STONERIDGE: RELIANCE BRINGS RELIEF TO SECONDARY ACTORS

Aneta D. Mincheva

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I. Introduction

By enacting the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act) (collectively Acts), Congress sought to achieve full disclosure in the securities industry[1] for the protection of investors and for the promotion of high ethical standards.[2] The Acts allow the Securities and Exchange Commission (SEC), as well as private parties, to sue for enforcement of their provisions.[3] Even in the absence of an express private right of action under the Acts,[4] courts implied such causes of action[5] not only against primary violators, but also against secondary actors, such as attorneys, accountants, and financial institutions.[6]

Although aiding and abetting liability was well established for decades,[7] the United States Supreme Court eliminated aiding and abetting liability in 1994 when the Court decided *Central Bank of Denver v.*

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1 Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972) (citing SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)).

2 Shores v. Sklar, 647 F.2d 462, 470 (5th Cir. 1981), *rev'd in part on other grounds*, 844 F.2d 1485 (11th Cir. 1988), *vacated*, 855 F.2d 722 (11th Cir. 1988), *reinstated in part*, 885 F.2d 760 (11th Cir. 1989).

3 Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 171 (1994).

4 *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729-30 (1975) ("Section 10(b) of the 1934 [Securities] Act does not by its terms provide an express civil remedy for its violation. . . . Similarly ther [sic] is no indication that the Commission in adopting Rule 10b-5 considered the question of private civil remedies under this provision.").

5 *See Cent. Bank*, 511 U.S. at 171 (holding that private plaintiffs "may also sue under private rights of action we have found to be implied by the terms of § 10(b) and § 14(a) of the 1934 Act").

6 Amanda J. Aymond, Comment, *You'd Better Watch What They Say: An Examination of Primary Liability for Secondary Actors Under Section 10(b)*, 68 U. Cin. L. Rev. 835, 838-39 (2000).

7 *See, e.g.*, *In re* MTC Elec. Techs. S'holders Litig., 898 F. Supp. 974, 985 (E.D.N.Y. 1995), *vacated in part*, 993 F. Supp. 160 (E.D.N.Y. 1997).

First Interstate Bank of Denver[8] (*Central Bank*). In *Central Bank*, the Supreme Court held secondary actors could no longer face aiding and abetting liability under § 10(b) of the 1934 Act and the SEC Rule 10b-5, but the Court made it clear that secondary actors could still be liable as primary violators if all the requirements for primary liability were met.[9] For over a decade after the *Central Bank* decision, the federal courts struggled to distinguish primary from secondary liability, thereby creating a split between the federal circuits as to what conduct would subject a secondary actor to primary liability under § 10(b).[10] Four different standards emerged, as discussed in Part II., subsection D. of this comment.

In 2008, more than a decade after the Supreme Court eliminated aiding and abetting liability, the Court handed down its decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*[11] (*Stoneridge*), where it considered the issue of primary liability of secondary actors under § 10(b) of the 1934 Act.[12] In a five-to-three decision, the Court found the third-party suppliers/customers were not liable under § 10(b) and Rule 10b-5 on a theory of scheme liability, where they made false statements in documents sent to the primary violator, but were not involved in the preparation or dissemination of the primary violator's financial statements and were not identified to the public during the relevant times.[13] Part IV of this comment examines the impact

8 *See Cent. Bank*, 511 U.S. at 164.

9 *Id.* at 191 ("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.").

10 *See* Carley Capital Group v. Deloitte & Touche, L.L.P., 27 F. Supp. 2d 1324, 1334 (D. Ga. 1998) ("Since the decision in *Central Bank*, the federal courts have split over the threshold required to show that a secondary actor's conduct constitutes primary liability."), *abrogated by* 88 F. Supp. 2d 326 (D.N.J. 1999).

11 *See* Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

12 *See id.* at 766 ("[T]he implied right of action [in § 10(b)] does not reach the customer/supplier companies because the investors did not rely upon their statements or representations.").

13 *See infra* Part III.

of *Stoneridge* and critically analyzes the majority and the dissenting opinions in the case.[14]

II. Background: Liability of Secondary Actors

A. *Liability Under § 10(b) of the 1934 Act and the SEC Rule 10b-5*

In response to the 1929 stock market collapse and complaints of abuses in the securities industry, Congress enacted the 1933 Act for regulation of initial offerings of securities and the 1934 Act for regulation of post-distribution trading of securities.[15] The purpose of the Acts was to achieve full disclosure in the securities industry and to replace the philosophy of caveat emptor.[16] The Supreme Court interpreted the Acts as protecting investors from fraud and promoting "ethical standards of honesty and fair dealing."[17] The Acts create an expansive scheme of civil liability, allowing not only the SEC, but also private parties to sue for enforcement of the statutory provisions.[18]

Section 10(b) of the 1934 Act has been judicially interpreted to imply a private right of action.[19] Section 10(b) states that it is:

> 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 . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance . . . .[20]

14 *See infra* Part IV.

15 Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 171 (1994).

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

17 Shores v. Sklar, 647 F.2d 462, 470 (5th Cir. 1981), *rev'd in part on other grounds*, 844 F.2d 1485 (11th Cir. 1988), *vacated*, 855 F.2d 722, (11th Cir. 1988), *reinstated in part*, 885 F.2d 760 (11th Cir. 1989).

18 *Cent. Bank*, 511 U.S. at 171.

19 *Id.* ("[Private plaintiffs] may also sue under private rights of action we have found to be implied by the terms of § 10(b) and § 14(a) of the 1934 Act.").

20 15 U.S.C. § 78j (2000).

In similar terms, Rule 10b-5, which the SEC adopted in 1942, implements § 10(b) of the 1934 Act[21] and provides that it is:

> 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,
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> (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.[22]

Neither the language of § 10(b) and Rule 10b-5, nor the history surrounding their implementation, shows Congress considered the issue of providing private civil remedies in case of a violation.[23] Yet, in 1946, the United States District Court for the Eastern District of Pennsylvania held that a private right of action was implied under Rule 10b-5.[24] In 1971, the Supreme Court confirmed this holding,[25] but four years later, the Supreme Court decided to restrict the right to actual purchasers or sellers of securities.[26]

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21 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 78 (2006).

22 17 C.F.R. § 240.10b-5 (2008).

23 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975).

24 *See* Kardon v. Nat'l. Gypsum Co., 69 F. Supp. 512, 514 (1946) ("[T]he mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.").

25 *See* Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) ("[A] private right of action is implied under § 10(b).").

26 *See Blue Chip*, 421 U.S. at 730-31 (holding that in order to bring a private lawsuit for damages under § 10(b) and Rule 10b-5, a private plaintiff must be an actual purchaser or seller of securities). The Court listed three classes of plaintiffs that

The courts not only implied a private right of action under § 10(b) and Rule 10b-5, but they also delineated its elements.[27] Accordingly, to hold a defendant liable for a primary violation of § 10(b) and Rule 10b-5, a private plaintiff must show that the defendant made a material misrepresentation or omission, with scienter,[28] in connection with the purchase or sale of a security, and that the plaintiff actually and justifiably relied on the defendant's material misrepresentation or omission, which caused the plaintiff's losses.[29] Moreover, by April 1994, all federal circuits[30] interpreted the 1934 Act as imposing aiding and abetting liability on secondary actors.[31] To find a secondary actor liable as an aider and abettor, there must be a showing that a violation of the securities laws has occurred, that the secondary actor knew about it, and

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cannot pursue a private cause of action for damages under Rule 10b-5: (1) potential purchasers of securities alleging they decided to abstain from buying due to "an unduly gloomy representation or the omission of favorable material which made the issuer appear to be a less favorable investment vehicle than it actually was"; (2) issuer's shareholders alleging they did not sell their shares as a result of "an unduly rosy representation or a failure to disclose unfavorable material"; (3) issuer's shareholders, creditors, or others who lost their investment's value because of "corporate or insider activities in connection with the purchase or sale of securities which violate Rule 10b-5." *Id.* at 737-38.

27 *See, e.g.*, Schlifke v. Seafirst Corp., 866 F.2d 935, 943 (7th Cir. 1989) (showing what elements a private plaintiff must meet in order to hold a defendant primarily liable under § 10(b) and Rule 10b-5).

28 *Id.* at 943. "Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2507 n.3 (2007); *see also* IIT v. Cornfeld, 619 F.2d 909, 923 (2d Cir. 1980) (stating that recklessness is considered sufficient to meet the scienter requirement).

29 *Schlifke*, 866 F.2d at 943; Shores v. Sklar, 647 F.2d 462, 476 n.4 (5th Cir. 1981) (Randall, J., dissenting), *rev'd in part on other grounds*, 844 F.2d 1485 (11th Cir. 1988), *vacated*, 855 F.2d 722 (11th Cir. 1988), *reinstated in part*, 885 F.2d 760 (11th Cir. 1989) ("[A] properly stated cause of action must establish . . . the materiality of any misrepresentation or omission by the defendant, the extent of actual reliance by the plaintiff on the defendant's statements, and the justifiability of the reliance . . . ."). *But see* SEC v. Lucent Techs. Inc., 363 F. Supp. 2d 708, 714 (D.N.J. 2005) (stating that when the SEC brings an action, it need not prove reliance and damages).

30 *See In re* MTC Elec. Techs. S'holders Litig., 898 F. Supp. 974, 985 (E.D.N.Y. 1995) (explaining that *Central Bank* eliminated secondary liability under § 10(b) despite established precedent to the contrary in every federal circuit), *vacated in part*, 993 F. Supp. 160 (E.D.N.Y. 1997).

31 Aymond, *supra* note 6, at 838-40.

that the secondary actor knowingly rendered substantial assistance to the primary violator in committing the wrongdoing.[32] Because a private cause of action under § 10(b) and Rule 10b-5 existed for both primary and secondary liability since 1946,[33] the distinction between the two types of liability was not deemed as critical until 1994, when the Supreme Court decided *Central Bank*.[34]

B. Central Bank*: Elimination of Aiding and Abetting Liability*

In 1994, despite established precedent in every federal circuit,[35] the Supreme Court eliminated aiding and abetting liability under § 10(b) of the 1934 Act when it decided *Central Bank*.[36] The Court stated § 10(b) provided a private cause of action against those who performed manipulative or deceptive acts in connection with the sale or purchase of securities,[37] but emphasized the text of the statute did not mention aiding and abetting.[38] Thus, private plaintiffs could not sue for conduct that was not prohibited by the text of the statute.[39]

The Supreme Court acknowledged that § 10(b) contained the phrase "directly or indirectly," but explained that "aiding and abetting liability extend[ed] beyond persons who engage[d], even indirectly, in a proscribed activity."[40] Rather, "aiding and abetting liability reach[ed] persons who [did] not engage in the proscribed activities at all, but who [gave] a degree of aid to those who [did]."[41] In sum, the Court concluded § 10(b) of the 1934 Act prohibited "only the making of a mate-

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32 Schatz v. Rosenberg, 943 F.2d 485, 495 (4th Cir. 1991); *IIT*, 619 F.2d at 922; Monsen v. Consol. Dressed Beef Co., 579 F.2d 793, 799 (3d Cir. 1978).
33 *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) ("[T]he mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.").
34 Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1230 (10th Cir. 1996); *In re MTC*, 898 F. Supp. at 985.
35 *In re MTC*, 898 F. Supp. at 985.
36 *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994) ("[Section 10(b)] prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act.").
37 *Id.* at 166.
38 *Id.* at 175.
39 *Id.* at 173.
40 *Id.* at 176.
41 *Id.*

rial misstatement (or omission) or the commission of a manipulative act."[42]

In reaching its decision, the Supreme Court considered the text of § 10(b)[43] and other provisions of the 1934 Act,[44] the other laws on secondary liability,[45] the intent of Congress,[46] the importance of the reliance requirement,[47] and the lack of a general civil statute on aiding and abetting.[48] The Court emphasized that the statutory silence did not signify support for aiding and abetting liability under § 10(b).[49] Furthermore, it dismissed any policy considerations as less determinative than the text and structure of the 1934 Act.[50] The Court explained aiding and abetting liability interfered with the goals of § 10(b) due to its unclear rules, the danger of excessive litigation, and the high costs associated with defending such lawsuits—costs that could be passed on to the intended beneficiaries of the law, namely, the investors.[51] In conclusion, the Court stated the lack of aiding and abetting liability under § 10(b) of the 1934 Act did not release secondary actors from all liability under the securities laws.[52] Rather, attorneys, accountants, and banks could still be liable when all requirements for primary liability were met.[53]

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42 *Id.* at 177.

43 *See id.* at 173 ("[T]he text of the statute controls our decision.").

44 *See id.* at 179 ("From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action.").

45 *See id.* at 184 (noting other case law held that if Congress wanted to create a private remedy it had little trouble doing so, and stating that "Congress did not overlook secondary liability when it created the private rights of action in the 1934 Act.").

46 *See id.* at 174 (stating there was "no indication that Congress meant to prohibit any conduct not involving manipulation or deception." (quoting Santa Fe Indust., Inc. v. Green, 430 U.S. 462, 473 (1977))) (internal quotations omitted).

47 *See id.* at 180 ("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.").

48 *Id.* at 182.

49 *Id.* at 185.

50 *Id.* at 188.

51 *Id.* at 188-89.

52 *Id.* at 191.

53 *Id.*

*C. Post-*Central Bank *Legislation*

Following the Supreme Court's decision in *Central Bank*, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA).[54] Superseding in part the holding of *Central Bank*, the PSLRA permitted aiding and abetting actions brought by the SEC.[55] Section 78t(e) specifically gives the SEC the power to prosecute violators who knowingly provide "substantial assistance to another person."[56] The bill's express grant of authority to the SEC to bring suit against aiders and abettors[57] signifies congressional approval of the *Central Bank*'s holding that precluded private plaintiffs from pursuing aiding and abetting liability claims.[58]

D. Different Interpretations of Central Bank

Central Bank eliminated aiding and abetting liability under § 10(b) of the 1934 Act.[59] The decision, however, did not provide clear guidelines to determine what conduct would subject a secondary actor to primary liability.[60] As a result, *Central Bank* caused a split between the federal circuits,[61] as shown by the four separate tests discussed below.

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54 *See* Pub. L. No. 104-67, 109 Stat. 737 (1995).

55 *See* 15 U.S.C. § 78t(e) (2000) ("For purposes of any action brought by the Commission . . . any person that knowingly provides substantial assistance to another person . . . shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.").

56 *Id.*

57 *See* Wright v. Ernst & Young L.L.P., 152 F.3d 169, 176 (2d Cir. 1998) (analyzing 15 U.S.C. § 78t(e)).

58 Aymond, *supra* note 6, at 844.

59 *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994) ("[§ 10(b)] prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act.").

60 *In re* Enron Corp. Sec., 235 F. Supp. 2d 549, 583 (S.D. Tex. 2002) (noting that the Supreme Court's decision in *Central Bank* "left it to the lower courts to determine when the conduct of a secondary actor makes it a primary violator under the statute.").

61 *See* Carley Capital Group v. Deloitte & Touche, L.L.P., 27 F. Supp. 2d 1324, 1334 (N.D. Ga. 1998) ("Since the decision in *Central Bank*, the federal courts have split over the threshold required to show that a secondary actor's conduct constitutes primary liability."), *abrogated by* Copland v. Grumet, 88 F. Supp. 2d 326 (D.N.J. 1999).

1. The Substantial Participation or Intricate Involvement Test

Adopted by the Ninth Circuit Court of Appeals, the substantial participation or intricate involvement test made a secondary actor liable if the actor's participation in the primary violation was significant.[62] It required more than a knowing assistance.[63] Specifically, the secondary actor's own actions, statements, or omissions had to be manipulative or deceitful.[64] Liability would attach even if the secondary actor's involvement was not made public because of the market's reliance on the actor's material misstatements or omissions.[65] In addition, accountants were subject to a more flexible standard for primary liability and thus, could be held liable even if not named in the specific document containing the material misrepresentation or omission.[66] In sum, because liability would attach not just for making "materially false and misleading statements or omissions,"[67] but also for participating "in *any* scheme or device that operate[d] as a fraud on investors,"[68] the substantial participation test covered both isolated misrepresentations or omissions and practices operating as a fraud.[69]

2. The Bright Line Test

Unlike the substantial participation test, the bright line test adopted by the Second Circuit Court of Appeals required more than just participation, assistance, or complicity, whether or not substantial.[70] Instead, the bright line test required the actual making of a false or mis-

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62 *See e.g.*, *In re* ZZZZ Best Sec. Litig., 864 F. Supp. 960, 970 (C.D. Cal. 1994) (holding anyone intricately involved in the creation of misrepresentations or omissions primarily liable under § 10(b)); *see also In re* Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 628 (9th Cir. 1994) (finding that evidence showing a defendant's "significant role in drafting and editing" a document containing material misrepresentations or omissions was sufficient for primary liability under § 10(b)).
63 *In re ZZZZ*, 864 F. Supp. at 969.
64 *Id.*
65 *Id.* at 970.
66 Employers Ins. of Wausau v. Musick, Peeler, & Garrett, 871 F. Supp. 381, 389-90 (S.D. Cal. 1994).
67 *In re ZZZZ*, 864 F. Supp. at 972.
68 *Id.* at 971.
69 *Id.* at 972.
70 Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997).

leading statement by a secondary actor.[71] Even if a secondary actor, such as an outside auditor, orally approved materially false and misleading statements,[72] the actor could not be held liable unless, at the moment of dissemination, the statements were attributed to the actor.[73] The Eleventh Circuit Court of Appeals also adopted this reliance requirement.[74] Furthermore, district courts outside the Second and the Eleventh Circuits applied the bright line test.[75] Courts favored this test

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71 *See In re* MTC Elec. Techs. S'holders Litig., 898 F. Supp. 974, 986 (E.D.N.Y. 1995) ("[R]eview and approval of documents containing fraudulent statements is not actionable under Section 10(b) because one must *make* the material misstatement or omission in order to be a primary violator."), *vacated in part*, 993 F. Supp. 160 (E.D.N.Y. 1997); *see also Shapiro*, 123 F.3d at 720-21 ("A claim under § 10(b) must allege a defendant has made a material misstatement or omission indicating an intent to deceive or defraud in connection with the purchase or sale of a security.").

72 *See* Wright v. Ernst & Young LLP, 152 F.3d 169, 171 (2d Cir. 1998) (Ernst & Young, LLP, an outside auditor orally approved "false and misleading financial statements . . . ." that were given to the public.).

73 *Id.* at 175; *see also* Filler v. Hanvit Bank, 156 F. App'x 413, 415 (2d Cir. 2005) ("[T]he misrepresentation must be attributed to [the defendant] at the time of the public dissemination, that is, in advance of the investment decision.") (internal quotations omitted).

74 *See* Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001) ("[I]n order for the defendant to be primarily liable under § 10(b) and Rule 10b-5, the alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made.").

75 *See, e.g.*, *In re* Mut. Funds Inv. Litig., 487 F. Supp. 2d 618, 621 (D. Md. 2007) (holding that the statements must be "directly attributable" to the secondary actors and that dissemination of allegedly false and misleading prospectuses alone was not sufficient); SEC v. Lucent Techs. Inc., 363 F. Supp. 2d 708, 724 (D.N.J. 2005) ("[T]he bright line test was the appropriate standard to apply for primary liability under Section 10(b)."); *In re* Rent-Way Sec. Litig., 209 F. Supp. 2d 493, 503 (W.D. Pa. 2002) (holding that review and approval of documents is insufficient for primary liability); Great Neck Capital Appreciation Inv. P'ship v. Pricewaterhousecoopers, L.L.P., 137 F. Supp. 2d 1114, 1121 (E.D. Wis. 2001) (concluding the secondary actor was not liable because it did not draft the release, it did not publicly adopt it, and it did not allow "its name to be associated with it."); Copland v. Grumet, 88 F. Supp. 2d 326, 332 (D.N.J. 1999) ("[I]n order to be held liable under § 10(b) and Rule 10b-5 for making a material misstatement (or omission), there must be allegations which demonstrate that the particular defendant named in the complaint in fact made a misstatement (or omission)."); *In re* Kendall Square Research Corp. Sec. Litig., 868 F. Supp. 26, 28 n.2 (D. Mass. 1994) (holding that liability attaches only for making a material misrepresentation or omission, or committing a manipulative act);

because it followed the text of § 10(b) and Rule 10b-5 more strictly,[76] and compared to the substantial participation test, delineated the types of conduct subject to liability more clearly.[77]

3. The *Anixter* Test

The Tenth Circuit Court of Appeals adopted the *Anixter* test, which was set forth in *Anixter v. Home-Stake Production Company*.[78] Under this test, a secondary actor could be liable if the actor made "a false or misleading statement (or omission)" and "knew or should have known that his representation would be communicated to investors," even if he did not directly communicate with the investors.[79] Similarly, a district court in the First Circuit Court of Appeals held that a secondary actor who prepared, edited, and drafted "a fraudulent financial statement knowing it [would] be publicly disseminated" should be subject to primary liability, even though another auditor actually signed the statement.[80] While reviewing and making comments on documents was deemed insufficient, actual preparation of a false or misleading statement by a secondary actor would be enough to make him liable,[81] even if his identity was not revealed to the public.[82]

4. The SEC's Creation Test

The SEC's creation test for primary liability of secondary actors appeared in the SEC's amicus brief submitted in *Carley Capital Group*

Vosgerichian v. Commodore Int'l, 862 F. Supp. 1371, 1378 (E.D. Pa. 1994) (stating that an accountant who "advised" and provided "guidance and express approval" to a client in making misrepresentations is not subject to primary liability).

76 *See Lucent Techs.*, 363 F. Supp. 2d at 724.

77 *Id.*

78 *See* Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1226 (10th Cir. 1996).

79 *Id.*

80 *See In re* Lernout & Hauspie Sec. Litig., 230 F. Supp. 2d 152, 168 (D. Mass. 2002) ("Absolving an auditor who prepares, edits, and drafts a fraudulent financial statement knowing it will be publicly disseminated simply because an affiliated auditor with which it is working under a common trademark is the one to actually sign it, would stretch *Central Bank's* holding too far.").

81 *Id.*

82 *See id.* at 169 ("[A]n accountant that 'ghost-writes' portions of a SEC financial disclosure can be deemed a primary violator.").

v. Deloitte & Touche, L.L.P. (*Carley*).[83] Under this test, secondary actors could be liable for *creating* a misrepresentation, regardless of whether they acted alone and regardless of whether they were identified to investors.[84] The court in *Carley* found the SEC's test consistent with the language of § 10(b) of the 1934 Act, and specifically, with the phrase "directly or indirectly."[85] Moreover, according to the court, it was consistent with *Central Bank* because *Central Bank* did not limit liability to those whose identities were revealed to investors.[86] Applying the new standard, the court in *Carley* found "the [d]efendant created the misrepresentation by directing [another] to include [the statements] in the report."[87]

A district court in the Fifth Circuit Court of Appeals also adopted the SEC's creation test, as it found the test "balanced in its concern for protection for victimized investors as well as for meritlessly harassed defendants (including businesses, law firms, accountants and underwriters), . . . [and] consistent with the language of § 10b(b) [sic], Rule 10b-5, and Central Bank."[88] The district court explained that primary liability could attach, even if the secondary actor did not initiate the misrepresentation, as long as there was proof of scienter.[89] Importantly, the actor would not be liable if he prepared "a truthful and complete portion of a document," even though other portions contained misrepresentations of which he was aware.[90] In 2007, however, the Fifth Circuit rejected the SEC's creation test and instead adopted the standard of the Eighth Circuit Court of Appeals.[91] The new test re-

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[83] Carley Capital Group v. Deloitte & Touche, L.L.P., 27 F. Supp. 2d 1324, 1334 (D. Ga. 1998), *abrogated by* Copland v. Grumet, 88 F. Supp. 2d 326 (D.N.J. 1999).

[84] *Id.* at 1334. The test reads as follows: "when a person, acting alone or with others, creates a misrepresentation [on which the investor-plaintiffs relied], the person can be liable as a primary violator . . . if . . . he acts with the requisite scienter." *In re* Enron Corp. Sec., 235 F. Supp. 2d 549, 588 (D. Tex. 2002) (internal quotations omitted).

[85] *Carley*, 27 F. Supp. 2d at 1334.

[86] *See id.* ("[T]here is nothing in *Central Bank* . . . that limits liability to those individuals who sign documents or are otherwise identified to investors.").

[87] *Id.*

[88] *In re Enron*, 235 F. Supp. 2d at 590-91.

[89] *Id.* at 588.

[90] *Id.*

[91] *See* Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 386-87, 391 (5th Cir. 2007) ("We agree with the Eighth Circuit that the SEC's proposed test (by which we are not bound) is too broad to fit within the

quired a showing that secondary actors made, or affirmatively caused to be made, material misrepresentations or omissions, or directly engaged in manipulative practices.[92]

III. *Stoneridge*: The Importance of Reliance Under § 10(b)

Acknowledging the federal circuit split on the standard of primary liability of secondary actors, the Supreme Court granted certiorari to review the Eighth Circuit's decision in the case of *In re Charter Communications, Inc., Securities Litigation*.[93] On January 15, 2008, the Supreme Court issued the long awaited decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*[94]

Stoneridge Investment Partners, LLC (Stoneridge), Plaintiff/Petitioner, invested in Charter Communications, Inc. (Charter), a Defendant in the case.[95] Stoneridge claimed Charter's suppliers/customers, Scientific-Atlanta, Inc. and Motorola, Inc., Defendants/Respondents, were liable under the implied private cause of action under § 10(b) of the 1934 Act and SEC Rule 10b-5.[96] The facts demonstrate that in documents sent to Charter, Charter's suppliers/customers misrepresented

contours of § 10(b). . . . Like the Eighth Circuit, we adopt Judge Higginbotham's reasoning and definition in full, and we are aware of no circuit that recognizes a broader definition.").

92 *Id.* at 386, n.24.

93 Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 127 S. Ct. 1873 (2007) (No. 06-43). The question presented was:

> Whether this Court should imply a private cause of action under Section 10(b) of the Securities Exchange Act against vendors whose transactions with a publicly traded company were improperly accounted for by the public company in its financial statements, when the plaintiff—an investor in the public company—did not rely on the transactions or on any statement by the vendors, and the vendors did not use or employ a deceptive device in connection with the purchase or sale of a security.

Brief for Respondents at i, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2007) (No. 06-43).

94 *See Stoneridge*, 128 S. Ct. at 761.

95 *Id.* at 766.

96 *See id.* ("In this suit [Stoneridge Investment Partners, L.L.C.] alleged losses after purchasing common stock. They sought to impose liability on [Scientific-Atlanta, Inc., and Motorola, Inc.].").

their production costs for the purpose of helping Charter mislead its auditor.[97] The facts also show Charter's suppliers/customers were not involved in the preparation or dissemination of Charter's financial statements, but allegedly knew they would be relied on by investors.[98]

A. The Majority Opinion[99]

The majority in *Stoneridge* began its analysis by stating "Rule 10b-5 encompasses only conduct already prohibited by §10(b)."[100] It then reiterated the elements of an implied private cause of action under § 10(b): "(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."[101] The Court also reaffirmed its holding in *Central Bank*, stating the implied private cause of action did not encompass aiders and abettors, but rather extended only to a secondary actor's conduct that satisfied the elements for primary liability.[102]

The Supreme Court emphasized that statements were not always necessary in § 10(b) actions as conduct itself could be deceptive.[103] The majority found that even though the Defendants made written and oral statements, the investors did not rely on their conduct or statements and therefore, liability could not be imposed.[104] The Court firmly established that reliance, which provided the causal connection between a secondary actor's misrepresentation or omission and a plaintiff's injury, was an essential element in a private right of action under § 10(b).[105] The majority found the two theories under which reliance would be presumed did not apply because Defendants did not have a duty to disclose a material fact and their deceptive acts or statements did not become

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97 *Id.* at 766-67.
98 *Id.* at 767.
99 Justice Kennedy wrote the majority opinion. *Id.* at 766.
100 *Id.* at 768.
101 *Id.*
102 *Id.* at 769.
103 *Id.*
104 *Id.*
105 *Id.* ("Reliance by the plaintiff upon a defendant's deceptive acts is an *essential element* of the § 10(b) private cause of action.") (emphasis added).

public under the fraud-on-the-market theory.[106] Since no investor had actual or presumed knowledge of Defendants' deceptive conduct during the relevant period of time, the majority concluded reliance could not be shown except in an extremely remote, indirect chain of causation.[107]

The Supreme Court addressed Plaintiff's claim of scheme liability under Rule 10b-5(a), but rejected it for lack of reliance.[108] The majority disagreed with Plaintiff's assertion that investors relied on both public statements concerning a security and the transactions reflected therein, because accepting that assertion would extend the implied right of action to the whole marketplace in which a company does business.[109] The majority explained it was Charter, not its suppliers/customers, that filed the false financial statements and that nothing the suppliers/customers did made it inevitable or necessary for Charter to prepare its financial statements in the way that it did.[110]

Furthermore, the majority explained state law governed ordinary business operations, such as purchase and supply contracts similar to those between Charter and its suppliers/customers.[111] The majority warned that extending the federal cause of action to ordinary business operations would encourage litigation not directly related to the securi-

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106 *Id.* In *Chiarella v. United States*, the Supreme Court found that under § 10(b) of the 1934 Act, "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so." 445 U.S. 222, 228 (1980). The duty exists "when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Id.* at 228 & n.9 (internal quotations omitted). The fraud-on-the-market theory applies where there is a public statement that includes a misrepresentation of a material fact, the shares are publicly traded, and plaintiff has traded them after the statement was made, but before the truth was revealed. Basic Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988) (discussing the lower court's holding).

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

108 *See id.* at 770 ("Invoking what some courts call 'scheme liability,' . . . petitioner nonetheless seeks to impose liability on the respondents even absent a public statement. In our view this approach does not answer the objection that petitioner did not in fact rely upon respondents' own deceptive conduct.").

109 *Id.*

110 *Id.*

111 *Id.*

ties markets and in areas governed by state law.[112] It explained § 10(b) did not extend to all fraudulent commercial transactions, as it did not incorporate common law fraud.[113]

Referring back to its holding in *Central Bank*, the majority was cautious not to revive the private cause of action for aiding and abetting that the Court explicitly abolished in 1994.[114] The majority gave deference to the congressional amendment, which allowed only the SEC to bring actions against aiders and abettors, and cited to the practical consequences of expanding the implied cause of action.[115] Such consequences included: exposing new classes of defendants to extensive discovery, uncertainty, business disruption, and enormous settlements for weak claims; raising business costs; deterring overseas businesses from transacting business in the United States; and moving securities offerings from domestic markets.[116] The majority stated a cause of action would be implied only where the underlying statute demonstrated intent to do so[117] and that it was for Congress to decide whether to extend the right of action, particularly in light of the new requirements under the PSLRA.[118]

Finally, in support of its decision to affirm the judgment of the Eighth Circuit,[119] the majority referred to the other available remedies for violations of the securities laws.[120] It expressed the view that the criminal prosecutions and the SEC's civil enforcement actions against secondary actors were not toothless.[121] It also stated aiders and abettors

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112 *Id.* at 770-71.

113 *Id.* at 771.

114 *See id.* (noting that if the Supreme Court adopted the Petitioner's theory it "would put an unsupportable interpretation on . . . § 104 of the PSLRA. Congress amended the securities laws to provide for limited coverage of aiders and abettors. Aiding and abetting liability is authorized in actions brought by the SEC but not by private parties").

115 *Id.* at 772.

116 *Id.*

117 *Id.*

118 *Id.* at 773.

119 *Id.* at 774.

120 *Id.* at 773.

121 *Id.*

could be subject to state laws, private lawsuits, and liability for primary violations.[122]

B. The Dissenting Opinion[123]

Unlike the majority, the dissent in *Stoneridge* found there was investor reliance on Defendants' fraud, characterized the fraud as a deceptive device, and distinguished the case from *Central Bank*.[124] The dissenting opinion asserted the majority based their conclusion on the following faulty premises: an overly broad interpretation of *Central Bank* and "the view that reliance requires a kind of super-causation."[125]

As to the first faulty premise, the dissent argued Defendants' statements and acts plainly qualified as deceptive devices.[126] It asserted *Central Bank* was critically different because the Defendant in *Central Bank* did not commit a deceptive act, but merely delayed the reviewing of an appraisal.[127] In sum, due to the dissimilarities between the two cases, the dissent concluded *Central Bank* did not apply.[128]

As to the second faulty premise, the dissent would choose to remand the case because the decision of the Eighth Circuit was not based on reliance grounds.[129] The dissent claimed the majority's view of reliance and causation was "unwarranted and without precedent."[130] The dissent asserted that in order to establish reliance, the investors did not have to be aware of the deceptive acts.[131] The dissent found Charter's suppliers/customers proximately caused Charter's misrepresentations and "knew their deceptive acts would be the basis for statements

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[122] *Id.* at 773-74.

[123] Justice Stevens wrote the dissenting opinion, with whom Justice Souter and Justice Ginsburg joined. *Id.* at 774 (Stevens, J., dissenting).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *See id.* ("*Central Bank* . . . poses no obstacle to petitioner's argument that it has alleged a cause of action under § 10(b).").

[129] *Id.* at 775-76.

[130] *Id.* at 776.

[131] *See id*. ("This Court has not held that investors must be aware of the specific deceptive act which violates § 10(b) to demonstrate reliance.").

that would influence the market price of Charter stock on which shareholders would rely."[132]

Moreover, unlike the majority, the dissent found the transactions between Charter and its suppliers/customers were not in the ordinary course of business.[133] The dissent asserted that common law fraud provisions were relevant because the legislature created the federal statutes to provide higher standards, not to replace common law fraud.[134] The dissent also argued that finding liability in this case would lead to safer American markets, which in turn, would not deter overseas businesses, but would rather enhance the competitiveness of the American markets.[135] In its last point, the dissent stated Congress implicitly authorized a private right of action because every wrong should have a remedy.[136]

IV. Discussion

The majority in *Stoneridge* based its conclusion on different reasoning than that of the Eighth Circuit,[137] but it is nevertheless a correct conclusion. The majority's emphasis on the element of reliance is consistent with the Supreme Court's holding in *Central Bank*,[138] even though it is inconsistent with the Ninth Circuit's substantial participation test, which allowed private plaintiffs to circumvent the reliance re-

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132 *Id.* at 776-77.

133 *Id.* at 777 n.4 ("[T]he kind of sham transactions alleged in this complaint are unquestionably isolated departures from the ordinary course of business in the American marketplace . . . .").

134 *See id.* at 777.

135 *Id.* at 779.

136 *Id.* at 781-82.

137 *Id.* at 774.

138 *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 180 (1994) ("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* Brief. for Respondents at 37, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2007) (No. 06-43) ("Plaintiff's scheme liability theory would make *Central Bank* a dead letter: every peripheral participant would be a primary violator and no one an aider and abettor. Because Congress has ratified *Central Bank* in Section 20(e), that result would frustrate and subvert Congress's informed policy decision.").

quirement.[139] The element of reliance ensures that plaintiffs seeking recovery actually consider the information available to them as a result of the disclosures mandated by the securities laws.[140]

In *Stoneridge*, the majority correctly concluded the element of reliance was not met because the investors did not know of the statements or conduct of Charter's suppliers/customers and therefore, they could not have relied on them.[141] In addition, reliance could not be presumed, as Charter's suppliers/customers did not owe a duty to the investors to disclose the fraudulent statements.[142] Reliance could also not be presumed under the fraud-on-the-market theory because the deceptive acts or statements of the secondary actors did not become public "during the relevant times."[143]

By using the phrase "during the relevant times," the Court demonstrated that without having any knowledge of the secondary actors' deceptive acts before being "irrevocably committed to trade,"[144] the investors could not show they relied on these acts. To show reliance, the investors had to possess knowledge of the secondary actors' conduct or statements, but not necessarily knowledge that the conduct or statements violated the law.[145] In *Stoneridge*, the investors would have had the requisite knowledge if the contracts between Charter and its suppliers/customers were publicly announced,[146] but because the facts demonstrate there was no knowledge, there could be no reliance.

139 SEC v. Lucent Techs. Inc., 363 F. Supp. 2d 708, 722 (D.N.J. 2005); *see also In re* ZZZZ Best Sec. Litig., 864 F. Supp. 960, 970 (C.D. Cal. 1994) (stating the substantial participation test does not require public knowledge of defendant's involvement).

140 Shores v. Sklar, 647 F.2d 462, 483 (5th Cir. 1981) (Randall, J., dissenting), *rev'd in part on other grounds*, 844 F.2d 1485 (11th Cir. 1988), *vacated*, 855 F.2d 722 (11th Cir. 1988), *reinstated in part*, 885 F.2d 760 (11th Cir. 1989).

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

142 *Id.*

143 *Id.*

144 ARNOLD S. JACOBS, 5C DISCLOSURE & REMEDIES UNDER THE SECURITIES LAWS § 12:113.42 (2008).

145 *See id.*

146 *Id.*

Without a showing of reliance on Defendants' deceptive conduct or statements, Plaintiff in *Stoneridge* could not establish causation.[147] The Supreme Court found the indirect chain between the secondary actors' fraud and the false contents of the primary violator's financial statements was too remote to subject the secondary actors to liability.[148] Apart from speaking about remoteness, however, the Court did not specify how close the connection between the fraud and Plaintiff's loss should be.[149]

In *Stoneridge*, Charter's suppliers/customers did not prepare or disseminate Charter's financial statements;[150] rather, they only made it possible for Charter to commit the fraud. The suppliers had no control over Charter's preparation or dissemination of its reports. Therefore, holding the suppliers/customers accountable under these facts would have created an "open-ended liability."[151] In addition, it would have made secondary actors insurers of their business partners' conduct and

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[147] *See Stoneridge*, 128 S. Ct. at 769 (explaining that reliance provides the causal connection between a secondary actor's misrepresentation/omission and a plaintiff's injury).

[148] *See id.* ("No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times. Petitioner, as a result cannot show reliance upon any of respondents' actions except in an indirect chain that we find too remote for liability."); *see also* Pugh v. Tribune Co., 521 F.3d 686, 697 (7th Cir. 2008) ("*Stoneridge* indicates that an indirect chain to the contents of false public statements is too remote to establish primary liability.").

[149] Jacobs, *supra* note 144, § 12:101.

[150] *Stoneridge*, 128 S. Ct. at 767.

[151] Ideoblog, The Future of Scheme Liability, http://busmovie.typepad.com/ideoblog/2008/01/the-future-of-s.html (last visited October 4, 2008); *see generally* James R. Carty, *Supreme Court's* Stoneridge *Decision a Boon to "Deep Pockets" When the Main Company Involved in a Fraud Has Financially Collapsed*, 6 J. Bankr. L.11 (2008) (stating that "[t]he *Stoneridge* decision has enormous consequences to the business community because a ruling in favor of the shareholder plaintiffs would have exposed many companies and professional firms (including accounting firms, law firms, bankers, suppliers, and customers) doing business with companies that are the target of a securities fraud suit, to costly litigation and potential civil liability to shareholder plaintiffs under Section 10(b) and Rule 10b-5. The ruling . . . may curb the practice of securities class action plaintiffs of targeting alternative 'deep pockets' when the main company involved has financially collapsed.").

would have led to increased costs of doing business as well as excessive litigation.[152] A member of the SEC observed:

> [H]ad *Stoneridge* gone the other way, plaintiffs would be able to reach into the pockets of customers, vendors and other firms that simply do business with companies that defraud investors. . . . But justice is not merely finding someone who *can* pay. Exposing one company to class-action lawsuits because another company defrauded its investors is not fair or just to shareholders who shoulder the burden of class-action settlements.[153]

Thus, the Court and Congress should not overlook fairness to secondary actors and their shareholders if they decide to redefine the limits of liability under § 10(b). By making reliance an essential element, the Court in *Stoneridge* acted for the protection of shareholders and for the promotion of predictability in future actions.[154]

Although the Supreme Court reached the correct conclusion, commentators have criticized the Court for its failure to provide a definitive standard for primary liability of secondary actors. For instance, critics ask how the new "necessary or inevitable"[155] test would be applied in later cases.[156] While the Court did not precisely define the type of actionable conduct, it provided guidance and predictability. First, *Stoneridge* demonstrates that conduct can be deceptive even in the ab-

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152 In their brief, Respondents assert that one consequence to investors would be increase in prices by suppliers, professionals, and lenders to compensate for the increased risk. Brief for Respondents at 15, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2007) (No. 06-43). Respondents also reminded the Court that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 43 (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739) (1975)).

153 Paul S. Atkins, Stoneridge *and the Rule of Law*, WALL ST. J., Jan. 25, 2008, at A14, *available at* 2008 WLNR 1527293.

154 *See id.* ("[T]he Supreme Court's decision actually protects shareholders from creative and unpredictable new ways to extract large settlements . . . .").

155 *Stoneridge*, 128 S. Ct. at 770 ("[N]othing respondents did made it necessary or inevitable for Charter to record the transactions as it did.").

156 Ideoblog, The Stoneridge Opinion, http://busmovie.typepad.com/ideoblog/2008/01/the-stoneridge.html (last visited October 4, 2008).

sence of written or oral statements, that the conduct or statement must cause the injury, and that the plaintiff must show reliance.[157] Next, under both *Central Bank*[158] and *Stoneridge*,[159] the secondary actor must *make* a statement. *Stoneridge*, however, seems to use *making* and *preparing or disseminating*[160] interchangeably.[161] Assuming this observation is correct, *Stoneridge* does not affect the bright line test, the substantial participation test, and the SEC's creation test. This means that when analyzing who *makes* a statement, the discussion should be the same as before *Stoneridge*, except with respect to reliance.[162]

Commentators also observe that not all secondary actors are created equal and point out that advisers might find themselves in a different position compared to suppliers/customers.[163] This concern, however, seems to lack basis after the Supreme Court denied the petition for writ of certiorari in the case of *Regents of the University of California v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[164] shortly after deciding *Stoneridge*.[165] The lead Plaintiff alleged the investment banks that advised Enron made huge profits by participating in a

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

158 *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994) ("[Section 10(b)] prohibits only the *making* of a material misstatement (or omission) or the commission of a manipulative act.") (emphasis added).

159 *See Stoneridge*, 128 S. Ct. at 769 ("[A]ny deceptive statement or act respondents *made* was not actionable . . . .") (emphasis added).

160 *Id.* at 767 ("Respondents had no role in preparing or disseminating Charter's financial statements.").

161 *See* Jacobs, *supra* note 144, § 12:113.12 ("Nothing in *Stoneridge* changes the proposition that a person who 'makes' a statement is primarily liable. The only gloss *Stoneridge* adds to the investment realm is the hint that 'making' a statement may equate to 'preparing or disseminating' a statement.").

162 *Id.*

163 *See* The Future of Scheme Liability, *supra* note 151.

164 Regents of the Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 128 S. Ct. 1120 (2008) *mem. denying cert. to* 482 F.3d 372 (2007).

165 *See* Michael L. Rugen, Stoneridge *and Enron—Are Secondary Actors Free from Liability for Securities Fraud?*, 13 No. 21 Andrews' Bank & Lender Liability. Litig. Rep. (West) 11 (March 3, 2008) ("By refusing to consider whether [secondary liability claims against the company's investment bankers] could be asserted . . . the court plainly signaled that . . . . private plaintiffs cannot assert . . . secondary liability claims under Section 10(b).").

scheme to falsify the financial statements of Enron.[166] The Court's decision to deny the petition demonstrates its intention to interpret *Stoneridge* broadly.[167] This does not mean, however, that scheme liability is foreclosed under all circumstances—the Court could have completely eliminated this theory of liability if it had held that only persons who make misrepresentations or omissions would be liable under § 10(b).[168] The fact that the Court held otherwise demonstrates that it elected to keep that route of liability open in the event of unusual fact patterns.[169] The Court's decision may have also been influenced by the inability of the SEC and other enforcement agencies to deal with all potential violations and to provide adequate remedies to all injured parties.[170]

Other decisions of the lower federal courts issued after *Stoneridge* demonstrate that federal courts are likely to absolve *any* secondary actor from liability as long as the facts are sufficiently similar to *Stoneridge*—that is, where the secondary actor was not identified to the public and did not prepare or disseminate the false statements.[171] Thus, persons in the goods and services arena who do not make statements or

166 Petition for Writ of Certiorari. Vol. I of II, Regents of the Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 128 S. Ct. 1120 (No. 06-1341), 2007 WL 1059567 at *3.

167 *See* Rugen, *supra* note 165.

168 *Id. Cf.* Carty, *supra* note 151 (stating scheme liability is almost extinguished).

169 Rugen, *supra* note 165.

170 *See* Arnold S. Jacobs, 5B Disclosure & Remedies under the Securities Laws § 6:14 (2008).

171 *See, e.g.*, Pugh v. Tribune Co., 521 F.3d 686, 697 (7th Cir. 2008) (finding defendant Sito not liable where defendant "participated in a fraudulent scheme but had no role in preparing or disseminating Tribune's financial statements or press releases . . ." and where Tribune investors were not informed of Sito's false statements, even if Sito had foreseen the misrepresentations would be reflected in Tribune's financial documents); *In re* DVI Inc. Sec. Litig., 249 F.R.D. 196, 218 (E.D. Pa. 2008) (refusing to certify a class action as to Clifford Chance because it did not make any public statements and the DVI investors did not rely on Clifford Chance's deceptive conduct as it was not publicized, even though Clifford Chance allegedly knew of and sometimes took an active role in the scheme). *Cf.* Katz v. Image Innovations Holdings, Inc., 542 F. Supp. 2d 269, 273 (S.D.N.Y. 2008) (holding that "*Stoneridge* does not require dismissal of the claims against Michael Radcliffe, Arthur Gononsky, or James Armenakis because these defendants are alleged to have signed the allegedly fraudulent financial statements. The claims against these defendants allege misstatements that were disseminated to the public as part of Image's SEC filings, and therefore do not rely on theories of 'scheme' or 'aider and abettor' liability.").

violate a duty to disclose are almost always exempt from liability.[172] These persons would be liable, however, if they breach a duty to disclose, which would likely be imposed under the same circumstances as in the investment arena.[173] In addition, these persons would be liable if they make a false statement, but the scope of liability in the goods and services arena would be narrower than that of the investment realm.[174] Liability in the latter two situations would attach only if all of the other elements of a § 10(b) cause of action are also satisfied.[175]

It is yet unclear whether a secondary actor, actively participating in preparing fraudulent statements that are communicated to investors, has a duty to disclose that would impose liability, even though the actor's participation is not made public.[176] A similar fact pattern was presented in *Lopes v. Vieira*,[177] where Plaintiffs invested in a manufacturing company, which was allegedly created to assist its promoter in a fraud.[178] Plaintiffs sued the law firm that drafted the offering memorandum, alleging the firm knew the promoter was being investigated for a similar scheme.[179] Although the false statements in the memorandum were not publicly attributed to the law firm, the court refused to grant the firm's motion to dismiss, because a duty to disclose could be implied from the firm's drafting of the memorandum.[180]

There is one final point about *Stoneridge*. Even though the dissent was correct that the majority's decision takes away a private person's right to have a remedy for every wrong, *Stoneridge* does not foreclose all available remedies. As the majority points out, there are still criminal penalties, enforcement mechanisms by the SEC, lawsuits

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172 JACOBS, *supra* note 144, § 12:113.63.

173 *Id.*

174 *Id.*

175 *See* JACOBS, *supra* note 170, § 11:1.

176 *See generally* James C. Dugan, *Whither* Stoneridge v. Scientific-Atlanta*? Early Results*, 240 N.Y. L.J. 4 (2008).

177 Lopes v. Vieira, 543 F. Supp. 2d 1149 (E.D. Cal. 2008).

178 *See id.* at 1152-56.

179 *Id.* at 1166-67.

180 *See id.* at 1177-78 ("[T]he existence of a duty on the part of Downey will depend upon the facts.").

for primary violations, and state law causes of action.[181] Importantly, although aiding and abetting liability is no longer available under federal law, it may be available under state law.[182] Even though some scholars and practitioners may consider these remedies insufficient, the practical consequences[183] of extending the implied cause of action to secondary actors, such as the suppliers/customers in *Stoneridge*, caution against the extension.

In sum, by focusing on the reliance requirement, the majority in *Stoneridge* reached the correct result. The new reliance/causation standard will likely produce consistent results[184] and while not foreclosing third-party liability completely, it makes it more difficult for plaintiffs to prevail against secondary actors, as those actors normally do not make public statements and do not owe investors a duty to disclose their transactions.[185] As a result, *Stoneridge* brings some relief to attorneys, accountants, vendors, and other secondary actors, but the decision

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181 Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 773-74 (2008); *see also* Brief for Respondents at 47, Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (No. 06-43), 2007 WL 2363257, at *47. ("During 2006, the Commission's 900-person enforcement staff initiated over 900 investigations, brought 218 suits and 356 administrative proceedings, and obtained orders requiring payment of more than $3.3 billion in disgorgement and penalties." (citing SEC, 2006 PERFORMANCE AND ACCOUNTABILITY REPORT 8, *available at* http://www.sec.gov/about/secpar/secpar2006.pdf)); Carty, *supra* note 151 ("The SEC is still free to hold responsible parties accountable by imposing injunctions, officer and director bars, disgorgement, and civil penalties. Such recoveries may be disbursed to injured investors without the usual cut going to the plaintiffs securities bar.").

182 *See Stoneridge*, 128 S. Ct. at 773 ("In addition some state securities laws permit state authorities to seek fines and restitution from aiders and abettors."); Houston v. Seward & Kissel, LLP, No. 07cv6305(HB), 2008 WL 818745, at *5 (S.D.N.Y. Mar. 27, 2008) ("[W]hile there is no private right of action against aiders and abettors under § 10(b), states *continue* to have securities regimes establishing aider and abettor liability.") (citing *Stoneridge*, 128 S. Ct. at 773).

183 *See* Stoneridge, 128 S. Ct. at 772. As practical consequences the Court refers to increased costs of doing business, the potential deterrent effect on overseas firms transacting business in the United States, and "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies . . . ." *Id.*

184 *See* Daniel Tyukody & Michael Hefter, Stoneridge *Alters Legal Landscape: In Limiting Scope of Primary Liability, Justices Shield Secondary Acto*rs, NAT'L L.J., Mar. 17, 2008, at S1.

185 *Id.*

should not lead them to exercise less care and caution in dealing with public companies.[186]

V. Conclusion

Since 1946, a private right of action has been implied under § 10(b) of the 1934 Act and SEC Rule 10b-5, extending to both primary and secondary liability.[187] Yet in 1994, in *Central Bank*, the Supreme Court eliminated aiding and abetting liability.[188] *Central Bank*, however, made it clear that secondary actors could still be liable if the requirements for primary liability are met.[189] Since the holding in *Central Bank* did not provide a clear standard as to what conduct exposes a secondary actor to primary liability, a split developed among the federal circuits as to the appropriate standard for liability.[190]

To bring clarity and consistency, the Supreme Court granted the petition for writ of certiorari in *Stoneridge* and delivered its opinion in 2008.[191] The majority in *Stoneridge* found Charter's suppliers/customers were not liable on a theory of scheme liability, because the investors could not establish reliance on the misrepresentations or conduct of the suppliers/customers.[192] The majority's conclusion was consistent with *Central Bank* and properly rejected Petitioner's allegations of broad scheme liability, which would have led to excessive litigation, extreme precautionary measures by secondary actors, and overall increased costs of transacting business in the United States.[193]

The Supreme Court's emphasis on reliance and causation shields most secondary actors from the expansive theory of liability advocated by Petitioner in *Stoneridge*, bringing consistency in results and avoiding

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186 *See* Carty, *supra* note 151.

187 *See* Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) ("[T]he legislature may withhold from parties injured the right to recover damages arising by reason of violation of a statute but the right is so fundamental . . . that where it is not expressly denied the intention to withhold it should appear very clearly . . . .").

188 *See supra* Part II.B.

189 *See supra* Part II.B.

190 *See supra* Part II.D.

191 *See supra* Part III.

192 *See supra* Part III.

193 *See supra* Part IV.

the detrimental effects on the securities markets.[194] Although plaintiffs' rights advocates may pressure Congress to abrogate *Stoneridge*,[195] before acting, Congress should consider not only the investors' losses caused by the conduct of primary and secondary actors, but also the effects, including increased costs, unpredictability, and enormous settlements for relatively weak claims that the extension of the private right of action would have on all investors.[196]

194 *See supra* Part IV.

195 *See* Carty, *supra* note 151, at 19 ("[T]he ruling [in *Central Bank*] . . . may curb the practice of securities class action plaintiffs of targeting alternative 'deep pockets' when the main company involved has financially collapsed.").

196 *See supra* Part IV.