

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X

3 STONERIDGE INVESTMENT :

4 PARTNERS, LLC, :

5 Petitioner :

6 v. : No. 06-43

7 SCIENTIFIC-ATLANTA, INC., :

8 ET AL. :

9 - - - - - X

10 Washington, D.C.

11 Tuesday, October 9, 2007

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:00 a.m.

16 APPEARANCES:

17 STANLEY M. GROSSMAN, ESQ., New York, N.Y.; on

18 behalf of the Petitioner

19 STEPHEN M. SHAPIRO, ESQ., Chicago, Ill.; on

20 behalf of Respondents

21 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,

22 Department of Justice, Washington, D.C.; on behalf of

23 the United States, as amicus curiae, supporting

24 Respondents.

25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
STANLEY M. GROSSMAN, ESQ.	
On behalf of the Petitioner	3
STEPHEN M. SHAPIRO, ESQ.	
On behalf of the Respondents	26
THOMAS G. HUNGAR, ESQ.	
On behalf of the United States, as amicus curiae, supporting Respondents	48
REBUTTAL ARGUMENT OF	
STANLEY M. GROSSMAN, ESQ.	
On behalf of the Petitioner	58

1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 06-43, Stoneridge Investment Partners v.
5 Scientific-Atlanta, et al.

6 Mr. Grossman.

7 ORAL ARGUMENT OF STANLEY GROSSMAN

8 ON BEHALF OF THE PETITIONER

9 MR. GROSSMAN: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The text of section 10(b) as well as the
12 rule 10b-5 promulgated by the Securities and Exchange
13 Commission prohibit the use of any deceptive device by
14 any person, indirectly or indirectly, in connection with
15 the purchase or sale of a security. The various
16 deceptive devices used by the Respondents in this case
17 is conduct that is squarely covered by the text of the
18 statute and by the rule.

19 Respondents here were not passive bystanders
20 facilitating a fraud by Charter. Their deceptive
21 conduct was integral to the scheme to create fictitious
22 advertising revenues for Charter to report to investors.

23 Respondents agreed to overcharge Charter so
24 that they could receive the money from Charter to then
25 return to it for the advertising, using Charter's very

1 same money for the purchase of the advertising.
2 Respondent Scientific-Atlanta created a document
3 falsely claiming that the reason for the increased
4 payments from Charter were because of increased
5 manufacturing expenses.

6 JUSTICE KENNEDY: The transaction was not
7 wholly without benefit to Scientific-Atlanta. They got
8 some advertising. And it was not wholly without benefit
9 to Charter. They were able to show that advertising
10 works. Now, that puts aside the fact that they were
11 using misleading accounting principles.

12 MR. GROSSMAN: Well, I would agree, Your
13 Honor, that they received free advertising. But the
14 problem was that they were creating the illusion that it
15 wasn't free advertising, but rather that they were
16 purchasing the advertising.

17 JUSTICE GINSBURG: And was the price four to
18 five times higher than the normal rates for advertising?

19 MR. GROSSMAN: That is correct, Justice
20 Ginsburg.

21 And the obvious purpose for creating the
22 illusion that they were purchasing the advertising
23 rather than receiving free advertising was so that
24 Charter can incorporate these increased revenues in
25 their financial statements. And Respondents understood,

1 they understood that in order to -- for Charter to pass
2 this by their accountants, to deceive the accountants --
3 and this is reflected in the indictment -- in order to
4 deceive the accountants for Charter, the Respondents
5 were told that there had to be separate agreements for
6 both the advertising agreements and the purchase
7 agreements.

8 JUSTICE SCALIA: Mr. Grossman, is there any
9 reason why, in principle, the elements for a cause of
10 action under 10b-5 have to be the same as the elements
11 for a cause of action by the agency under 10(b)? I mean,
12 we, we created this, this cause of action. It's not set
13 forth in the statute, although other private causes of
14 action are.

15 If it's our creation, couldn't we sensibly
16 limit it so that, for example, schemes can be attacked
17 by the SEC, but schemes do not form the basis for
18 private attorney general's actions? You need actual
19 conveyance of a misrepresentation to the injured party.
20 Is there any reason why we couldn't do that?

21 MR. GROSSMAN: Well, I think there are two
22 reasons, Your Honor. The first is that at this point in
23 time -- I think as the Court recognized in *Dura* fairly
24 recently -- that when Congress enacted the Private
25 Security Law Reform Act, that at that time they accepted

1 the private right of action that this Court had
2 previously inferred. And this Court had previously
3 inferred the private right of action not only for the
4 section but each of the rules in Section 10(b).

5 CHIEF JUSTICE ROBERTS: But it's not like
6 under the Sherman Act, where we have reason to think
7 Congress intended the Court to go about the business of
8 construing and developing antitrust law. In fact, they
9 have kind of taken over for us. They are imposing
10 certain limits on when actions can be brought, proposing
11 particular specific elements. In one of the provisions,
12 20(e), specifying the SEC can bring an action but
13 private investors can't.

14 I mean, we don't get in this business of
15 implying private rights of action any more. And isn't
16 the effort by Congress to legislate a good signal that
17 they have kind of picked up the ball and they are
18 running with it and we shouldn't?

19 MR. GROSSMAN: Well, this Court, Your Honor,
20 as recently as 2002 in *Wharf (Holdings)* said there is a
21 private right of action for violation of any of the
22 subdivisions of rule 10b-5: a, b, or c. That would
23 have to be reversed.

24 Going back to the Superintendent of
25 Insurance case in, in -- that would be in 1971, Your

1 Honor, the Court held there was a private right of
2 action for violation of --

3 CHIEF JUSTICE ROBERTS: Well, that's kind of
4 my point. We did that sort of thing in 1971. We
5 haven't done it for quite sometime.

6 MR. GROSSMAN: But when Congress enacted
7 the Private Security Law Reform Act, everything it did
8 in connection with that statute was directed to the
9 private right of action that this Court had previously
10 implied under 10(b). Nothing that Congress did was
11 intended in any way --

12 CHIEF JUSTICE ROBERTS: I'm not -- my
13 suggestion is not that we should go back and say that
14 there is no private right of action. My suggestion is
15 that we should get out of the business of expanding it,
16 because Congress has taken over and is legislating in
17 the area in a way they weren't back when we implied
18 the right of action under 10(b).

19 MR. GROSSMAN: Well, I would agree,
20 Congress has taken it over. And when they enacted the
21 Private Security Law Reform Act, they recognized this
22 private right of action. Everything they did recognized
23 the private right of action. It recognized that there
24 would be multiple primary violators of 10(b). It did
25 that in connection with proportionate liability

1 provisions. It recognized that there would be multiple
2 players.

3 So certainly, Congress had an understanding
4 of what this Court had done up until that time. And
5 this Court up until that time had implied the private
6 right of action for every subset of rule 10b-5.

7 CHIEF JUSTICE ROBERTS: Is it -- is it a
8 necessary part of your theory that the deceptive
9 practice that Scientific-Atlanta went in, that they
10 knew that that was also -- that Charter would carry that
11 forward? I mean, let's suppose that there were benefits
12 to this deceptive practice to Scientific-Atlanta, that
13 it looked like it had more money to spend on advertising
14 than it really did, but they didn't care what Charter
15 did with it. In fact, they didn't know that Charter was
16 going to carry it on its books the way they did. Would
17 there still be liability for Scientific-Atlanta?

18 MR. GROSSMAN: No. No, not under the test
19 that we have proposed, which is very similar to the test
20 proposed by the Ninth Circuit or applied in the Ninth
21 Circuit in the Simpson case, and the test proposed by
22 the Securities and Exchange Commission in their amicus
23 brief submitted in the Simpson case. It's not enough
24 to just to have the deceptive act. The deceptive act for
25 scheme liability has to be with the purpose of

1 furthering a scheme to defraud investors.

2 So if Scientific-Atlanta or Motorola had
3 engaged in deceptive conduct, but that deceptive conduct
4 was not intended to further a scheme to defraud the
5 shareholders, no, Your Honor, there would be no action
6 under the theory that we are pursuing here.

7 JUSTICE SCALIA: Intended or known? I mean,
8 I don't see -- what's in it for Scientific-Atlanta to
9 defraud the shareholders? Is it enough that they just
10 knew it would be used for that purpose?

11 MR. GROSSMAN: Oh, it would be enough if
12 they committed a deceptive act and they knew it was in
13 furtherance of a scheme.

14 JUSTICE SCALIA: Well, when you say "in
15 furtherance of," you -- you import intent. They didn't
16 care what Charter was going to do with it, but they
17 pretty well knew that what Charter was going to do was
18 to make its books look better.

19 Would that be enough?

20 MR. GROSSMAN: I think that would be
21 reckless.

22 JUSTICE SCALIA: That's what I thought your
23 position was.

24 MR. GROSSMAN: Yes, but my position is also
25 --

1 JUSTICE SCALIA: So it's not an intent
2 necessarily. It's just knowledge.

3 MR. GROSSMAN: It certainly needs scienter.
4 You certainly need scienter.

5 JUSTICE SOUTER: I mean, it's more than
6 knowledge. I mean, you mentioned recklessness. It's got
7 to have either knowledge of or a willingness to maintain
8 an indifference to the consequence.

9 MR. GROSSMAN: Exactly right, Justice
10 Souter. And I think it's important -- and there is a
11 very -- there is a very good discussion of this in the
12 Simpson case by the Ninth Circuit, that the purpose of
13 the test is such that it will not ensnare someone who
14 does engage in a deceptive act but doesn't understand
15 that the reason for it is to further a scheme.

16 JUSTICE SCALIA: Sure. After trial -- you
17 know, after trial which causes your stock to tank, you
18 may indeed be able to show that you didn't know it was
19 going to be used for that purpose. I mean, that's what
20 this is all about, isn't it, getting it -- getting it by
21 the summary-judgment stage?

22 MR. GROSSMAN: No. I think, Your Honor,
23 that this Court answered this last term in the Tellabs
24 case. And Congress answered that question that you pose
25 in the PSLRA, the Private Security Law Reform Act, so

1 that you cannot just bring a case and hope to get it by
2 the summary-judgment stage. You have to have
3 particularized facts alleged under the heightened
4 pleading standards of the PSLRA and this Court's
5 decision in Tellabs showing that not only the deceptive
6 act, but that the purpose of that deceptive act was to
7 further a scheme. So, no, you can't just --

8 JUSTICE SCALIA: What facts -- what has to
9 be alleged short of -- on information and belief the
10 defendant knew that -- that this information would
11 appear on the balance sheets and be used to improve the
12 status of the stock?

13 MR. GROSSMAN: Well, of course if you just
14 -- if you just allege it on information and belief,
15 you're out of court. No doubt about that. That doesn't
16 pass the heightened pleading standard in Tellabs or the
17 PSLRA. What you do need is what we have here. Here you
18 have allegations -- and we didn't make these allegations
19 from whole cloth -- these allegations were derived
20 principally from a grand jury -- the Federal grand
21 jury indictment against Charter executives. That
22 indictment says that Respondents were informed and
23 ordered to deceive Charter's accountants. They had to
24 have --

25 CHIEF JUSTICE ROBERTS: Why shouldn't we be

1 guided by what Congress did in reaction to the Central
2 Bank case? There we said there's no aiding-and-abetting
3 liability, Congress amended the statute in 20(e) to say
4 yes, there is, but private plaintiffs can't sue on that
5 basis. Why shouldn't that inform how we further develop
6 the private action under 10b-5?

7 MR. GROSSMAN: Well, I think if Congress
8 intended under 20(e) -- certainly the private actions
9 similar to this -- it would have said that only the SEC
10 has the authority to bring a claim for substantial
11 assistance whether or not it involves deceptive conduct.
12 They could have very easily said "any deceptive conduct,"
13 and that would have barred these claims. They chose not
14 to do that.

15 CHIEF JUSTICE ROBERTS: But they were --
16 they were addressing a very specific decision from this
17 Court, the Central Bank decision. And the one thing
18 they did not do is say that that decision was wrong
19 with respect to private -- or going forward they weren't
20 going to overrule that decision with respect to private
21 rights of action. You're asking us to extend to non --
22 I know you call it a primary violator, but not the
23 person who --

24 MR. GROSSMAN: Secondary actors.

25 CHIEF JUSTICE ROBERTS: -- who put the

1 deceptive conduct into the market. You're asking us to
2 extend that liability to them, which seems inconsistent
3 with Congress's approach in 20(e).

4 MR. GROSSMAN: We are not asking any
5 extension. Quite the contrary, Your Honor. I think
6 that is the Respondents who are asking for a narrowing.
7 When Congress addressed the PSLRA it addressed all of
8 the arguments that we are hearing today from Respondents
9 and their amici.

10 JUSTICE ALITO: Is your theory dependent on
11 the proposition that Scientific-Atlanta and Motorola
12 deceived Arthur Andersen?

13 MR. GROSSMAN: That certainly is a large
14 part of it. Yes, Your Honor.

15 JUSTICE ALITO: But didn't you allege
16 exactly the opposite in your complaint?

17 MR. GROSSMAN: No. We -- I think what
18 you're referring to is that -- is that the accountants
19 should have conducted a more diligent audit than they
20 did. I mean these people clearly were trying to deceive
21 the auditors. Why else would you issue a document
22 falsely stating a reason for a price increase?

23 JUSTICE ALITO: Well, I'm looking at
24 paragraph 218 of your amended complaint, 109a of the
25 joint appendix, subsection 4. It says, speaking of

1 Arthur Andersen, "though aware that Charter was seeking
2 to boost its revenues by paying vendors higher prices at
3 the same time it received additional advertising from
4 the same vendors, Andersen failed to properly audit
5 these transactions by confirming them with the vendors."
6 So you alleged that they weren't deceived. You alleged
7 that they knew exactly what was going on.

8 MR. GROSSMAN: No -- no, Your Honor, they
9 knew that they were paying the vendors higher prices,
10 but they didn't know why. The contract -- the contract
11 for the higher prices was followed by this misstatement
12 saying the reason for the higher prices is because of
13 increased manufacturing expenses, when in fact that
14 wasn't the reason. The reason was to take money --

15 JUSTICE GINSBURG: Who told -- who told
16 Charter that it was necessary for them to have a time
17 spread between the contract -- the \$20 above the
18 contract price and the advertising payment?

19 MR. GROSSMAN: Arthur Andersen.

20 JUSTICE GINSBURG: Well, if it told them
21 that, didn't it have -- it sounds to me from that that
22 the accountant says, look, if you want to make this
23 appear on the balance sheet as though the advertising
24 revenues were just ordinary advertising revenues, you
25 better separate these two. That suggests that Arthur

1 Andersen knew all along what was going on.

2 MR. GROSSMAN: No. Justice Ginsburg, what
3 Arthur Andersen did not know -- and this is very clear.
4 They did not know that it was Charter's own money that
5 was being used by the Respondents to purchase the
6 advertising. They were deceived by that document that
7 said, we are increasing the price on the set-top boxes
8 because of increased manufacturing expense. That was
9 false. The reason they were increasing it is because
10 Charter was delivering the money to them.

11 JUSTICE SCALIA: But that's exactly the
12 thing they told them to separate.

13 MR. GROSSMAN: Well, not for that reason,
14 Your Honor.

15 JUSTICE SCALIA: What other reason?

16 MR. GROSSMAN: The reason is as follows.
17 This is what they refer to as barter contracts, two
18 companies exchanging things, which is perfectly
19 legitimate, there's nothing wrong with that. And there
20 are certain ways to account for it properly, and what
21 Arthur Andersen was telling Charter was in order to be
22 able to have revenues included, gross revenues, you have
23 to have unrelated -- unrelated contracts. They couldn't
24 be a barter transaction. But there is no way -- no way
25 that you could recognize the advertising revenues if

1 you're using Charter's own money, and that's what Arthur
2 Andersen did not do. It would be no different, Justice
3 Scalia, if Charter delivered a suitcase filled with cash
4 and gave it to them and said okay, buy the advertising
5 from us.

6 JUSTICE SCALIA: I understand what you're
7 saying. It seems to me that when you say that they
8 can't be connected, you're saying precisely, you can't
9 be bartering the advertising revenue for the increased
10 money that you're paying.

11 MR. GROSSMAN: No. You can barter. You can
12 barter, it's just a question of how you account for it.
13 But the bartering is one thing. I mean, that's one
14 accounting principle relating to bartering, but there is
15 no accounting principle that permits the recording of
16 revenue if you're using the money from the seller. And
17 that's why they disguised --

18 JUSTICE ALITO: All right, just -- just to
19 be clear on this -- if Charter and Arthur Andersen and
20 Scientific-Atlanta and Motorola all sat down and cooked
21 up this scheme together and they all knew exactly what
22 was going on, would you have a claim against the
23 Respondents here?

24 MR. GROSSMAN: Yes. And the reason for
25 that, Your Honor, is because the advertising contract

1 was a sham, and the advertising contract was a sham
2 because Charter was giving the Respondents the money to
3 buy the advertising.

4 JUSTICE ALITO: Then I see absolutely no
5 difference between your test and the elements of aiding
6 and abetting.

7 MR. GROSSMAN: The difference is here we
8 would have conceptual --

9 JUSTICE ALITO: Because you just said that
10 it's not necessary for there to be an actual deceptive
11 act on the part of the Respondents.

12 MR. GROSSMAN: There has to be a deception
13 -- there is deception. The deception is you're entering
14 into an advertising contract that presents the illusion
15 that you were purchasing advertising, when in fact you
16 were not purchasing the advertising.

17 CHIEF JUSTICE ROBERTS: But that's -- but
18 that's not the fraud that was imposed upon the market.
19 The fraud that was imposed on the market was Charter's
20 accounting for the transaction on its books. Nobody
21 bought or sold stock in reliance upon the way that
22 Scientific-Atlanta and Charter structured their deal.
23 They did so in reliance on the way that Charter
24 communicated its accounting to the marketplace.

25 MR. GROSSMAN: There was no way -- no way

1 that that could properly be accounted for, and the
2 Respondents understood that. And that's why they did
3 what they did, that's what --

4 JUSTICE SOUTER: But you're saying --

5 JUSTICE KENNEDY: But there are -- there are
6 any number of kickbacks and mismanagement and petty
7 frauds that go on in the business, and business people
8 know that any publicly held company's shares are going
9 to be affected by its profits, so I see no limitation to
10 your -- to your proposal for liability.

11 MR. GROSSMAN: Well, I think the limitations
12 are as follows, Your Honor. Number one, there has to be
13 the purpose of furthering a scheme to defraud
14 shareholders. Number two, the test has an element of
15 materiality, that it cannot be --

16 JUSTICE KENNEDY: Well, I agree with Justice
17 Scalia's earlier comment, I don't think that
18 Scientific-Atlanta and Motorola really cared anything of
19 -- one way or the other about the investors.

20 MR. GROSSMAN: Well, that may be that they
21 didn't care about the investors --

22 JUSTICE KENNEDY: For them the scheme made a
23 certain amount of sense, they didn't really care.

24 MR. GROSSMAN: Well, they may not have cared,
25 but that would be reckless because they certainly

1 understood --

2 JUSTICE KENNEDY: But that's far different
3 from having a purpose. You said they have to have a
4 purpose.

5 MR. GROSSMAN: That's correct. If you just
6 close your eyes -- if somebody comes to you and says,
7 look, we want you to enter into this transaction, it's a
8 phony transaction and we don't care -- do whatever you
9 want with that, and they know it's a publicly held
10 corporation and they have every reason to understand
11 that this information --

12 JUSTICE KENNEDY: Which goes back to my
13 earlier question, that most people that engage in
14 frauds on business know that if it's a publicly held
15 corporation, it's going to hurt the price of the shares
16 or affect the price of the shares.

17 MR. GROSSMAN: Well, they shouldn't engage
18 in schemes to defraud, that's what Congress intended by
19 section 10.

20 JUSTICE SOUTER: But as I understand your
21 argument, it is the difference between aiding and
22 abetting liability on the part of the Respondents and
23 liability as, in effect, as first line principles, is
24 their intent, or at the very least in knowledge that
25 they were committing a deceptive act as part of this

1 scheme. Is that correct?

2 MR. GROSSMAN: That they have to commit the
3 deceptive act --

4 JUSTICE SOUTER: Yes.

5 MR. GROSSMAN: -- with the requisite intent.
6 That's correct.

7 JUSTICE SOUTER: Now, how many times are
8 parties of the position of Respondents ever going to
9 engage in those acts except with exactly the state of
10 mind that on your judgment makes them principals, rather
11 than aiders and abettors.

12 MR. GROSSMAN: It is not on my judgment. It
13 has to be pled with the particularity required by the
14 PSLRA.

15 JUSTICE SOUTER: No. No, I realize that you
16 have to plead it. What I'm getting at is: Are you
17 making a distinction that in the real world is not a
18 distinction? That, in reality, no one is going to do
19 what these Respondents did without the kind of knowledge
20 or intent that makes them, on your theory, principals
21 rather than aiders or abettors?

22 MR. GROSSMAN: No, there are cases, I think,
23 Your Honor, where they can engage in deceptive conduct,
24 and there would not be the purpose to defraud
25 shareholders. For instance, Charter may have come to

1 them and said look, do me a favor, says the sales
2 manager. I want to make my numbers for this period so I
3 can take my wife on a trip to Hawaii that the company
4 will give me.

5 So the company gives him a phony order,
6 thinking that's the purpose of it. That's the purpose
7 of the phony order to help this guy along.

8 Well, you've engaged in a deceptive act. It
9 may be deceptive under 10(b), but you wouldn't satisfy
10 the "purpose" test, because the purpose --

11 JUSTICE SOUTER: In other words, it's
12 deceptive but not deceptive in relation to, or for the
13 purpose of, deceiving the -- someone like the Petitioner.

14 CHIEF JUSTICE ROBERTS: Well, wouldn't it --

15 JUSTICE SCALIA: But don't aiders and
16 abettors have to have that purpose as well? What
17 distinguishes -- what distinguishes the liability that
18 you propose from aider and abettor liability?

19 MR. GROSSMAN: You have to engage in a
20 deceptive act under 10(b). 10(b) prohibits any deceptive
21 act.

22 JUSTICE SOUTER: I thought you were telling
23 me that in each case there may be a deceptive act but
24 not a deceptive act in relation to somebody like the
25 Petitioner here.

1 MR. GROSSMAN: Exactly.

2 JUSTICE SOUTER: But that's a different
3 answer, I think, from the one you were just giving
4 Justice Scalia.

5 MR. GROSSMAN: No. I -- I understood,
6 perhaps mistakenly, from Justice Scalia that there
7 wasn't a deceptive act in your hypothetical. If there
8 is a deceptive act, then it's prohibited by 10(b), and
9 we move to the next statute --

10 JUSTICE SCALIA: So any aiding-and-abetting
11 through a deceptive act makes you a principal? Is that
12 it? You can't be an aider and abettor by committing or
13 enabling a deceptive act without becoming a principal?

14 MR. GROSSMAN: No. Not at all.

15 JUSTICE SCALIA: You cannot?

16 MR. GROSSMAN: You, yourself -- you,
17 yourself, have to engage in the deceptive act.

18 JUSTICE SCALIA: Yes.

19 MR. GROSSMAN: Your own deceptive act.

20 JUSTICE SCALIA: Yes, but -- but if you do,
21 or if you should have known, you are not an aider and
22 abettor. You are automatically a principal.

23 MR. GROSSMAN: You may be a principal if you
24 satisfy the other elements of our test, which are
25 serious elements that you have to plead with

1 particularity, with the heightened pleading standards,
2 that they have the purpose to further a scheme to
3 defraud. That's very different --

4 JUSTICE SCALIA: Is it fair to say that all
5 aiders and abettors who commit deceptive acts are
6 principals?

7 MR. GROSSMAN: No.

8 JUSTICE SCALIA: What's the difference?
9 What separates the two?

10 MR. GROSSMAN: There are tests. You have
11 to take it the next step further, because whether or
12 not that deceptive act had the purpose and effect of
13 furthering a scheme on investors.

14 JUSTICE SCALIA: Don't you need that to be
15 an aider or abettor?

16 MR. GROSSMAN: An aider or abettor? You
17 have to have --

18 JUSTICE SCALIA: If I'm entirely innocent,
19 and I don't --

20 MR. GROSSMAN: An aider -- certainly --
21 certainly, the primary violator in the situation that we
22 are discussing where there are deceptive acts is aiding
23 and abetting.

24 I mean, if an accountant comes in and
25 deliberately falsifies a financial statement, he is

1 giving substantial assistance to the company's statement
2 -- the company who is issuing those false statements.
3 He would be an aider and abettor in that sense. He is
4 also a primary --

5 JUSTICE SCALIA: You see, I really thought
6 the difference was that the principal is the one who
7 makes the deceptive representation and obtains money
8 from it. The aider and abettor is the person who
9 facilitates or enables that deceptive representation,
10 which is what we have here.

11 MR. GROSSMAN: No.

12 JUSTICE SCALIA: And you say if you
13 facilitate knowingly and intentionally or even grossly
14 negligently, you are not an aider and abettor, but
15 you're a principal. I really don't understand what's
16 the line between the two.

17 MR. GROSSMAN: If you facilitate with a
18 deceptive act, then you're a primary violator. That's
19 what section 10(b) prohibits. If you facilitate without
20 a deceptive act, then you are an aider and abettor.

21 JUSTICE GINSBURG: Mr. Grossman, before you
22 finish, there is one statement made by the other side
23 that you are trying to use this -- small in comparison
24 to all the fraud that was involved here in order to
25 collect on the entire loss. That is, you are asserting

1 that the vendors are liable for the entire loss when
2 they were just a bit player.

3 MR. GROSSMAN: Yes. We are not seeking that
4 at all, Your Honor. We -- the PSLRA proportionate
5 liability provisions govern this with respect to --

6 JUSTICE GINSBURG: So what are you seeking?
7 How would you measure your damages?

8 MR. GROSSMAN: We would measure the damages,
9 number one, that flow from this particular scheme. We
10 would have to first subtract the settlements that have
11 been achieved already, and then the proportionate
12 liability provisions of the PSLRA provide how you make
13 this determination.

14 You look at the particular nature of their
15 conduct, and you look at the extent to which their
16 particular conduct had a causal relationship with the
17 damages.

18 CHIEF JUSTICE ROBERTS: Mr. Grossman, I'm
19 conscious of eating into your time but a question -- how
20 many chains of this connection can you have? Let's say
21 Charter was not a publicly traded company, but same
22 thing happened with respect to Scientific-Atlanta, and
23 that made it look valuable to a company that is publicly
24 traded. So they decided to buy Charter and then that
25 made their profits look better to investors. Can you --

1 how many chains in the link can you go?

2 MR. GROSSMAN: Well, I -- I think you can go
3 so long as the person's deceptive conduct has the
4 purpose of furthering a scheme to defraud. If they
5 engage in some deceptive conduct that was not in
6 furtherance of the scheme to defraud, that's the end of
7 the chain. I --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Grossman.

10 MR. GROSSMAN: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Mr. Shapiro.

12 ORAL ARGUMENT OF STEPHEN M. SHAPIRO.

13 ON BEHALF OF THE RESPONDENTS

14 MR. SHAPIRO: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 My friend has just asked the Court to expand
17 an implied cause of action by diluting traditional
18 requirements such as the reliance requirement and by
19 eroding this Court's precedent in the Central Bank case.

20 The Court has said in the past that it must
21 be very cautious about expanding implied causes of
22 action, but here there are special reasons for caution.
23 Expanding the implied cause of action would give
24 plaintiff the very thing that Congress said it should
25 not get in section 20(e) of the Exchange Act.

1 Congress wanted cases like this one to be
2 handled by an expert and disinterested administrative
3 agency.

4 JUSTICE GINSBURG: That's if you equate this
5 with aiding-and-abetting, and I think the question is is
6 there a middle category between Charter, who is
7 clearly primarily liable, and Central Bank, that didn't
8 do anything deceptive?

9 MR. SHAPIRO: The Central Bank case, I
10 believe, answers that by saying to be a primary violator
11 you have to satisfy all the prerequisites of 10(b)
12 liability, including reliance, loss causation, the
13 "in-connection-with" standard. And here plaintiffs fail
14 to meet these tests. And Congress in 20(e) --

15 JUSTICE GINSBURG: But you are saying -- I
16 thought your argument, unlike the government's argument,
17 is that there was no deceptive device. There was no
18 deceptive device. They simply aided and abetted.

19 MR. SHAPIRO: Yes. That's one of the
20 arguments we make. It is this case is governed by
21 Central Bank because the defendant did not use or employ
22 deception in connection with a securities transaction.
23 That exactly describes what Charter did.

24 Now, what exactly describes what the vendors
25 are alleged to do is what is said in 20(e) -- to

1 knowingly give substantial assistance to someone else
2 that is misleading an investor. That fits this case
3 like a glove --

4 JUSTICE KENNEDY: Well, I thought -- I agree
5 with Justice Ginsburg. I thought the "in-connection-with"
6 argument is actually in addition to or separate from an
7 additional argument you made that there was no deceptive
8 statement made here. I thought that's what you were
9 arguing, and I have problems with that argument because
10 the statute doesn't require a statement. It requires
11 -- conduct suffice.

12 MR. SHAPIRO: We don't make these arguments
13 without reference to each other. We think all of these
14 statutory terms have to be viewed together. You have to
15 use deception in connection with securities trading,
16 which these vendors did not do. That's what Charter
17 did. And --

18 JUSTICE SOUTER: You don't defend the
19 position --

20 JUSTICE KENNEDY: Would you say that there
21 was deception, standing alone?

22 MR. SHAPIRO: Well, we have -- we have
23 suggested that that is not true when you're speaking
24 with somebody that knows the facts such as Charter.
25 Charter understood all these facts. Charter could have

1 accounted for these transactions correctly, itself. The
2 vendors did that. They didn't recognize any revenues
3 here. It was up to Charter to account for these
4 transactions properly. Congress required it to do that,
5 so it is the speaker here.

6 JUSTICE GINSBURG: But Charter said --
7 vendors, I need you to consummate this fraud on the
8 public. I can't do it without you. I've got to have
9 those revenues that you're going to give me through
10 these phony advertising payments at four or five times
11 the usual rate.

12 MR. SHAPIRO: Well, we believe even placing
13 that most pejorative characterization on these facts,
14 which we don't agree are the true facts, that still --

15 JUSTICE GINSBURG: But you must assume that
16 they are now.

17 MR. SHAPIRO: Assuming that they are, that
18 this is a 20(e) situation where it is alleged that the
19 vendors gave substantial, knowing assistance to somebody
20 who was committing a fraud. And Congress said that an
21 expert and disinterested administrative agency should
22 decide whether to proceed, because it is so slippery to
23 apply these characterizations.

24 JUSTICE GINSBURG: That's if they are --
25 that's if they are aiders and if there are only two

1 categories and everyone who is not Charter is an aider
2 and abettor, then you're right. But if there's a middle
3 category of people who, while not the benefited company
4 -- the company that's trying to achieve the deception --
5 but made it possible for that -- for that deception to
6 happen.

7 MR. SHAPIRO: Well, you know that's an exact
8 description of Central Bank because there it was alleged
9 that the trustee entered --

10 JUSTICE GINSBURG: No --

11 MR. SHAPIRO: -- into a secret agreement.

12 JUSTICE GINSBURG: In Central Bank, it was
13 conceded that the bank engaged in no deceptive act.

14 MR. SHAPIRO: Well, the --

15 JUSTICE GINSBURG: Here there is the charge
16 that it did engage in deceptive acts.

17 MR. SHAPIRO: What was conceded was that the
18 bank made no statement to investors, but what was
19 alleged in the complaint and argued in the briefs was
20 that the bank entered into a secret side agreement that
21 enabled the use of a fraudulent prospectus that
22 unleashed securities that were worthless on investors,
23 and investors said, we were depending on our trustee to
24 prevent that from happening.

25 JUSTICE SOUTER: Now, I take it, though, you

1 do not defend the position that there must -- for 10(b)
2 liability -- that there must have been a statement
3 addressed to investors.

4 MR. SHAPIRO: Well, we -- we think that for
5 reliance purposes, there --

6 JUSTICE SOUTER: Well, do you --

7 MR. SHAPIRO: -- the defendant has to
8 communicate with investors.

9 JUSTICE SOUTER: Would you answer my
10 question first? Do you take the position that there can
11 be no 10(b) liability without a statement addressed to
12 investors?

13 MR. SHAPIRO: It has to be communicated to
14 the investors and it has to be attributed under the case
15 law to the speaker.

16 JUSTICE SOUTER: You mean the statement as
17 such or a statement which could not have been made but
18 for the statements of the Respondents must be
19 communicated to the investors? Which one?

20 MR. SHAPIRO: That -- that kind of but-for
21 causation is not sufficient. That is not reliance.
22 That kind of --

23 JUSTICE SOUTER: So are you -- so you are
24 saying that there can be no causation and hence, you
25 know -- and I think you're going further. You're saying

1 there can be no liability within the description of
2 10(b) unless there is a statement directly addressed to
3 the investors, is that correct?

4 MR. SHAPIRO: That is one of our
5 submissions, but we also say that the substance of these
6 statements was never communicated to investors. Only
7 Charter --

8 JUSTICE GINSBURG: Because the whole purpose
9 of it --

10 MR. SHAPIRO: -- spoke to the investors and
11 never summarized these.

12 JUSTICE GINSBURG: Mr. Shapiro, if --

13 MR. SHAPIRO: Yes?

14 JUSTICE GINSBURG: If it was communicated to
15 investors that there had been \$20 per set box over the
16 regular price, if there had been advertising that was
17 paid for by the very money that Charter gave, then the
18 whole thing would have failed. So this can work only if
19 the vendors are silent. Silence and not speech is what
20 counts. If the vendors communicate anything at all, the
21 whole thing fails.

22 MR. SHAPIRO: But the -- the communication,
23 Your Honor, has to be to the market and to investors.
24 There was no duty to disclose to investors here. The
25 only communications the vendors made were "we're raising

1 our prices 6 percent, the date of our contract is August
2 31st, for the simple reason that it started the very
3 next day" --

4 JUSTICE GINSBURG: Was there any --

5 MR. SHAPIRO: -- on September 1st."

6 JUSTICE GINSBURG: Was there any economic
7 substance to this?

8 MR. SHAPIRO: Oh, of course. There was
9 economic substance from the vendors' perspective. They
10 were selling their products at exactly the price that
11 they wanted to receive for those products and they were
12 getting some free cooperative advertising thrown in at
13 the same time.

14 JUSTICE GINSBURG: Is it true that the price
15 that they were charging, they did not charge to other
16 customers -- the \$20 hike?

17 MR. SHAPIRO: Well, it's true because they
18 weren't concerned with that because they weren't paying
19 for it. Charter was paying for this cooperative --
20 cooperative advertising, the reason being --

21 JUSTICE GINSBURG: But it was --

22 MR. SHAPIRO: -- that Charter had a big
23 interest.

24 JUSTICE GINSBURG: -- a sham then, because
25 they said the reason they upped the price \$20 a box was

1 they -- the inflationary conditions, so they had to
2 renegotiate the contract, but didn't renegotiate with
3 any of their other customers.

4 MR. SHAPIRO: Well, Your Honor, from the
5 vendors' perspective, this was a transaction that
6 appeared to be a way to increase cooperative
7 advertising. It cost the vendors no money. They were
8 told by Charter that Arthur Andersen had approved the
9 transaction. That's alleged in the Barford indictment.
10 Then they went home and talked to their own auditors --
11 how do you account for this unusual transaction? The
12 auditors said, you cannot record any revenues from the
13 transaction. They didn't record any revenues. They
14 expected Charter to do the same thing, to not record
15 revenues --

16 JUSTICE KENNEDY: Well, but that's --

17 MR. SHAPIRO: -- if that's what the rules
18 required.

19 JUSTICE KENNEDY: -- that's not the
20 allegation of the complaint. I -- I thought the
21 allegation of the complaint was that they -- they
22 knew that this was a fraud and they participated in
23 the fraud.

24 MR. SHAPIRO: Yes, they -- they do allege.
25 I'm merely pointing out that in the Barford --

1 JUSTICE KENNEDY: But I mean that -- so that
2 your answer doesn't seem to be -- get us very far on a
3 legal point.

4 MR. SHAPIRO: Well, we say that if you take
5 the complaint at face value and you don't even consider
6 the Barford indictment that they cite, that it still is
7 a classic example of knowingly giving substantial
8 assistance to someone else that is making misstatements
9 to investors, because these vendors didn't make any
10 misstatement to investors. Nobody relied on their sales
11 correspondence. It sat in a file drawer until long
12 after the stock had gone all the way up and come all the
13 way down.

14 JUSTICE GINSBURG: That's the essence of the
15 scheme. You said that they -- they are home free
16 because they didn't themselves make any statement to
17 investors. But they set up Charter to make those
18 statements, to swell its revenues -- revenues that it in
19 fact didn't have.

20 MR. SHAPIRO: But Congress's policy judgment
21 here is that the SEC, an expert agency that is
22 impartial, should evaluate a claim of that sort and
23 decide whether to proceed.

24 JUSTICE GINSBURG: That's if they are aiders
25 and abettors, which is what Congress covered. And I

1 again go back to, is there another category or is
2 everyone -- either Charter, the person whose stock is at
3 stake, the company whose stock is at stake and everyone
4 else is an aider? I take it that that's your position.

5 MR. SHAPIRO: Well --

6 JUSTICE GINSBURG: It's either the company
7 whose stock is in question or you're an aider and
8 abettor.

9 MR. SHAPIRO: You are only a primary
10 violation under -- under Central Bank if each and every
11 element of 10b-5 liability is satisfied, including
12 reliance on your statement, including the
13 "in-connection-with" test, and including loss causation.
14 None of those tests are satisfied here, but what is
15 satisfied is section 20(e), which says, did they
16 knowingly give substantial assistance to somebody who is
17 committing a fraud? And that -- that fits this case
18 like a glove --

19 JUSTICE KENNEDY: If we accept --

20 MR. SHAPIRO: -- if Congress wanted the SEC
21 to address --

22 JUSTICE KENNEDY: If we accept your theory
23 of the case and we then get another case in which an
24 accountant or an attorney who prepares the statement for
25 publication to the investors and then gives it to

1 Charter, and they are before us, could we find liability
2 under 10b-5 as to the accountants and still rule -- and
3 still keep our ruling in favor of your client here?

4 MR. SHAPIRO: It really depends on --

5 JUSTICE KENNEDY: And if so, what would --

6 MR. SHAPIRO: -- on the circumstances.

7 JUSTICE KENNEDY: And if so, what would be
8 the rationale?

9 MR. SHAPIRO: Some attorneys are control
10 persons within corporations, and in-house counsel that
11 drafts the disclosure statement which contains a
12 falsehood may be liable as in the McConville case, which
13 the Court recently considered. Individuals may be
14 liable --

15 JUSTICE KENNEDY: How about outside
16 accountants and attorneys who deliberately and directly
17 participate in negotiating -- or in drafting the false
18 disclosure statements?

19 MR. SHAPIRO: I --

20 JUSTICE KENNEDY: Could they be liable and
21 under your theory of the case, but your client not
22 liable?

23 MR. SHAPIRO: It -- it's possible. Your
24 Honor, at the end of your --

25 JUSTICE SOUTER: Well what about in this

1 case? Let's be specific. As I understood an earlier
2 answer of yours, the answer was that Arthur Andersen
3 knew what was going on. If I've -- if you are -- and
4 as I understand it, that's not what was charged -- but
5 if that's correct, Arthur Andersen did know what was
6 going on. Can Arthur Andersen be held liable under
7 10b-5 --

8 MR. SHAPIRO: Absolutely --

9 JUSTICE SOUTER: -- whereas your client
10 cannot?

11 MR. SHAPIRO: Yes, sir. The reason --

12 JUSTICE SOUTER: And the difference is?

13 MR. SHAPIRO: The reason is they issued
14 opinions that were circulated to investors, that were
15 attributed to them and which were authorized by them,
16 and if a lawyer does the same thing, if Steve Shapiro
17 writes an opinion letter and circulates it to investors
18 and it's full of falsehoods --

19 JUSTICE SOUTER: But --

20 MR. SHAPIRO: -- I can be held liable for
21 that --

22 JUSTICE SOUTER: What if Arthur Andersen --

23 MR. SHAPIRO: -- as a speaker.

24 JUSTICE SOUTER: What if Arthur Andersen has
25 a footnote in there saying, this is okay because we have

1 this -- this letter from I forget which one of the two
2 Respondents it was, saying there's been inflation and
3 therefore we've got to renegotiate the prices and jack
4 them up 20 percent, Arthur Andersen knows that that is
5 false and the Respondent who made it knows that it is
6 false, can the Respondent who made it then be held
7 liable?

8 MR. SHAPIRO: Only people who speak to the
9 market --

10 JUSTICE SOUTER: Yes, but doesn't --

11 MR. SHAPIRO: -- and induce investor
12 reliance.

13 JUSTICE SOUTER: Yes, but doesn't -- doesn't
14 the Respondent in that case know that it is likely that
15 the auditor is going to indicate the basis for its
16 statement, that the transaction is okay --

17 MR. SHAPIRO: Well --

18 JUSTICE SOUTER: -- and, therefore, isn't it
19 reasonable to suppose that they anticipated that their
20 statement would be communicated to the market?

21 MR. SHAPIRO: That is just aiding and
22 abetting, and in fact Congress dealt with that squarely
23 in section 303 --

24 JUSTICE SOUTER: But there's a communication
25 to the market there --

1 MR. SHAPIRO: Oh, yes --

2 JUSTICE SOUTER: -- and there's a reason to
3 expect that communication.

4 MR. SHAPIRO: Yes.

5 JUSTICE SOUTER: Doesn't that make any
6 difference?

7 MR. SHAPIRO: That is not sufficient.
8 Congress addressed that in section 303 of
9 Sarbanes-Oxley, and it held that any person -- said any
10 person including a vendor that misleads an auditor can
11 be held liable in an SEC proceeding only, not in a
12 private suit. It excluded private actions.

13 JUSTICE SOUTER: Is the word "only" in
14 there?

15 MR. SHAPIRO: Pardon me?

16 JUSTICE SOUTER: Is the word "only" in
17 there?

18 MR. SHAPIRO: The word "exclusively" is in
19 there --

20 JUSTICE SOUTER: In the statute?

21 MR. SHAPIRO: -- and my --

22 JUSTICE SOUTER: So you have an independent
23 defense quite apart from -- from the construction of
24 10b-5?

25 MR. SHAPIRO: We rely on 20(e) and 303 of

1 Sarbanes-Oxley, and my friend has made the argument --

2 JUSTICE GINSBURG: Which I thought speak
3 about aiders and abettors.

4 MR. SHAPIRO: It's talking about an aider
5 and abettor that misleads an auditor and then --

6 JUSTICE GINSBURG: But is usually --

7 MR. SHAPIRO: -- the auditor issues a false
8 certification.

9 JUSTICE GINSBURG: -- aider and abettor --
10 then again we get back to the question: If there's
11 nothing in this world other than the company that puts
12 out the false statement and the aider and abettor --

13 MR. SHAPIRO: Well -- oh, no --

14 JUSTICE GINSBURG: -- and is there something
15 in between?

16 MR. SHAPIRO: Your Honor, there are other
17 persons that are control persons within a company who
18 are liable.

19 JUSTICE GINSBURG: But we're taking those out.
20 We're talking about independent actors.

21 MR. SHAPIRO: Independent actors that don't
22 speak to the markets and cause direct reliance on their
23 own statements are aiders and abettors. And they are supposed
24 to be dealt with by the SEC, an expert agency.

25 Now, my -- you know, my friend made the

1 argument about Sarbanes-Oxley that there's a savings
2 clause in that provision that preserves other remedies.
3 But if you look at the legislative history, it says
4 explicitly we are preserving SEC remedies. We want the
5 SEC to pursue these suits. And Congress refused in 2002
6 in Sarbanes-Oxley to reinstate the aiding-and-abetting
7 private liability cause of action.

8 JUSTICE KENNEDY: Do you know, Mr. Shapiro,
9 if in the law of torts and the restatement of torts or
10 in other areas of the law there is some third
11 classification that's between aider and abettor in
12 principle?

13 MR. SHAPIRO: I don't know the answer.
14 Although in these statutes themselves there are such
15 provisions not included in section 10(b). For example
16 in section 18(a), if you cause some other person to make
17 a false statement in a financial statement, you can be
18 held liable, but they are not invoking it in section 18.
19 Same thing under section 17. If you engage in a scheme
20 to cause some falsehood, you can be prosecuted by the
21 government.

22 But nowhere has Congress said that an
23 individual litigant can bring a claim like that without
24 regard for reliance and "in connection with" and the
25 loss causation test.

1 JUSTICE SOUTER: Let's assume there is
2 reliance and loss causation. Let me ask a question very
3 similar to what Justice Ginsburg has posed a couple of
4 times. She has said is there a third category. My
5 question is, is there an overlap? Can there be an
6 overlap?

7 MR. SHAPIRO: No, I don't think there can be.

8 JUSTICE SOUTER: Why?

9 MR. SHAPIRO: Because Congress intended in
10 section 20(e) to have an expert agency address these
11 cases and not to have the trial --

12 JUSTICE SOUTER: Congress intended an expert
13 agency to address solely aiding-and-abetting cases. My
14 question is if there is an overlap -- A, can there be an
15 overlap? And if so, I don't see why Congress's intent to
16 reserve aiding-and-abetting alone to the agency affects
17 the determination of this case.

18 MR. SHAPIRO: We believe they are separate
19 categories and that Central Bank tells us exactly who
20 the primary violator is. He is somebody who makes a
21 statement that investors rely on in connection with
22 securities transactions, and that is not these vendors.
23 That is exactly what section 20(e) addresses and commits
24 --

25 JUSTICE SCALIA: Could you amend that to

1 say -- you don't insist that he make a statement that
2 invest -- he could engage in a deceptive practice
3 directed at investments?

4 MR. SHAPIRO: Absolutely. Absolutely. We
5 don't quarrel over that, Justice Scalia.

6 JUSTICE SOUTER: For example, for example,
7 let's assume in this case that Charter said we've, we've
8 got to let the investors know that our cost of doing
9 business is going up, and we want to you make an
10 announcement that you're jacking up your price 20
11 percent. In that case there would be primary liability.

12 MR. SHAPIRO: Absolutely.

13 JUSTICE SOUTER: Why in that case is there
14 not also aiding-and-abetting? We know perfectly well
15 why they are doing it, and they are doing it solely to
16 aid and abet Charter in its scheme themselves enjoying
17 a wash transaction. Why isn't that both primary and
18 aiding-and-abetting?

19 MR. SHAPIRO: Well, it's primary because
20 there is the communication to the market that's missing
21 here.

22 JUSTICE SOUTER: We know it's primary. Why
23 isn't it also aiding-and-abetting?

24 MR. SHAPIRO: You can call it -- both of
25 those things.

1 JUSTICE SOUTER: If you can call it, why
2 isn't there the kind of overlap which raises the
3 question that Justice Ginsburg has raised?

4 MR. SHAPIRO: You can't have primary
5 liability, which they are asserting here, without the
6 statement to the market. And it can be a statement by
7 conduct, and it can be by nodding of the head.

8 JUSTICE SOUTER: So you are saying there can
9 be an overlap but there is no overlap that helps the
10 Petitioner in this case?

11 MR. SHAPIRO: Oh, yes. Nodding the head is
12 the same thing as saying yes. But it has to be made
13 directly to an investor and cause reliance by that
14 investor. That's what's missing here.

15 So there is nothing wrong with the Eighth
16 Circuit's decision. It didn't address that refinement,
17 because it has no bearing on this case. So there is no
18 point in reversing the decision. It has to be affirmed
19 in our view for want of reliance, for want of loss
20 causation, for lack of "in connection with", and because
21 most importantly, Congress intended to remove this
22 category of case and commit it to an expert agency as
23 part of its very important reform effort to deal with
24 excessive litigation that was harming our economy.

25 This was an important concept for Congress.

1 And it said it twice: First in the PSLRA in 1995, then
2 in 2002, in the Sarbanes-Oxley law. And it removed even
3 claims that you mislead an auditor under section 303 of
4 Sarbanes-Oxley. And there is no savings clause there
5 for private actions. Congress refused to permit the
6 private actions.

7 Instead, it permitted the SEC to bring
8 intentional misconduct cases under section 20(e) or
9 negligent misconduct cases under section 303 or under
10 section 13. And the SEC has a broad panoply of
11 remedies. It doesn't have to just allege intentional --

12 JUSTICE GINSBURG: Does the SEC distinguish
13 this kind of situation where silence is the essence of
14 the thing for the deceiver, silence not speech? Does
15 the SEC distinguish this from aiding-and-abetting?

16 MR. SHAPIRO: Well, the SEC's view is the
17 one rejected by the Solicitor General, and that's this
18 purpose-and-effect standard that's been advocated, which
19 we think is hopelessly vague. And it overrides the
20 reliance requirement. It overrides the "in connection
21 with" requirement. And it overrides loss causation, not
22 to mention Central Bank.

23 JUSTICE STEVENS: Mr. Shapiro, what is your
24 strongest case, in your view, for the reliance
25 requirement?

1 MR. SHAPIRO: Central Bank itself.

2 JUSTICE STEVENS: Central Bank itself?

3 MR. SHAPIRO: Because the Court there
4 said that even though the bank did something that was a
5 secret agreement that facilitated the issuer's
6 distribution of a false prospectus and caused all the
7 harm to the shareholders, it was a direct sine qua non
8 cause of all of that harm, that that was merely aiding
9 and abetting, because there was no reliance on anything
10 that the bank stated or anything that the bank had a duty
11 to state because of a fiduciary relationship.

12 Now, the vendors here are even far more
13 removed from investors than the bank was in Central
14 Bank. The investors knew about the bank in Central
15 Bank, and they were relying on it to do its job. But
16 that was not sufficient because it made no statement
17 that the investors relied on. There is no
18 communication here between these vendors and investors.
19 There is no way you could --

20 JUSTICE STEVENS: Mr. Shapiro, in your
21 judgment, is the reliance requirement an element of
22 the violation or of the private cause of action?

23 MR. SHAPIRO: It's the private cause of
24 action. An important point, Justice Stevens, because
25 the SEC is not burdened with any of these elusive

1 inquiries into but-for causation, speculative questions
2 of indirect reliance; none of that burdens the SEC.

3 And the SEC also has power to distribute
4 funds to investors. This is the better mousetrap that
5 Congress prescribed for these kinds of cases. It didn't
6 want the trial lawyers to bring class actions that
7 always result in settlements.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Shapiro.

10 MR. SHAPIRO: We thank the Court.

11 CHIEF JUSTICE ROBERTS: Mr. Hungar.

12 ORAL ARGUMENT OF THOMAS G. HUNGAR

13 ON BEHALF OF THE UNITED STATES,

14 AS AMICUS CURIAE,

15 SUPPORTING THE RESPONDENTS

16 MR. HUNGAR: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 The court of appeals erred to the extent it
19 held that section 10(b) applies only to verbal
20 misrepresentations or omissions. But the court
21 correctly held that this Court's decision in Central
22 Bank forecloses Petitioner's claim here. Like the
23 plaintiff in Central Bank, Petitioner cannot establish
24 reliance, a critical element of the section 10(b)
25 implied right of action.

1 Neither Petitioner nor the market relied on
2 or was even aware of any deceptive conduct or statement
3 by Respondents --

4 JUSTICE STEVENS: Mr. Hungar, I want to be
5 sure I understand one part of the government's position.
6 You do take the position that there has a violation of
7 10b-5?

8 MR. HUNGAR: We haven't taken a position on
9 that question, Your Honor. We take the position that
10 there was deceptive conduct alleged. The -- one of the
11 elements of a 10b-5 violation, but not the only
12 element.

13 JUSTICE STEVENS: Were the other elements
14 present?

15 MR. HUNGAR: As I say, we have not taken --
16 I mean, materiality, for instance, the "in connection
17 with" requirement, scienter, we haven't addressed those
18 questions and have not taken a position.

19 JUSTICE STEVENS: Do you have an opinion as
20 to whether there was a violation of 10(b) in this case?

21 MR. HUNGAR: No, Your Honor.

22 JUSTICE STEVENS: You don't have an opinion?

23 MR. HUNGAR: We haven't taken a position, and
24 --

25 JUSTICE STEVENS: I know you haven't taken a

1 position, but I was just wondering if you have an
2 opinion?

3 (Laughter.)

4 MR. HUNGAR: No, Your Honor. We haven't
5 addressed the other elements and those -- questions that
6 we have -- because there is no need to resolve them in
7 this case and because they weren't resolved by the court
8 of appeals or by the district court, we have chosen to
9 focus on what we think is dispositive and what was
10 raised and decided below, which is reliance.

11 JUSTICE STEVENS: You have not reached
12 opinion as to whether there was a violation of the
13 statute?

14 MR. HUNGAR: Correct.

15 JUSTICE SOUTER: Has the SEC publicly taken
16 a position on that question?

17 MR. HUNGAR: I'm not sure of the answer to
18 that question, Your Honor. Certainly individual
19 commissioners have given speeches and testified before
20 Congress to the effect that the Commission voted in this
21 case to agree with our position on deception, the
22 position that's expressed in our brief, and by a
23 three-to-two vote to disagree with the position on
24 reliance that is expressed in our brief. But I don't
25 know that there has been any official SEC Commission

1 statement to that effect that's been publicly released.

2 As I said, the only deceptive conduct that
3 was allegedly committed by Respondents in this case
4 involves the backdating of contracts and the false
5 justifications for the price increase. That conduct was
6 never disclosed to the market at any time during the
7 class period, and therefore, could not have been relied
8 on by the market or by Petitioners.

9 And as a consequence, under this Court's
10 decisions in Central Bank and in Basic, reliance cannot
11 be established because the presumption of reliance that
12 Petitioner seeks to invoke requires as a prerequisite to
13 its invocation the existence of a publicly disseminated
14 statement from the defendant that was disseminated to,
15 and therefore, relied on by the market. That did not
16 happen here with respect to Respondents.

17 JUSTICE GINSBURG: Could the SEC get any
18 monetary recovery for the investors on your theory? You
19 say yes, it's a deceptive practice, but this belongs in
20 the SEC's bailiwick, not in private suits?

21 MR. HUNGAR: Yes, Your Honor.

22 JUSTICE GINSBURG: Private suits; obviously
23 they are seeking damages for the decline in the share
24 price. What could the SEC -- suppose it should take up
25 this case -- get by way of remedy?

1 MR. HUNGAR: The SEC is entitled to obtain
2 civil fines, as well as disgorgement remedies.

3 JUSTICE GINSBURG: But there is no
4 disgorgement here because the vendors didn't get
5 anything. For them it was a wash.

6 MR. HUNGAR: Well, I don't know -- I believe
7 in the, not in this case but in the Adelphia case, which
8 is addressed --

9 JUSTICE GINSBURG: Well, but this case,
10 disgorgement would not be a remedy. You say fines,
11 but those would be payable to the government, right?

12 MR. HUNGAR: If I may -- yes, yes and no, I
13 think is the answer to that question; because under the
14 fair funds provision of the Sarbanes-Oxley Act, section
15 308 of Sarbanes-Oxley, the SEC is authorized to take
16 fines and distribute those -- add those to disgorgement
17 relief -- and distribute them to investors.

18 JUSTICE GINSBURG: But there would be no
19 disgorgement relief.

20 MR. HUNGAR: Well, I'm not sure I can agree
21 with that point. In the Adelphia matter --

22 JUSTICE GINSBURG: What profits did the
23 vendors get? For them it was a wash. They got -- what
24 did they have to disgorge?

25 MR. HUNGAR: Well, they obtained -- at least

1 it appears that they obtained advertising that
2 presumably had some value, although it didn't cost them
3 anything; and presumably the SEC could seek the value of
4 that advertising. As I said, in the Adelphia matter
5 where the SEC did pursue the vendors that assisted
6 Adelphia in a somewhat similar transaction, it obtained
7 substantial monetary recoveries from them. I --

8 JUSTICE GINSBURG: But did they receive
9 something that they then disgorged?

10 MR. HUNGAR: I believe the allegations were
11 similar to those presented here. But in any event,
12 certainly the SEC has the authority to proceed in that
13 fashion, and additionally the Justice Department has
14 the ability to proceed criminally and obtain substantial
15 monetary sanctions, either as part of a deferred
16 prosecution agreement, as part of a restitutionary
17 sanction and the like; but the fundamental point is that
18 for the private right of action to apply, as this Court
19 said in Central Bank, all of the elements of the private
20 cause of action must be satisfied with respect to the
21 individual defendant. That is the line.

22 CHIEF JUSTICE ROBERTS: Do you agree, do you
23 agree with Mr. Shapiro, what I understood to be his
24 argument, that 20(e), the aider and abettor statute,
25 more or less occupies the field here and there is no

1 role for additional 10b-5 liability?

2 MR. HUNGAR: Well, I wouldn't say that it
3 occupies the field per se, but what it does do is --
4 given the timing of this Court's decision in Central
5 Bank in 1994, followed by Congress's considering the
6 question whether to provide for secondary liability
7 in private actions, and its decision not to authorize such
8 secondary liability -- what it does clearly suggest is
9 that this Court ought not adopt the expansive view of
10 the implied right of action that Petitioner is urging,
11 but instead both because the Court is appropriately
12 cautious in expanding liability under implied rights of
13 action, and because Congress has now looked at this
14 question, not once but twice, and has declined to
15 provide secondary liability for secondary actors under
16 the cause of action.

17 JUSTICE SCALIA: You think that you are
18 either a principal or an aider and abettor?

19 MR. HUNGAR: You can -- it's possible for
20 someone to be both but in order to be both they must
21 have -- they must have satisfied all of the elements.

22 JUSTICE SCALIA: For the same act, I'm
23 talking about -- for the same act.

24 MR. HUNGAR: Yes. For instance an auditor
25 who certifies false financial statements and allows

1 that -- its certification to be, to be publicly
2 disseminated, thereby aiding and assisting in the
3 issuer's primary fraud, but is also a -- quite likely to
4 be a primary violator, because they have spoken to the
5 market. The market is relying on their statements, and
6 is aware that they are making them; and so they would be
7 both a primary violator, but could presumably be pursued
8 as an aider and abettor. I don't think there is any
9 preclusion of liability under both, but in order to be
10 in that category you must be a primary violator. And
11 here, Petitioners have not established and cannot
12 establish the reliance element with respect to
13 Respondents, because nothing that Respondents said or
14 did was disseminated to the market during the class
15 period.

16 JUSTICE KENNEDY: And I take it in your view
17 they cannot establish the "in connection with"
18 argument?

19 MR. HUNGAR: We have not taken a position --

20 JUSTICE KENNEDY: Prior to the statment,
21 there is no reliance, but that there is "in connection
22 with" --

23 MR. HUNGAR: Your Honor, I would hesitate to
24 say that, Your Honor, because the SEC and the United
25 States do not have to establish reliance in criminal or

1 civil enforcement proceedings, but we do have to
2 establish "in connection with," and we think they are
3 different. We think reliance adds something more than
4 what "in connection with" requires, and so I certainly
5 would urge the Court not to suggest that merely because
6 reliance is not established, therefore "in connection
7 with" must not also be established; and that is one of
8 the reasons why we think that the "in connection with"
9 question is best resolved, not in this case, but in the
10 case where it's been squarely presented, and preferably
11 a government enforcement action where the government
12 has an opportunity to tailor the case in an appropriate
13 fashion.

14 The Court, as I said has been --

15 CHIEF JUSTICE ROBERTS: It's at least a
16 little awkward for you to say we should wait for a case
17 in which it's been fully presented when the argument
18 you're making here wasn't fully presented, or at
19 least not decided below.

20 MR. HUNGAR: I think it was, Your Honor. It
21 was certainly briefed and argued in both the district
22 court and the court of appeals. The district court
23 squarely resolved it at page 41a of the petition
24 appendix. The court of appeals addressed reliance at
25 page 10a of the petition appendix. It did not give it a

1 fully orb'd discussion.

2 CHIEF JUSTICE ROBERTS: I understood the
3 court of appeals' decision to be based on its
4 determination that there was no deceptive act because
5 there was no statement or omission.

6 MR. HUNGAR: But on page 10a, they also talk
7 about reliance, Your Honor; and what's important here to
8 understand is that Petitioner's theory of reliance
9 rests on a misstatement, because they say the market
10 -- it's a basic presumption of reliance based on the
11 fraud-on-the-market theory case. That's the only
12 allegation of reliance in the complaint; that requires
13 something publicly disseminated. The only thing that
14 was publicly disseminated is the statement. What the
15 court of appeals said is, that doesn't work, there was
16 no reliance because Respondents didn't make any publicly
17 disseminated statement. So it's actually, perhaps not a
18 complete, but certainly a perfectly reasonable resolution
19 of the reliance question; and therefore it is squarely
20 presented. Petitioners raised reliance in their petition
21 --

22 JUSTICE GINSBURG: I don't see --

23 MR. HUNGAR: -- at page 25. In their
24 opening brief at pages 37 to 40, it's squarely presented
25 and --

1 JUSTICE GINSBURG: I'm looking at the court
2 of appeals decision which I thought just said that there
3 was no deceptive device.

4 MR. HUNGAR: Your Honor, on page 10a, the
5 second line, the first full sentence, speaking of
6 Motorola and Scientific-Atlanta, "they did not issue
7 any misstatement relied upon by the investing public,"
8 and then it goes on the next sentence: "None of the
9 alleged financial misrepresentations by Charter was made
10 by or even with the approval of the vendors," that is
11 the Respondents.

12 Again as I say, it's not as complete a
13 discussion of the reliance issue as we would have
14 thought appropriate if we had been writing the opinion,
15 but it certainly does touch on the question and we think
16 it's wholly presented.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 Mr. Hungar.

19 Mr. Grossman, have you three minutes.

20 REBUTTAL ARGUMENT OF STANLEY M. GROSSMAN

21 ON BEHALF OF THE PETITIONER

22 MR. GROSSMAN: Thank you.

23 I -- excuse me, I have three quick points to
24 make.

25 One, Mr. Shapiro and Mr. Hungar both said

1 that the advertising cost the vendors no money. Well,
2 if the advertising cost them no money, why was there a
3 contract that they entered into for the purchase of
4 advertising? Clearly it was designed to give the false
5 appearance that Charter had this additional \$17 million
6 in revenue.

7 Number two, the SEC did take a position in
8 the Simpson case as it submitted an amicus brief;
9 Commissioner Cox testified before a House committee this
10 past spring that they wanted to submit the same brief on
11 the same points supporting the position that we are
12 taking here; and the testimony of Commissioner Cox is
13 appended to the briefs of Congressmen Franks and
14 Conyers.

15 Number three, Central Bank did not turn on
16 reliance. Central Bank turned on the issue of deceptive
17 conduct. There was no deceptive conduct in that case.
18 The plaintiffs conceded there was no deceptive conduct;
19 the court of appeals and the district court said there
20 was no deceptive conduct; it was strictly an aiding-and-
21 abetting case.

22 With respect to the reliance issue in
23 Central Bank, what the Court did say was under
24 plaintiff's theory he wouldn't have to prove reliance.
25 He only had to prove that he -- that the defendant

1 substantially assisted a defendant who engaged in a
2 primary violation, but he would not have to prove any
3 reliance by the aiding and abettor.

4 Number three, with respect to 20(e), how do
5 my friends on the other side read 20(e) in connection
6 with section 9 and section 18 of the Exchange Act, each
7 of which provides remedies and private rights of actions
8 against multiple parties? Under their definition, that
9 would appear to be displaced by 20(e). 20(e) was not
10 designed, it was not intended to do anything but to give
11 the SEC the right to bring the very type of aiding-and-
12 abetting action that this Court barred in Central Bank.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Grossman. The case is submitted.

15 (Whereupon, at 12:00 p.m., the case in the
16 above-entitled matter was submitted.)

17

18

19

20

21

22

23

24

25