IN THE SUPREME COURT OF THE UNITED STATES

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STONERIDGE INVESTMENT :

PARTNERS, LLC, :

Petitioner :

v. : No. 06-43

SCIENTIFIC-ATLANTA, INC., :

ET AL. :

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Washington, D.C.

Tuesday, October 9, 2007

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

APPEARANCES:

STANLEY M. GROSSMAN, ESQ., New York, N.Y.; on behalf of the Petitioner

STEPHEN M. SHAPIRO, ESQ., Chicago, Ill.; on behalf of Respondents

THOMAS G. HUNGAR, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:00 a.m.)

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

Mr. Grossman.

ORAL ARGUMENT OF STANLEY GROSSMAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

MR. GROSSMAN: That is correct, Justice Ginsburg.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

provisions. It recognized that there would be multiple players.

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

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

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

furthering a scheme to defraud investors.

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

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

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

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

Would that be enough?

MR. GROSSMAN: I think that would be reckless.

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Why shouldn't we be

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

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

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

MR. GROSSMAN: Secondary actors.

CHIEF JUSTICE ROBERTS: -- who put the

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

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

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

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

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

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

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

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

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

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

MR. GROSSMAN: Arthur Andersen.

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

Andersen knew all along what was going on.

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

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

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

JUSTICE SCALIA: What other reason?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: But you're saying --

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

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

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

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

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

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

understood --

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

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

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

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

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

scheme. Is that correct?

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

JUSTICE SOUTER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GROSSMAN: Exactly.
JUSTICE SOUTER: But that's a different answer, I think, from the one you were just giving Justice Scalia.
MR. GROSSMAN: No. I -- I understood, perhaps mistakenly, from Justice Scalia that there wasn't a deceptive act in your hypothetical. If there is a deceptive act, then it's prohibited by 10(b), and we move to the next statute --
JUSTICE SCALIA: So any aiding-and-abetting through a deceptive act makes you a principal? Is that it? You can't be an aider and abettor by committing or enabling a deceptive act without becoming a principal?
MR. GROSSMAN: No. Not at all.
JUSTICE SCALIA: You cannot?
MR. GROSSMAN: You, yourself -- you, yourself, have to engage in the deceptive act.
JUSTICE SCALIA: Yes.
MR. GROSSMAN: Your own deceptive act.
JUSTICE SCALIA: Yes, but -- but if you do, or if you should have known, you are not an aider and abettor. You are automatically a principal.
MR. GROSSMAN: You may be a principal if you satisfy the other elements of our test, which are serious elements that you have to plead with

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

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

MR. GROSSMAN: No.

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

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

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

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

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

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

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

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

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

MR. GROSSMAN: No.

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

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

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

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

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

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

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

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

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

how many chains in the link can you go?

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Grossman.

MR. GROSSMAN: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO.

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: No --

MR. SHAPIRO: -- into a secret agreement.

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

MR. SHAPIRO: Well, the --

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

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

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

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

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

JUSTICE SOUTER: Well, do you --

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Because the whole purpose of it --

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

JUSTICE GINSBURG: Mr. Shapiro, if --

MR. SHAPIRO: Yes?

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

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

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

JUSTICE GINSBURG: Was there any --

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

JUSTICE GINSBURG: Was there any economic substance to this?

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

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

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

JUSTICE GINSBURG: But it was --

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

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

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

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

JUSTICE KENNEDY: Well, but that's --

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

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

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

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

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

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

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

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

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

MR. SHAPIRO: Well --

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

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

JUSTICE KENNEDY: If we accept --

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

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

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

MR. SHAPIRO: It really depends on --

JUSTICE KENNEDY: And if so, what would --

MR. SHAPIRO: -- on the circumstances.

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

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

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

MR. SHAPIRO: I --

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

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

JUSTICE SOUTER: Well what about in this

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

MR. SHAPIRO: Absolutely --

JUSTICE SOUTER: -- whereas your client cannot?

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

JUSTICE SOUTER: And the difference is?

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

JUSTICE SOUTER: But --

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

JUSTICE SOUTER: What if Arthur Andersen --

MR. SHAPIRO: -- as a speaker.

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

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

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

JUSTICE SOUTER: Yes, but doesn't --

MR. SHAPIRO: -- and induce investor reliance.

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

MR. SHAPIRO: Well --

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

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

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

MR. SHAPIRO: Oh, yes --
JUSTICE SOUTER: -- and there's a reason to expect that communication.
MR. SHAPIRO: Yes.
JUSTICE SOUTER: Doesn't that make any difference?
MR. SHAPIRO: That is not sufficient. Congress addressed that in section 303 of Sarbanes-Oxley, and it held that any person -- said any person including a vendor that misleads an auditor can be held liable in an SEC proceeding only, not in a private suit. It excluded private actions.
JUSTICE SOUTER: Is the word "only" in there?
MR. SHAPIRO: Pardon me?
JUSTICE SOUTER: Is the word "only" in there?
MR. SHAPIRO: The word "exclusively" is in there --
JUSTICE SOUTER: In the statute?
MR. SHAPIRO: -- and my --
JUSTICE SOUTER: So you have an independent defense quite apart from -- from the construction of 10b-5?
MR. SHAPIRO: We rely on 20(e) and 303 of

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

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

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

JUSTICE GINSBURG: But is usually --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Why?

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

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

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

JUSTICE SCALIA: Could you amend that to

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

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

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

MR. SHAPIRO: Absolutely.

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

MR. SHAPIRO: Well, it's primary because there is the communication of the market that's missing here.

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

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

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

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

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

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

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

This was an important concept for Congress.

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

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

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

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

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

MR. SHAPIRO: Central Bank itself.

JUSTICE STEVENS: Central Bank itself?

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Shapiro.

MR. SHAPIRO: We thank the Court.

CHIEF JUSTICE ROBERTS: Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

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

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

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

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

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

JUSTICE STEVENS: Were the other elements present?

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

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

MR. HUNGAR: No, Your Honor.

JUSTICE STEVENS: You don't have an opinion?

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

JUSTICE STEVENS: I know you haven't taken a

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

(Laughter.)

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

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

MR. HUNGAR: Correct.

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

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

statement to that effect that's been publicly released.

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

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

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

MR. HUNGAR: Yes, Your Honor.

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

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

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

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

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

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

JUSTICE GINSBURG: But there would be no disgorgement relief.

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

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

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

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

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

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

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

role for additional 10b-5 liability?

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

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

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

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

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

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

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

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

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

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

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

The Court, as I said has been --

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

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

fully orbed discussion.

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

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

JUSTICE GINSBURG: I don't see --

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Hungar.

Mr. Grossman, have you three minutes.

REBUTTAL ARGUMENT OF STANLEY M. GROSSMAN
ON BEHALF OF THE PETITIONER

MR. GROSSMAN: Thank you.

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

One, Mr. Shapiro and Mr. Hungar both said

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

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

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

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

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

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

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

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

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