Andersen, LLP, an accounting firm that served as Charter's independent auditor, were also named as defendants.<sup>61</sup>

Two other defendants (collectively Vendor Defendants<sup>62</sup>), Scientific-Atlanta, Inc. (Scientific-Atlanta) and Motorola, Inc. (Motorola), were also involved.<sup>63</sup> Scientific-Atlanta and Motorola are leading manufacturers of electronic equipment.<sup>64</sup> They design, develop, and manufacture products which they market to cable system operators, including Charter.<sup>65</sup> One product the Vendor Defendants manufacture and distribute to cable system operators is a "digital set-top" unit.<sup>66</sup> This unit sits on top of television sets

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57. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766 (2008).

58. *Id.*

59. *Id.*

60. *Stoneridge Inv. Partners LLC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc., Sec. Litig.)*, No. 4:02-CV-1186 CAS, 2004 WL 3826761, at \*1 (E.D. Mo. Oct. 12, 2004).

61. *Id.*

62. *Stoneridge Inv. Partners LLC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc., Sec. Litig.)*, No. 4:02-CV-1186 CAS, 2004 WL 3826760, at \*1 (E.D. Mo. Dec. 20, 2004).

63. *Stoneridge Inv. Partners LLC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc., Sec. Litig.)*, No. 4:02-CV-1186 CAS, 2004 WL 3826761, at \*1 (E.D. Mo. Oct. 12, 2004).

64. *Id.* at \*3.

65. *Id.*

66. *Id.*

to allow access to digital services, including digital cable.<sup>67</sup> Charter buys and provides this equipment to its customers in order to allow them to view Charter's cable television programs.<sup>68</sup>

During the litigation described below, Stoneridge reached a settlement agreement, which was approved by the United States District Court for the Eastern District of Missouri, with Charter, certain individual officers and directors of Charter, and Arthur Anderson, LLP.<sup>69</sup> Therefore, Scientific-Atlanta and Motorola remained as the only defendants in the case.

#### B. THE ALLEGED SCHEME<sup>70</sup>

Charter executives and officers realized in August 2000 that Charter was going to fall short in its projected cash flow and, therefore, not meet its own or analysts' projections for the company.<sup>71</sup> To overcome this shortfall, Charter modified its existing contracts with Vendor Defendants.<sup>72</sup> Charter devised a plan to overpay Vendor Defendants twenty dollars for each set-top unit so long as Vendor Defendants would repay the same amount in advertising purchases from Charter.<sup>73</sup> The Supreme Court further noted that

Charter would then record the advertising purchases as revenue and capitalize its purchases of the set-top boxes, in violation of generally accepted accounting principles, the transactions would enable Charter to fool its auditor into approving a financial statement showing it met projected revenue and operating cash flow numbers.<sup>74</sup>

Scientific-Atlanta, in response to a request by Charter, created documents falsely stating that production costs had increased by twenty dollars

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67. *Id.*

68. Stoneridge Inv. Partners LLC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc., Sec. Litig.), No. 4:02-CV-1186 CAS, 2004 WL 3826761, at \*3 (E.D. Mo. Oct. 12, 2004).

69. Stoneridge Inv. Partners LLC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc., Sec. Litig.), No. 4:02-CV-1186 CAS, 2005 WL 4045741, at \*1, \*25 (E.D. Mo. June 30, 2005) (certifying the settlement agreement consisting of \$146 million in cash and securities).

70. Stoneridge Inv. Partners, LLS v. Scientific-Atlanta, Inc. (*In re* Charter Commc'ns, Inc., Sec. Litig.), 443 F.3d 987, 989 (8th Cir. 2006).

71. Stoneridge Inv. Partners LLC v. Charter Commc'ns, Inc. (*In re* Charter Commc'ns, Inc., Sec. Litig.), No. 4:02-CV-1186 CAS, 2004 WL 3826761, at \*3 (E.D. Mo. Oct. 12, 2004).

72. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 766 (2008).

73. *Id.*

74. *Id.*

per set-top unit.<sup>75</sup> In a written contract with Motorola, Charter promised to purchase a specific number of set-top units, paying an additional twenty dollars per unit in liquidated damages for every unit not taken.<sup>76</sup> The contract was knowingly made with the presumption that Charter would purposefully not purchase all of the agreed upon set-top units and would thus pay Motorola liquidated damages.<sup>77</sup> In order for Charter to recover the additional monies it was paying to the Vendor Defendants for the set-top units, Charter entered into contracts with the Vendor Defendants “to purchase advertising time for a price higher than fair value.”<sup>78</sup> To make the set-top unit agreements and advertising contracts appear separate, the set-top unit agreements were backdated a month before the advertising contracts.<sup>79</sup> The advertising payments were then recorded by Charter to inflate revenue and operating cash flow by approximately \$17 million.<sup>80</sup>

#### IV. THE ANALYSIS

##### A. THE REPORT

In a five-to-three decision, the United States Supreme Court in *Stoneridge* decided that, at most, Vendor Defendants aided and abetted Charter’s misstatement and that § 10(b) and rule 10b-5 do not extend to aiding and abetting.<sup>81</sup> The Court noted that

[i]n a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.<sup>82</sup>

In reaching its decision, the Court held that Stoneridge did not rely upon Vendor Defendants’ statements or representations, and, therefore, Stoneridge could not sustain a cause of action for primary liability against Vendor Defendants.<sup>83</sup>

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75. *Id.* at 767.

76. *Id.*

77. *Id.*

78. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 767 (2008).

79. *Id.*

80. *Id.*

81. *Id.* at 773-74.

82. *Id.* at 768 (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)).

83. *Id.* at 766.

The majority relied heavily upon the decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* in refusing to extend § 10(b) liability to aiders and abettors.<sup>84</sup> Quoting *Central Bank*, the majority reasoned that “the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor’s statements or actions. Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery . . . .”<sup>85</sup> The majority recognized the SEC recommendation to allow aiding and abetting liability in private claims as a response to *Central Bank*.<sup>86</sup> The Court further discussed that Congress’s response was to only allow prosecution by the SEC for aiders and abettors, but not private civil liability.<sup>87</sup>

In analyzing each element for liability, the Court ultimately found that Stoneridge did not rely on Vendor Defendants’ acts or statements, and, therefore, liability could not be imposed.<sup>88</sup> Reliance “ensures that, for liability to arise, the ‘requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury’ exists as a predicate for liability.”<sup>89</sup> The Court noted that a rebuttable presumption for reliance has been found in two situations.<sup>90</sup> The first situation occurs when the defendant, who had a duty to disclose, omits a material fact.<sup>91</sup> The second situation is when the statements at issue become public under the fraud-on-the-market doctrine.<sup>92</sup> The majority found neither presumption to apply because Vendor Defendants did not have a duty to disclose and because “their deceptive acts were not communicated to the public.”<sup>93</sup>

The majority then addressed Stoneridge’s scheme liability argument.<sup>94</sup> Stoneridge sought to impose liability absent a public statement because Vendor Defendants “engaged in conduct with the purpose and effect of creating a false appearance of material fact to further a scheme to misrepre-

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84. See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768 (2008) (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994)).

85. *Id.* at 768 (citation omitted) (quoting *Cent. Bank*, 511 U.S. at 180).

86. *Id.* at 768-69 (citing *Central Bank of Denver Decision: Hearing Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 103rd Cong. 13-14 (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission)).

87. *Id.* at 769 (citing 15 U.S.C. § 78t(e) (2006)).

88. *Id.*

89. *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

90. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008).

91. *Id.* (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972)).

92. *Id.*

93. *Id.*

94. See *id.* at 770.

sent Charter's revenue."<sup>95</sup> Stoneridge argued that if the Vendor Defendants had not assisted Charter, the financial statement would have been a more accurate reflection of the financial condition of Charter.<sup>96</sup> The majority found that "[w]ere this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule."<sup>97</sup> The Court concluded in all events that Vendor Defendants' undisclosed deceptive acts were "too remote to satisfy the requirement of reliance."<sup>98</sup>

The majority felt Stoneridge was attempting to apply § 10(b) liability to ordinary business operations rather than just to finance business operations.<sup>99</sup> The Court distinguished the two types of operations by characterizing purchase and supply contracts as ordinary business operations and the securities market as finance business operations.<sup>100</sup> According to the Court, ordinary business operations are governed, for the most part, by state law.<sup>101</sup> And if the implied cause of action under § 10(b) were to be extended to Vendor Defendants' actions, "there would be a risk that federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees."<sup>102</sup> The majority feared that if it were to adopt Stoneridge's construction of § 10(b),

it would revive in substance the implied cause of action against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud; and [this] would undermine Congress's determination that this class of defendants should be pursued by the SEC and not by private litigants.<sup>103</sup>

The majority also found the "practical consequences" of including aiding and abetting in § 10(b) liability to be too profound.<sup>104</sup> As a result of such expansion of § 10(b), the majority feared noncolorable or weak claims would routinely be asserted by plaintiffs, thus causing the potential exten-

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95. *Id.*

96. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770 (2008).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 771 (2008).

103. *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

104. *Id.* at 772.

sive discovery and extortion of settlements from innocent companies.<sup>105</sup> The court further discussed the negative impact such expansion would have on raising the costs of doing business, which would, in turn, deter overseas firms from doing business in the United States.<sup>106</sup> The rising costs of doing business may in turn raise the cost of being a publicly traded company.<sup>107</sup>

Although the majority reinforced *Central Bank*'s limitation on the application of § 10(b) to mere aiders and abettors, the Court did hold that “§ 10(b) continues to cover secondary actors who commit primary violations.”<sup>108</sup>

## B. THE ANALYSIS

The majority in *Stoneridge* based its holding on poor analysis. This section will discuss four critical issues misaddressed by the majority. First, the plain language of § 10(b) and rule 10b-5 will be analyzed to determine that Vendor Defendants clearly violated § 10(b). Next, the majority's reading of *Central Bank* will be scrutinized, ultimately finding that *Central Bank*'s holding posed no threat to the investor plaintiffs in *Stoneridge*. Third, the majority's discussion of plaintiffs' reliance and the fraud-on-the-market theory will be addressed to show that plaintiffs had the requisite reliance for a § 10(b) action. Finally, the theory of scheme liability and the concept that Vendor Defendants were primary violators of § 10(b) will be advanced.

### 1. Plain Language

#### i. Section 10(b)

On its face, § 10(b) states that *any* person is liable for *any* manipulative or deceptive device or contrivance. Section 10(b) makes it unlawful, “directly or indirectly,” for “any person . . . [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.”<sup>109</sup> The language of the statute is the starting place in all cases concerning the construction of a statute, including defining liability for securi-

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105. *Id.* (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)).

106. *Id.*

107. *Id.*

108. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008) (citing *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994)).

109. 15 U.S.C. § 78(j)(b) (2006).

ties fraud under § 10(b).<sup>110</sup> Generally, statutory language must be given its ordinary meaning.<sup>111</sup> Specifically, § 10(b)'s words must be given their "commonly accepted meaning."<sup>112</sup>

The words of § 10(b) quoted above cannot sensibly be limited to prohibiting only misstatements. Even under the common law—which the securities laws were meant to enlarge—deception included misleading conduct and active concealment.<sup>113</sup> Section 10(b) was roughly patterned after the common law of fraud and deceit.<sup>114</sup> To the extent that Congress intended to alter the common law, it intended to make it easier, not more difficult, for securities law plaintiffs to recover under § 10(b) and rule 10b-5.<sup>115</sup> The actual terms of § 10(b) logically reach those who defraud investors indirectly through a scheme.

Section 10(b) covers "devices or contrivances" by "any person," whether used "directly or indirectly."<sup>116</sup> The use of the word "any" was clearly meant to be inclusive.<sup>117</sup> The word "directly" means without anything intervening.<sup>118</sup> "Indirectly" simply means not directly.<sup>119</sup> Those who make statements commit fraud directly. The language clearly allows for others to be liable for indirectly committing fraud, thus liability must extend beyond the speakers themselves.<sup>120</sup> From these simple terms, it seems only

110. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)).

111. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 356 (2005).

112. *Ernst & Ernst*, 425 U.S. at 198-99.

113. *Accord United States v. Colton*, 231 F.3d 890, 899-900 (4th Cir. 2000) (following *Stewart v. Wyo. Cattle Rancho Co.*, 128 U.S. 383 (1888)); *United States v. Brown*, 5 F. Supp. 81, 89 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935); *Leonard v. Springer*, 64 N.E. 299, 301 (Ill. 1902); *see Stewart v. Wyo. Cattle Rancho Co.*, 128 U.S. 383, 388 (1888) ("The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished it is unimportant whether the means of accomplishing it are words or acts of the defendants.").

114. *See Harris v. Am. Inv. Co.*, 523 F.2d 220, 224 (8th Cir. 1975); *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968).

115. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 307 (1985) (stating that the Supreme Court has "eschewed rigid common-law barriers in construing the securities laws"); *Harris*, 523 F.2d at 244-48 (observing that rule 10b-5 offers greater protection to plaintiffs than does common law fraud); *James v. Gerber Prod. Co.*, 483 F.2d 944, 946 (6th Cir. 1973) (noting that rule 10b-5 plaintiffs do not face the same limits of recovery as common law fraud plaintiffs); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1096 (2d Cir. 1972) (stating that plaintiffs need not prove all the elements of common law fraud to recover under rule 10b-5).

116. 15 U.S.C. § 78j(b) (2006).

117. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972).

118. WEBSTER'S INTERNATIONAL DICTIONARY 738 (2d ed. 1934).

119. *Id.* at 1267.

120. *See Thomas L. Riesenber, Fraud Claims Against Professionals After Central Bank*, INSIGHTS, Feb. 1995, at 9, 13.

logical that anyone who engages in deceptive conduct in connection with the purchase or sale of securities violates § 10(b), even if the fraud is accomplished as part of a greater scheme and even if the violator does not make any statements.

The Supreme Court defined “device” and “contrivance” to incorporate schemes to defraud.<sup>121</sup> The Court defined “device” to mean “scheme; often, a scheme to deceive,” and it defined “contrivance” as “a scheme, plan or artifice.”<sup>122</sup> The scheme to defraud by Vendor Defendants in *Stoneridge*, using sham transactions and false backdated documents to cause the publication of artificially inflated financial statements to investors,<sup>123</sup> falls squarely within these definitions.

Also, the words “employ” and “use” in § 10(b) support Vendor Defendants’ liability. The word “employ” is a synonym for the verb “use,” which means to engage in or to put into operation.<sup>124</sup> In § 10(b), the simple sentence structure shows that both verbs, “employ” and “use,” focus exclusively on the conduct of the violator and do not require any particular relationship with those injured by the conduct. Therefore, Vendor Defendants’ tangential relationship with *Stoneridge* is inapposite to the analysis of whether Vendor Defendants violated § 10(b).

*ii. Rule 10b-5*

Section 10(b) expressly authorizes the SEC to define “manipulative or deceptive devices or contrivances” through “such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”<sup>125</sup> The SEC first exercised this authority in 1942 by adopting rule 10b-5 to specify three categories of manipulative or deceptive devices or contrivances:

- (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

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121. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 n.20 (1976) (citing WEBSTER’S INTERNATIONAL DICTIONARY (2d ed. 1934)).

122. *Id.*

123. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 766-67 (2008).

124. WEBSTER’S INTERNATIONAL DICTIONARY 839, 2806 (2d ed. 1934).

125. 15 U.S.C. § 78j(b) (2006).

(c) To engage in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person . . . .<sup>126</sup>

From this plain language, it is clear that only subpart 10b-5(b) provides that the defendant make a deceptive misstatement or omission. In contrast, subparts 10b-5(a) and (c) address conduct rather than statements. Subpart (b) specifically addresses untrue statements of material facts and omissions of material facts; however, subparts (a) and (c) are not so restricted.<sup>127</sup> The Supreme Court in *Stoneridge* recognized the appellate court's restrictive reading of rule 10b-5 as only allowing misrepresentations and omissions described in subpart (b).<sup>128</sup> The appellate court's reading of rule 10b-5 effectively nullifies subpart (a) and (c). However, the Supreme Court dismissed this reading of the appellate court's decision, instead erroneously reading the appellate court's decision as finding no reliance on the part of the plaintiffs.<sup>129</sup> The majority, however, failed to recognize that in the appellate court, and the Supreme Court for that matter, the issue of reliance was not before the court.<sup>130</sup>

## 2. *The Court's Overly Broad Reading of Central Bank*

The majority in *Stoneridge* relied heavily upon *Central Bank*, fearing that if Vendor Defendants were held liable, the decision in *Central Bank* would be turned upside down because Vendor Defendants were nothing more than aiders and abettors.<sup>131</sup> However, Vendor Defendants were not mere aiders and abettors, and liability for using or employing a manipulative or deceptive device is not barred by the Court's decision in *Central Bank*. The *Central Bank* Court did not explore what constitutes a primary violation under § 10(b).<sup>132</sup> *Central Bank* held only that liability does not attach for merely aiding and abetting a primary violation.<sup>133</sup> *Central Bank* expressly said that "[a]ny person or entity . . . may be liable as a primary

126. 17 C.F.R. § 240.10b-5 (2008).

127. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972).

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

129. *Id.*

130. *Id.* at 775-76 (Stevens, J., dissenting).

131. *See id.* at 768, 772 (majority opinion).

132. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

133. *Id.* *See generally* Robert A. Prentice, *Locating That "Indistinct" and "Virtually Nonexistent" Line Between Primary and Secondary Liability Under Section 10(b)*, 75 N.C. L. REV. 691 (1997) (arguing that *Central Bank* should not significantly affect professionals' liability in securities fraud cases and that collateral participants should be held liable).

violator under rule 10b-5.”<sup>134</sup> Simply because there is no longer an action for aiding and abetting under § 10(b) does not mean that secondary actors are always free from liability.<sup>135</sup>

The Court held in *Central Bank* only that, to be liable, a defendant must itself employ one or more of the types of manipulative or deceptive devices or contrivances listed in rule 10b-5, rather than merely assist another in doing so.<sup>136</sup> *Central Bank* focused on the relationship or connection between the defendant and the fraudulent conduct; however, it did not alter the definition of fraudulent conduct itself.<sup>137</sup> *Central Bank* did not address or alter the basic concept that any person or entity may be liable as a primary violator of § 10(b) or rule 10b-5.

*Stoneridge* is fundamentally different from *Central Bank*. In *Stoneridge*, Vendor Defendants engaged in fraud;<sup>138</sup> they did not just facilitate or aid and abet Charter’s fraud, they engaged in classic fraudulent behavior themselves. The majority in *Stoneridge* failed to recognize this critical difference.<sup>139</sup> In *Central Bank*, unlike *Stoneridge*, the defendant did not itself violate § 10(b) because it did not engage in any deceptive acts.<sup>140</sup> Therefore, *Central Bank*’s holding should not have posed any obstacle for the plaintiffs in *Stoneridge*.<sup>141</sup>

### 3. *Reliance and the Court’s Reading of the Fraud-on-the-Market Theory*

As mentioned earlier, the issue of reliance should not have even been addressed by the *Stoneridge* Court.<sup>142</sup> The majority ultimately rested its holding on reliance despite it not being the question presented to the Court.<sup>143</sup> If anything, the majority should have remanded the issue of reliance to the court of appeals, but the majority, ironically, in an act of judicial activism, addressed the issue despite its continued deference to Congress to step in and create a cause of action for the *Stoneridge* plaintiffs. Not only did the *Stoneridge* plaintiffs demonstrate reliance, the majority fundamentally misinterpreted the fraud-on-the-market theory.

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134. *Cent. Bank*, 511 U.S. at 191.

135. *Id.*

136. *Id.*

137. *Id.* at 167 (framing the question before the Court as “whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation”).

138. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766-67 (2008).

139. *Id.* at 775 (Stevens, J., dissenting).

140. *Id.*

141. *Id.*

142. *Id.* at 775-76.

143. *Id.*

As mentioned above, the issue of reliance was not a question before either the appellate court or the Supreme Court in *Stoneridge*. Despite this technicality, the Supreme Court held that the plaintiffs in *Stoneridge* had not relied upon any acts or statements made by Vendor Defendants.<sup>144</sup> The dissent picked up this discrepancy and stated that if the majority was truly concerned about reliance, it should have remanded the case back to the appellate court to determine the issue of reliance.<sup>145</sup>

The Supreme Court's holding in *Basic* was that the fraud-on-the-market theory creates a presumption that shareholders rely on public material misstatements that affect the price of stock.<sup>146</sup> The dissent appropriately applied the fraud-on-the-market theory to *Stoneridge* and found reliance on the deceptive acts of Vendor Defendants that had a material effect on the price of Charter's stock.<sup>147</sup> Although an analysis of the fraud-on-the-market theory involving Vendor Defendants is more complicated than such analysis would be with Charter themselves, the fraud-on-the-market theory does provide the reliance needed by *Stoneridge* to bring suit against Vendor Defendants. Vendor Defendants' conduct did not impact the market directly; however, their actions of falsifying documents allowed Charter to issue materially misleading financial statements that directly impacted market integrity, and without Vendor Defendants willing substantial participation, Charter's scheme to defraud investors would have been near impossible to complete.

The majority discussed the fraud-on-the-market theory prior to addressing the issue of causation.<sup>148</sup> However, the issue of causation should have been addressed first and then coupled with the issue of fraud on the market.<sup>149</sup> Reliance is often viewed in terms of transaction causation.<sup>150</sup> Transaction causation is finding that but for the deceptive acts of the defendant, the plaintiff would not have entered into the securities transaction.<sup>151</sup> This concept of transaction causation, coupled with the fraud-on-the-market theory, demonstrates reliance on behalf of the plaintiffs in *Stoneridge*.<sup>152</sup>

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144. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008).

145. *Id.* at 775-76 (Stevens, J., dissenting).

146. *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988); see also Roberta S. Karmel, *When Should Investor Reliance be Presumed in Securities Class Actions?*, 63 BUS. LAW. 25, 26 (2007) (arguing that liability should exist despite actual investor reliance because publicly traded companies impliedly represent that the statements made in SEC filings are truthful).

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

148. *Id.* at 770 (majority opinion).

149. *Id.* at 776 (Stevens, J., dissenting).

150. *Id.* (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)).

151. *Id.*

152. *Id.*

The dissent also argued that in addition to but for causation, the plaintiffs had also established that Vendor Defendants proximately caused Charter's misstatement of income.<sup>153</sup> Plaintiffs alleged that Vendor Defendants "knew their deceptive acts would be the basis for statements that would influence the market price of Charter stock on which shareholders would rely."<sup>154</sup> Vendor Defendants' deceptive acts had the foreseeable consequence of causing the plaintiffs to enter into securities transactions.<sup>155</sup> The false documents that Vendor Defendants were willingly parties to had the same effect as the false statements of revenues.<sup>156</sup>

The majority overstates the issue and claims that if reliance is found on behalf of the plaintiffs in *Stoneridge*, the implied cause of action under § 10(b) "would reach the whole marketplace in which the issuing company does business."<sup>157</sup> This overexaggeration has permeated the press. In an online article discussing the *Stoneridge* decision, the authors cling to the majority's ordinary business transaction exaggeration and ask the reader to imagine what it would be like if the company that merely sold Enron its pens and paper could be held liable for Enron's stock price manipulation.<sup>158</sup> But the majority's view that finding for the plaintiffs in *Stoneridge* would involve all ordinary business transactions being at risk for securities fraud is more than overreaching. The precedent is that "liability only attaches when the company doing business with the issuing company has *itself* violated § 10(b)."<sup>159</sup> Therefore, OfficeMax would not be liable for Enron's stock manipulation for merely selling office products to Enron. In *Stoneridge*, Vendor Defendants did not enter into mere ordinary business transactions with Charter. Vendor Defendants did not simply sell Charter set-top boxes and purchase advertising time. Vendor Defendants backdated documents, falsified information regarding price increases, and voluntarily agreed to overpay for advertising.<sup>160</sup>

Further, the majority either misunderstood the purpose of the fraud-on-the-market theory or knowingly ignored its purpose. The majority found that because Vendor Defendants' deceptive acts were not communicated to the public, even under the fraud-on-the-market theory, plaintiffs did not

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153. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 776-77 (2008) (Stevens, J., dissenting).

154. *Id.* at 777.

155. *Id.*

156. *Id.*

157. *Id.* at 770 (majority opinion).

158. Robert Alt & Brian Walsh, *Stoneridge Sanity: The Most Important Case You Never Heard Of*, NAT'L REV. ONLINE, Jan. 16, 2008, <http://article.nationalreview.com/?q=NDM0MjhiNTgyYzgzN2E4MDQ0MWI2N2IzMDdhOWFmZjU=>.

159. *Stoneridge*, 128 S. Ct. at 777 (Stevens, J., dissenting).

160. *Id.* at 766-67 (majority opinion).

demonstrate reliance.<sup>161</sup> However, this reading of the fraud-on-the-market theory misses the mark. Under the fraud-on-the-market theory, investors purchase stock in reliance on the price's integrity.<sup>162</sup> Since public information is reflected in the market price of stock, the investor's reliance can be presumed for rule 10b-5 actions.<sup>163</sup> It does not matter whether the information was actually communicated to the public. It is assumed that the market price reflects all available public information and that investors rely on the market price.

#### 4. Primary Fraud and Scheme Liability

There is no question that Vendor Defendants were secondary actors. However, being secondary actors does not preclude them from liability. Section 10(b), even post-*Central Bank*, covers secondary actors who commit primary violations.<sup>164</sup> In *Stoneridge*, Vendor Defendants, although secondary actors, were primary violators under a theory of scheme liability.

Nonspeaking actors are subject to primary liability as long as their own conduct contributing to the scheme has a deceptive purpose and effect. If the defendant is shown to have the required intent to deceive and the defendant actively participated in a scheme whose principal purpose and effect was to create a false appearance of fact in furtherance of that scheme, then the defendant has violated § 10(b).<sup>165</sup>

The theory of scheme liability rests on rule 10b-5(a) and (c), and not on (b).<sup>166</sup> Under subparts (a) and (c), a defendant can be held liable for employing a "device, scheme, or artifice" to defraud and for engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."<sup>167</sup> Prior to *Central Bank*, scheme liability was not alleged separately from aiding and abetting. However, when *Central Bank* foreclosed aiding and abetting under § 10(b), scheme liability became more prominent.<sup>168</sup>

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161. *Id.* at 769.

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

163. *Id.*

164. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

165. *See Simpson v. AOL Time Warner, Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006).

166. *See Mark S. Pincus, Note, Circuit Split or a Matter of Semantics? The Supreme Court's Upcoming Decision on Rule 10b-5 "Scheme Liability" and its Implications for Tax Shelter Fraud Litigation*, 76 *FORDHAM L. REV.* 423, 447 (2007) (discussing scheme liability under rule 10b-5(a) and (c) and the circuit split involving the various tests for scheme liability).

167. 17 C.F.R. § 240.10b-5(a), (c) (2008).

168. *See, e.g., SEC v. Jakubowski*, 912 F. Supp. 1073, 1079 n.3 (N.D. Ill. 1996) ("Most cases concerning Rule 10b-5 focus on subpart (b) and largely ignore subpart (a) . . .

Post-*Central Bank*, the Supreme Court drew additional attention to scheme liability in its 2002 decision, *SEC v. Zandford*, interpreting rule 10b-5(a) and (c).<sup>169</sup> In *Zandford*, a stock broker sold his customer's securities but then used the proceeds for his own benefit.<sup>170</sup> The Supreme Court held that the broker violated rule 10b-5(a) and (c)<sup>171</sup> and, thus, committed securities fraud against his own customer.<sup>172</sup> The language the *Zandford* Court used is definitive as to why the holding was based on subparts (a) and (c). The Court held that each time Zandford "exercised his power of disposition [over his customer's securities] for his own benefit, that conduct, *without more*, was a fraud."<sup>173</sup> However, some critics of that reading of the Court's decision claim that the theory used in *Zandford* was based on a violation of a duty to disclose and therefore an omission on the part of the broker who owed fiduciary duties towards his client—thus, the rule 10b-5 claim was nothing very novel.<sup>174</sup>

Some courts argue that there is no claim under rule 10b-5(a) and (c) when the claim is essentially based on misrepresentations or omissions and thus that scheme liability has no independent existence outside a misrepresentation claim under rule 10b-5(b).<sup>175</sup> However, as discussed above, this

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and subpart (c) . . . . Notwithstanding the relatively vague language of subparts (a) and (c), the courts, the Commission, and private parties might look more closely at subparts (a) and (c) in future cases, especially those involving 'novel' forms of fraud.").

169. 535 U.S. 813 (2002).

170. *Id.* at 815.

171. *Id.* at 819 (citing provisions from subsections (a) and (c) of rule 10b-5, but not from subsection (b)).

172. *Id.* at 820.

173. *Id.* at 821 (emphasis added).

174. Daniel A. McLaughlin, *Liability Under Rules 10b-5(a) & (c)*, 31 DEL. J. CORP. L. 631, 647-49 (2006).

175. See *Regents of the Univ. of Cal. v. Credit Suisse First Boston, Inc.*, 482 F.3d 372, 387 (5th Cir. 2007); *Stoneridge Inv. Partners, LLS v. Scientific-Atlanta, Inc.* (*In re Charter Commc'n, Inc., Sec. Litig.*), 443 F.3d 987, 992 (8th Cir. 2006); *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1472 (N.D. Ill. 1996), *abrogated on other issues by Damato v. Hermanson*, 153 F.3d 464 (7th Cir. 1998) ("[Rule] 10b-5 claims must allege either (1) material misstatements or (2) material omissions by a person having a duty to disclose.").

Pre-*Central Bank*, the use of rule 10b-5(a) and (c) was much less prevalent; however, in many instances, its earlier uses support the separation of rule 10b-5(a) and (c) from (b). See, e.g., *Chiarella v. United States*, 445 U.S. 222, 225 n.5 (1980) (discussing the dismissal of charges under rule 10b-5(b) because Chiarella made no statements, and, thus, only (a) and (c) were implicated); *O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 898 (10th Cir. 1992) (stating that "fraud by conduct is a violation of Rule 10b-5(a) and (c)," thus implying that statements or omissions under (a) and (c) are not required); *Lucas v. Fla. Power & Light Co.*, 575 F. Supp. 552, 568 (D.C. Fla. 1983) ("A plaintiff who did not rely on misrepresentations or omissions in securities disclosure documents may recover on a broader theory of fraud under Rule 10b-5(a) and (c) . . ." (citing *Shores v. Sklar*, 647 F.2d 462, 470 (5th Cir. 1981))).

restrictive view is contrary to the plain language of rule 10b-5. Restricting subsections (a) and (c) to misstatements or omissions leaves large parts of rule 10b-5(a) and (c) without clear application. Statutes should not be interpreted in a way that leaves them with no meaning or application.<sup>176</sup>

This narrow interpretation coincides with the bright-line test articulated above. Under the bright-line test, the appellate court in *Stoneridge* found that the defendant must make a materially false or misleading statement and that there must be proof that the defendant knew or should have known that the misrepresentation or omission would be relied on by investors.<sup>177</sup> Although this is contrary to the plain language of rule 10b-5, even if it is accepted as a valid reading of rule 10b-5, it does not require that the alleged violator directly communicate misrepresentations to plaintiff investors in order for primary liability to attach. Rather, the defendant need have only known or recklessly disregarded the fact that its misrepresentation would be relied on by investors.<sup>178</sup> In *Stoneridge*, Vendor Defendants misrepresented statements through falsifying documents that it knew Charter was using to inflate revenues.<sup>179</sup> Although Vendor Defendants did not communicate directly with investors, they knew that investors would rely on the financial statements of Charter, which were made up of the sham transactions by Vendor Defendants.<sup>180</sup>

Under the substantial participation test discussed above, rule 10b-5(a) and (c) have more teeth. Substantial participation in the preparation of fraudulent statements creates primary liability even if that participation does not lead to the secondary actor making false statements.<sup>181</sup> Under this test, substantial participation in the preparation of a misrepresentation is sufficient. In *Stoneridge*, Vendor Defendants clearly participated substantially in the preparation of the misrepresentations in Charter's financial statements.<sup>182</sup>

Under rule 10b-5(a) and (c), Vendor Defendants possessed an intent to deceive knowing that their falsified documents would deceive Charter's

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176. See *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (noting that provisions of statutory enactments should not be construed so that some other provisions of the same statute would be superfluous).

177. *Stoneridge Inv. Partners, LLS v. Scientific-Atlanta, Inc. (In re Charter Commc'n, Inc., Sec. Litig.)*, 443 F.3d 987, 992 (8th Cir. 2006).

178. See *McGann v. Ernst & Young*, 102 F.3d 390, 397 (9th Cir. 1996), *cert. denied*, 520 U.S. 1181 (1997).

179. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 766-67 (2008).

180. *Id.*

181. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *In re Software Toolworks*, 50 F.3d 615, 628-29 (9th Cir. 1994).

182. *Stoneridge*, 128 S. Ct. at 766-67.

auditors.<sup>183</sup> Further, Vendor Defendants actively participated in a scheme to defraud with the purpose and effect of creating a false appearance of material fact in furtherance of that scheme. Under the plain language of rule 10b-5(a) and (c), the bright-line test, and the substantial participation test, Vendor Defendants, as secondary actors, committed primary violations.

### C. THE PRACTICAL IMPACT

Section 10(b) has long been the quintessential cause of action for plaintiffs asserting securities fraud. Additionally, the mere number of amicus curiae briefs filed for both sides of the *Stoneridge* litigation demonstrates the affect *Stoneridge* will have on the current status of securities fraud under § 10(b).<sup>184</sup> The amici curiae had various stakes in the outcome of the decision, ranging from thirty-two of the fifty states concerned about state pension investments and individual citizen investors,<sup>185</sup> to former SEC commissioners and law and finance professors.<sup>186</sup> It was rather evident that as the *Stoneridge* case approached its day in the Supreme Court, its decision would have lasting impacts.

In light of the Supreme Court's decision in *Stoneridge*, the question still remains whether scheme liability under rule 10b-5(a) and (c) is a viable option for plaintiffs. The Court never directly addressed rule 10b-5(a) and (c), but instead simply depended on its flimsy interpretation of *Central Bank*.<sup>187</sup> The fate of rule 10b-5(a) and (c) actions remains unclear; however, it is questionable that courts will find primary liability under (a) and (c) in light of the Supreme Court's analysis in *Stoneridge*, which boiled all the

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183. *Id.* at 767.

184. *See, e.g.*, Brief for Former SEC Commissioners and Officials and Law and Finance Professors as Amici Curiae Supporting Respondents, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329638; Brief of Merrill Lynch & Co., Inc. as Amici Curiae in Support of Respondents, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363254; Brief of Ohio, Texas and 30 Other States and Commonwealths as Amici Curiae in Support of Petitioner, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1957413; Brief of the Regents of the University of California, Court-Appointed Lead Plaintiff in the Enron Securities Litigation, as Amici Curiae in Support of Petitioner, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701942.

185. Brief of Ohio, Texas and 30 Other States and Commonwealths as Amici Curiae in Support of Petitioner, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1957413.

186. Brief for Former SEC Commissioners and Officials and Law and Finance Professors as Amici Curiae Supporting Respondents, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2329638.

187. *Stoneridge*, 128 S. Ct. at 768.

allegations down to mere aiding and abetting under *Central Bank*.<sup>188</sup> Furthermore, it is likely that courts will not allow actions under rule 10b-5(a) and (c) absent a public statement, due to the Supreme Court's finding that Vendor Defendants' acts were too remote to satisfy reliance and its careless reference to the deceptive acts not being disclosed to the investing public.<sup>189</sup> Although the Supreme Court in *Stoneridge* did not address subparts (a) and (c) specifically, it effectively held that without public statements reliance cannot be satisfied, and thus ultimately nullified all of rule 10b-5 except for subpart (b).<sup>190</sup>

Several cases still lingering in the court system have been greatly impacted by the *Stoneridge* decision. One of these cases is *In re Parmalat Securities Litigation*.<sup>191</sup> In *Parmalat*, the court held that the duplication of invoices to inflate revenues was a deceptive device despite the lack of public statements.<sup>192</sup> This holding was based on analysis under rule 10b-5(a) and (c) and the substantial participation test.<sup>193</sup> However, it would follow that defendants would appeal this decision requesting the holding to be vacated in light of the Supreme Court's decision in *Stoneridge*.

*In re Enron Corp. Securities, Derivative & ERISA Litigation*<sup>194</sup> is also immensely impacted by the *Stoneridge* decision. Although the *Enron* court found mere aiding and abetting,<sup>195</sup> the court did agree with *Parmalat* in that plaintiffs could bring a claim under rule 10b-5(a) and (c) and could demonstrate substantial participation.<sup>196</sup> Both sides of the table from *Enron* wrote as amici curiae in the *Stoneridge* case.<sup>197</sup> The plaintiffs in *Enron* wrote in support of the plaintiffs in *Stoneridge*, hoping the *Stoneridge* decision would give the *Enron* plaintiffs solid grounds for appeal.<sup>198</sup> However, with *Stoneridge*'s decision, it is clear that the *Enron* plaintiffs are out of steam.

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188. *Id.*

189. *Id.* at 770.

190. *See id.*

191. 376 F. Supp. 2d 472 (S.D.N.Y. 2005).

192. *Id.* at 504.

193. *Id.*

194. 439 F. Supp. 2d 692 (S.D. Tex. 2006).

195. *Id.* at 721.

196. *Id.* at 723.

197. Brief of Merrill Lynch & Co., Inc. as Amicus Curiae in Support of Respondents, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363254; Brief of the Regents of the University of California, Court-Appointed Lead Plaintiff in the *Enron Securities Litigation*, as Amici Curiae in Support of Petitioner, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701942.

198. Brief of the Regents of the University of California, Court-Appointed Lead Plaintiff in the *Enron Securities Litigation*, as Amici Curiae in Support of Petitioner, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 1701942.

Enron's lack of further appeal as a result of *Stoneridge* poses the broader question of where the *Stoneridge* decision leaves many plaintiffs in securities fraud litigations. The answer, unfortunately, seems to be without much recourse. It is still true that plaintiffs can assert strong claims under rule 10b-5(b) if misstatements are involved. However, plaintiffs, like those in *Enron*, often end up jilted by the issuing company, and the burden of proving any additional potential defendants issued false or misleading statements is a large hurdle to overcome. After *Central Bank*, and now after *Stoneridge*, plaintiffs must seek remedies from either the issuing company of stock or find some public statement of secondary actors to pursue a violation of rule 10b-5(b).

## V. CONCLUSION

The Court in *Stoneridge* ultimately held that due to a lack of reliance, plaintiffs had not stated a cause of action under § 10(b).<sup>199</sup> Despite reliance not being the issue presented before the Supreme Court or the appellate court,<sup>200</sup> plaintiffs were precluded from proceeding on a cause of action against Vendor Defendants. The Court relied on its previous holding in *Central Bank*, and notwithstanding the Court's continued stance that secondary actors can be primarily liable under § 10(b), the Court ultimately required some form of misstatement or omission for an action under rule 10b-5.<sup>201</sup>

The plain language of § 10(b) and rule 10b-5 indicates separation between subparts (b) and (a) and (c). Case law surrounding § 10(b) has seen days of great flexibility and prosperity, allowing the judicial oak to flourish, and days of restriction and drought, causing the great oak to dig its roots deep into the soil seeking water and nutrition. The *Stoneridge* Court has boxed this oak in by failing to analyze the plain language of the statute and rule, expanding the holding of *Central Bank*, inappropriately exploring the issue of reliance and ultimately misrepresenting the fraud-on-the-market theory, and ignoring its previous commitment to holding secondary actors primarily liable for their own fraudulent acts.

Plaintiffs' attorneys will have to either be able to prove subpart (b) for secondary actors or attempt to seek redress outside of rule 10b-5. Mr. Freeman, the father of rule 10b-5, was pleased with the application of his legislative child just prior to the Court's holding in *Central Bank*.<sup>202</sup> It

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199. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008).

200. *Id.* at 775-76 (Stevens, J., dissenting).

201. *Id.* at 770 (majority opinion).

202. *Forward, supra* note 2, at S3-S4.

2009]            *THE IMPACT OF STONERIDGE ON PLAINTIFF'S ACTIONS UNDER § 10(B)*            309

would be interesting to know now, considering the Court's recent restrictions on rule 10b-5 for plaintiffs, whether Mr. Freeman would be proud of its current application.