No. 06-43

IN THE

Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,
Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR CHANGE TO WIN AND THE CtW INVESTMENT GROUP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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"*Actions lie louder than words.*"
– Carolyn Wells, American author and poet (1862-1942)

INTEREST OF *AMICI* [1]

Change to Win is an alliance of seven partner unions and six million workers, united to build a new movement of

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters of consent to the filing of this brief have been filed with the Court.

working people that can meet the challenges of the global economy and restore the American Dream: a paycheck that can support a family, affordable health care, a secure retirement and dignity on the job. The seven partner unions are: International Brotherhood of Teamsters, Laborers' International Union of North America, Service Employees International Union, UNITE HERE, United Brotherhood of Carpenters and Joiners of America, United Farm Workers of America, and United Food and Commercial Workers International Union. The Change to Win Investment Group was established in February 2006 to monitor corporate activity and protect the interests of Change to Win workers in various Taft-Hartley and public pension funds with approximately $1.5 trillion in assets.

In recent years, funds like those associated with *amici* have suffered substantial losses due to securities misconduct and have utilized the remedies afforded them under the federal securities laws to protect their beneficiaries. These actions have included §10(b) suits—both class actions in which such funds sought lead plaintiff status under the Private Securities Litigation Reform Act of 1995 and individual suits.

Amici have a significant interest in assuring that federal securities laws protect the interests of investors in accord with Congress' intent. If allowed to stand, the court of appeals' ruling in this case would virtually immunize banks, brokers, accountants, law firms, and others from liability in many cases. The view that those crafty enough to benefit from participating in a securities fraud can escape liability by carefully avoiding a public statement directly conflicts with the broad language and purposes of the antifraud provisions. Indeed, it is precisely with respect to such secret schemes that the antifraud provisions are needed the most. The federal securities laws are not designed to allow the most cunningly devised white collar fraud to be rewarded with immunity from liability.

SUMMARY OF ARGUMENT

The complaint in this action alleges that Defendants Scientific-Atlanta and Motorola engaged knowingly in a scheme with Charter Communications to enter into sham transactions for the sole purpose of falsely portraying Charter's financial performance to investors and the public at a critical time. Purporting to apply this Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), the court below held that Section 10(b)'s proscription against "any manipulative or deceptive device or contrivance" imposes liability only where there is "a misstatement or a failure to disclose by one who has a duty to disclose." *In re Charter Comms., Inc.*, 443 F.3d 987, 992 (8th Cir. 2006). Despite the allegations of the complaint, the court characterized the arrangement between Charter and the vendors as "an arm's length business transaction," noted that the vendors were not alleged to have "issue[d] any misstatement relied upon by the investing public," found that they "were not under any duty to disclose information useful in evaluating Charter's true financial condition" and upheld dismissal of the claims against them. *Id*.

Amici submit this brief because this "*Speak No Evil*" rule created by the court of appeals profoundly affects the honesty and integrity of the securities markets as well as the ability of defrauded investors to recover their losses. The significance of this issue cannot be underestimated. The rule eviscerates the federal regime of investor protection and threatens to turn back the clock to the 1920's. The Enron, WorldCom, and other devastating corporate financial scandals of recent years have demonstrated the sophistication and ingenuity with which securities fraud may be perpetrated through sham transactions and seriously undermined confidence in our markets and our regulatory system. Immunizing intentionally deceptive conduct just because the perpetrator has not itself

made any direct public statement guts the central purpose of the federal securities laws and encourages fraud.

I. The "*Speak No Evil*" rule conflicts with the broad purpose, structure and wording of federal securities law. The Securities Exchange Act of 1934 was enacted "to insure the maintenance of fair and honest markets" in securities. 15 U.S.C. §78b. Consistent with that broad purpose, Section 10(b)'s broad scope covers the "use" or "employ[ment]" by "any person," whether "directly or indirectly," of "any manipulative or deceptive device or contrivance." 15 U.S.C. §78j(b). The Court repeatedly has recognized the broad antifraud purposes of federal securities law. *SEC v. Zandford*, 535 U.S. 813, 821 (2002); *United States v. O'Hagan*, 521 U.S. 642, 658 (1997); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977). Nothing in the statute explicitly requires fraudulent statements or omissions and the Court has twice found Congress did not adopt limited meanings of the words "device" and "contrivance." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 & n.20 (1976); *Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980). Moreover, the various statutory provisions show that Congress knew how to limit the reach of securities law to specific statements but deliberately declined to do so in Section 10(b).

II. The "*Speak No Evil*" rule conflicts with the common law underlying Section 10(b). Section 10(b) was derived from the common law and this Court repeatedly has relied upon the common law in interpreting its provisions. *E.g.*, *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744 (1975). In the absence of any contrary direction by Congress, Section 10(b) should at least be construed consistent with the common law's understanding of fraud. *Safeco Ins. Co. of America v. Burr*, 2007 U.S. LEXIS 6963, **20-21 (June 4, 2007). Indeed, in enacting Section 10(b), Congress meant to enact a level of investor protection and

ethical standards that go beyond the common law. *See Basic Inc. v. Levinson*, 485 U.S. 224, 244 n.22 (1988); *Herman & Maclean v. Huddleston*, 459 U.S. 375, 388 (1983). Under common law, conduct can be just as fraudulent as statements. The conduct at issue here was intended and designed to deceive and therefore clearly falls within the range of actions proscribed by the common law of fraud. Restatement of Torts, Second, §§525, 550; *accord* W. Page Keeton et al., PROSSER AND KEETON ON TORTS §106 (5th ed. 1984); *United States v. Colton*, 231 F.3d 890, 898-903 (4th Cir. 2000).

III. Although pure "silence" is not actionable as fraud under the common law or Section 10(b) absent a duty to disclose, the conduct at issue here cannot legitimately be characterized or analyzed as pure "silence." The complaint alleges the vendor-Defendants engaged in deceptive transactions designed and intended to inflate Charter's financial performance and dupe the public and investors. These were not arms' length, legitimate transactions that merely aided and abetted Charter's fraud. They had no legitimate business purpose but were fabricated for one purpose and one purpose only—to communicate a lie to investors purchasing the company's securities. These were acts of deceit as effective in achieving their deceptive purpose as any false statements could have been. Indeed, their effectiveness may only have been exceeded by their cunning and audacity. What is at issue here is not "silence" but deceptive conduct prohibited by Section 10(b) and Rule 10b-5, as it would be under common law.

IV. This Court did not in *Central Bank*, or in any other case, confine fraudulent conduct under Section 10(b) and Rule 10b-5 to misstatements or omissions. In *Central Bank*, this Court declared that merely lending aid or assistance to others who commit fraud, without engaging in any deceptive acts of one's own, does not violate the statute or rule. The Court did not hold an act cannot be a prohibited deceptive

device or contrivance unless one publicly lies about it. To the contrary, this Court consistently has upheld liability under Section 10(b) and subsections (a) and (c) of Rule 10b-5 for fraudulent conduct not involving a misstatement or omission.

ARGUMENT

I. THE "SPEAK NO EVIL" RULE CONFLICTS WITH THE WORDING, PURPOSE, AND STRUCTURE OF THE FEDERAL SECURITIES LAWS

The court of appeals concluded that "[a] device or contrivance is not 'deceptive' within the meaning of §10(b), absent some misstatement or a failure to disclose by one who has a duty to disclose." *In re Charter Comms., Inc.*, 443 F.3d at 992.[2] Although the court did not explicitly invalidate subsections (a) and (c) of Rule 10b-5, its holding necessarily renders those subsections redundant and undermines every judgment and claim based upon them.[3] The court of appeals' ruling was not based on the wording or legislative history of Section 10(b), the structure or other provisions of the federal securities laws, the wording of Rule 10b-5, the common law of fraud or deceit, or the plain meaning of the word "deceptive." It was based *solely* on its view that this Court

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[2] As this Court stated with respect to another attempt to add an element to a securities antifraud provision, "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979) (construing §17(a) of the Securities Act of 1933).

[3] Subsection (b) of Rule 10b-5 prohibits "any untrue statement of a material fact" or any "omi[ssion] to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. §240.10b-5(b). The court of appeals' ruling would require such an untrue statement or omission in all Rule 10b-5 cases. Thus, the ruling amounts to a determination that liability cannot be predicated on subsections (a) or (c) independently of subsection (b).

has adopted a specific, term-of-art definition of "deceptive" for purposes of Section 10(b). It has not. Nor should it.

The Securities Exchange Act of 1934 was enacted "to insure the maintenance of fair and honest markets" in securities. 15 U.S.C. §78b.[4] Consistent with that broad purpose, Section 10(b)'s broad scope covers the "use" or "employ[ment]" by "any person," whether "directly or indirectly," of "any manipulative or deceptive device or contrivance." 15 U.S.C. §78j(b). The broad purpose of the statute is plain from its broad delegation of authority to the Securities and Exchange Commission to promulgate whatever rules regarding such conduct it may find "necessary or appropriate" for the "protection of investors" or even the "public interest" at large.

This Court consistently has recognized the broad antifraud purposes of the federal securities laws. *E.g., Zandford*, 535 U.S. at 821 (emphasizing broad language and interpretation of antifraud provisions); *O'Hagan*, 521 U.S. at 658 (Congress intended "to insure honest securities markets and thereby promote investor confidence"); *Santa Fe*, 430 U.S. at 477 ("No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices"); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53 (1972) (antifraud provisions "are broad and, by

[4] Many of the abuses of the 1920's, which Congress sought to eliminate by enacting the securities laws, involved manipulative or deceptive conduct designed to separate a stock's price from its true value. *See* 15 U.S.C. §78b(3) ("Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control," which undermines credit, tax, and banking systems). The Court noted in *Santa Fe* that Section 10(b) was "aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function." 430 U.S. at 473 n.13 (quoting S. Rep. No. 792, 73d Cong., 2d Sess., 6 (1934)). The sham transactions here were designed to preclude Charter's stock price from reflecting its true value and served no other useful function.

repeated use of the word 'any,' are obviously meant to be inclusive. The . . . 1934 Act . . . embrace[s] a 'fundamental purpose . . . to achieve a high standard of business ethics in the securities industry'") (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 11 n.7 (1971) ("'We believe that §10 (b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws'") (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967) (emphasis in original)); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1963) ("It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail . . . .").

Nothing in the wording of Section 10(b) limits it to fraudulent statements or omissions. This Court twice has found Congress did not adopt limited meanings of the words "device" and "contrivance" and such terms should be accorded their ordinary dictionary meanings. *Hochfelder*, 425 U.S. at 199 & n.20; *Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980).[5] The ordinary meaning of "device" or "contrivance" is not limited to a statement or omission. Nor is there

[5] As the Court found, the 1934 dictionary definition of "device" was "[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice," and the definition of "contrivance" was "[a] thing contrived or used in contriving; a scheme, plan, or artifice." *Hochfelder*, 425 U.S. at 199 n.20. The Court also found the 1934 dictionary definition of "scheme" was "[a] plan or program of something to be done; an enterprise; a project; as, a business *scheme* [, or a] crafty, unethical project," and the definition of "artifice" was a "[crafty] device; trickery; also, an artful stratagem or trick; artfulness; ingeniousness." *Aaron*, 446 U.S. at 696 n.13 (emphasis in original).

anything in the ordinary meaning of the word "deceptive" that even vaguely implies it must involve a public statement or omission.

To the contrary, the statutory words broadly connote conduct involving a plan or scheme. Although the words "device" and "contrivance" themselves may include an element of deception or trickery in common usage, the addition of the modifying adjective "deceptive" requires that they must. The adjective "deceptive" indicates the "devices" or "contrivances" *must be misleading*, not that they *must consist of public statements or omissions*, as the court of appeals concluded. *Santa Fe*, 430 U.S. at 472-74 ("The language of §10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception"). In *Hochfelder*, this Court cautioned against the very thing the court of appeals did here—"add a gloss to the operative language of the statute quite different from its commonly accepted meaning." 425 U.S. at 199.[6]

Although this Court has found that "manipulative" is a term of art with a specific meaning under Section 10(b), it has not found that "deceptive" is a term of art and has never accorded it anything other than its commonly accepted meaning. *E.g.*, *O'Hagan*, 521 U.S. at 653 (misappropriators "deal in deception" because they "'dupe[]' or defraud[] the principal"); *Santa Fe*, 430 U.S. at 472 (equating "commonly accepted meaning" of "fraud" with statutory term "deceptive").[7] Therefore, the "Speak No Evil" rule is inconsistent

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[6] "To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another . . . . After all, legislation when not expressed in technical terms is addressed to the common run of men . . . ." *Addison v. Holly Hill Fruit Prods, Inc.*, 322 U.S. 607, 617-18 (1944).

[7] That Congress intended the antifraud provisions to be read according to their ordinary or common law meanings also is evident from the

with the wording and purposes of the antifraud laws and this Court's admonition to read those laws flexibly in accordance with Congress' broad remedial purposes.

In enacting the federal securities laws, Congress knew well how to proscribe misstatements or omissions when that was its objective. The securities laws as originally enacted are replete with prohibitions directed against misstatements or omissions. *See* Securities Act of 1933, §§8(d), 11(a), 12(a), 24, 15 U.S.C. §§77h(d), 77k(a), 77l(a), 77x; Securities Exchange Act of 1934, §§9(a)(4), 18, 32(a), 15 U.S.C. §§78i(a)(4), 78r, 78ff(a).

Congress in 1933 and 1934, however, also knew well how to more broadly proscribe deceptive conduct when that was its objective. *See* Securities Act of 1933, §17(a), 15 U.S.C. §77q(a) (prohibiting "any device, scheme, or artifice to defraud" and "any transaction, practice, or course of business which operates or would operate as a fraud or deceit"); Securities Exchange Act of 1934, §§10(b), 15 U.S.C. §78j(b) (prohibiting "any manipulative or deceptive device or contrivance"), 9(a)(1), 15 U.S.C. §78i(a)(1) (prohibiting conduct "for the purpose of creating a false or misleading appearance").[8]

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statutes themselves. The title of Section 17 of the Securities Act of 1933, 15 U.S.C. §77q, the section upon which Rule 10b-5 was based, is "Fraudulent Interstate Transactions" and the original heading of subsection 17(a) was "Use of interstate commerce for purpose of fraud or deceit." Congress continues to have this understanding. In 2000, Congress amended the heading of subsection 17(a) to read "Anti-fraud and anti-manipulation enforcement authority." In 2000, Congress also added language to Section 10 of the 1934 Act, 15 U.S.C. §78j, recognizing it gives the SEC authority to promulgate rules "that prohibit fraud, manipulation, or insider trading."

[8] Two years after enacting the 1934 Act, Congress amended the statute to add another broad prohibition against engaging in "any manipulative, deceptive, or other fraudulent device or contrivance." 15 U.S.C. §78o(c)(1).

Congress has continued to enact securities fraud provisions based on its understanding that conduct other than misstatements or omissions can be "deceptive." In 1938, it prohibited brokers and dealers from "engag[ing] in any fraudulent, deceptive, or manipulative act or practice, *or* mak[ing] any fictitious quotation." 15 U.S.C. §78o(c)(2) (emphasis added). In 1968, Congress made it "unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading *or* to engage in any fraudulent, deceptive, or manipulative acts or practices" in connection with tender offers. 15 U.S.C. §78n(e) (emphasis added). In 1993, Congress enacted a narrow prohibition against certain misstatements or omissions by government securities brokers and dealers in a statute that already broadly prohibited "manipulative, deceptive, or other fraudulent device[s] or contrivance[s]" by such persons. 15 U.S.C. §78o(c)(7). Again, in 1998, Congress preempted certain actions under state law that alleged *either* that the defendant made "an untrue statement or omission of a material fact" *or* that the defendant "used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. §§77p(b), 78bb(f)(1). Congress referred to such actions collectively as those that allege "misrepresentation, omission, *or* manipulative or deceptive conduct." *Id*. at §78bb(f)(5)(E) (emphasis added).

In enacting the Private Securities Litigation Reform Act of 1995, Congress adopted a proportionate liability scheme for private securities fraud actions under which "knowing" violators generally are jointly and severally liable while non-knowing violators are proportionately liable. *See* 15 U.S.C. §78u-4(f). Under that scheme, the definition of a "knowing" violation differs depending on whether the action is "based on an untrue statement of material fact or omission of a material fact necessary to make the statement not misleading" *or* is "based on *any [other] conduct*." *Id*. at §78u-4(f)(10)(A) (em-

phasis added). Thus, Congress continues to understand that conduct other than speech or omissions can be fraudulent and to enact legislation accordingly.[9]

II. THE "SPEAK NO EVIL" RULE CONFLICTS WITH THE COMMON LAW DERIVATION OF THE ANTIFRAUD STATUTE

In interpreting Section 10(b) and Rule 10b-5, this Court has referred for guidance to the common law, from which the antifraud provisions were derived. *E.g., Dura Pharmaceuticals*, 544 U.S. at 343-44; *Blue Chip Stamps*, 421 U.S. at 744. This is in accordance with the well-established rule of statutory construction that when Congress does not define words commonly understood at common law, courts must infer Congress intended to incorporate the common law meanings of the relevant terms. *Safeco*, 2007 U.S. LEXIS 6963, at **20-21 ("general rule [is] that a common law term in a statute comes with a common law meaning, absent anything pointing another way"); *id*. at **40-41 ("There being no indication that Congress had something different in mind, we have no reason to deviate from the common law understanding in applying the statute"); *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000); *Neder v. United States*, 527 U.S. 1, 20-23 (1999); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction

[9] In devising the PSLRA liability scheme for securities fraud committed by multiple actors, Congress enacted safeguards to protect investment banks, brokers, accountants, lawyers and others who engage in securities fraud violations through conduct rather than public statements, from exposure to unlimited liability. To be held jointly and severally liable, they must engage in the fraudulent conduct "with actual knowledge of the facts and circumstances that make the conduct . . . a violation of the securities laws." 15 U.S.C. §78u-4(f)(10)(A)(ii). Moreover, recklessness is not sufficient to constitute such knowing conduct. *Id*. at §78u-4(f)(10)(B). Further, they are accorded contribution rights to proceed against others liable for the same damages. *Id*. at §78u-4(f)(8).

with widely held definitions, not as a departure from them"). In *Neder*, this Court found the words "any scheme or artifice to defraud" in the federal mail fraud, wire fraud, and bank fraud statutes were left undefined and, therefore, Congress implicitly incorporated their common law meanings with respect to an action for fraud. 527 U.S. at 20-23.[10] Just as the Court looks to the common law of fraud for purposes of interpreting the wording of those statutes, it looks to the common law of fraud for purposes of interpreting similar wording in the securities laws.

Further, the Court has recognized that the statute's derivation from common law accounts for its elements. Because Section 10(b) requires deceit or fraud, the elements of common law fraud—scienter, materiality, reliance, causation, and damages—must be part of any Rule 10b-5 claim. For example, in *Hochfelder*, this Court found that the statutory deception requirement mandates a showing of scienter in order to state a Rule 10b-5 claim precisely because deception connotes common law fraud and common law fraud requires scienter. *See* 425 U.S. at 197; *see also Aaron*, 446 U.S. at 695.

Although the statutory deception requirement generally has been equated with common law fraud, this Court has acknowledged that Congress intended to enact a broad remedial provision that would go *beyond* the limitations of the common law protection. *See Basic*, 485 U.S. at 244 n.22 ("Actions under Rule 10b-5 are distinct from common-law deceit and misrepresentation claims, and are in part designed to *add to* the protections provided investors by the common law")

[10] On the basis of this rule of construction and the application of common law fraud to the federal bank fraud statute, the Second Circuit found an affirmative statement is not required for liability under that statute and defendants' scheme to defraud, executed through affirmative deceptive acts, violated the statute even in the absence of a preexisting legal duty to disclose. *See Colton*, 231 F.3d 890.

(citations omitted) (emphasis added); *Huddleston*, 459 U.S. at 388 ("the antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was to *rectify perceived deficiencies* in the available common-law protections by establishing *higher standards of conduct* in the securities industry") (emphasis added).[11] It is for this reason the Court consistently has emphasized that Congress intended the antifraud provision to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Capital Gains Research Bureau*, 375 U.S. at 195 (quoted in *Superintendent of Ins.*, 404 U.S. at 12 and *Affiliated Ute*, 430 U.S. at 151).

The common law did not limit fraud to actual speech but recognized that acts can be as deceptive as words and misrepresentations can be made through either. *Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888) ("The gist of the action [of common law deceit] is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendants, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff"). Under the common law of misrepresentation or deceit, the definition of "misrepresentation" included "not only words spoken or written but also *any other conduct that amounts to*

[11] *See also Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975) ("although derived from it, the 10b-5 action is not coterminous with a common law fraud action"); *Green v. Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968) (federal courts "have gone far beyond the limits of the common law in imposing liability under [Rule] 10b-5"). The SEC agrees. *See In re Cady, Roberts & Co.*, 40 S.E.C. 907, 910 (1961) ("Section 10(b) of the Exchange Act and Rule 10b-5, issued under that section, are broad remedial provisions aimed at reaching misleading or deceptive activities, whether or not they are precisely and technically sufficient to sustain a common law action for fraud and deceit").

an assertion not in accordance with the truth." Restatement of Torts, Second, §525, comment b (emphasis added).[12] Thus, words and acts were on an equal footing in terms of common law fraud: "words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist." *Id*.

For example, if an automobile dealer turns the odometer back from 60,000 miles to 18,000 miles on a car offered for sale, his *conduct* constitutes a misrepresentation. *Id*., illustration 1; *District Motor Co. v. Rodill*, 88 A.2d 489, 494 (D.C. Ct. App. 1952) (turning back odometer "was an act of deceit, calculated to destroy or conceal evidence highly significant" to plaintiff's purchase); *accord Leonard v. Springer*, 197 Ill. 532, 64 N.E. 299 (Ill. 1902) (representation "proceed[s] from the action or conduct of the party charged, which is sufficient to create upon the mind a distinct impression of fact, conducive of action. The most usual and obvious example is an oral, written or printed statement. *But a statement is by no means necessary. Any conduct capable of being turned into a statement of fact is a representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts*") (quoting BIGELOW ON FRAUD, at p. 467) (emphasis added); *Salzman v. Maldaver*,

[12] *See generally Reichert Estate*, 356 Pa. 269, 274, 51 A.2d 615, 617 (Pa. 1947) (under common law fraud, "[a]s a general rule, fraud consists in anything calculated to deceive, whether by single act or combination, or by suppression of truth, or a suggestion of what is false, whether it be by direct falsehood, or by innuendo, by speech or silence, word of mouth, or look or gesture. It is any artifice by which a person is deceived to his disadvantage"); *People ex rel. Chicago Bar Assn. v. Gilmore*, 345 Ill. 28, 46, 177 N.E. 710, 717 (Ill. 1931) (same); *Philadelphia Workingmen's Sav. Loan & Bldg. Assn. v. Wurzel*, 355 Pa. 86, 94, 49 A.2d 55, 59 (Pa. 1946) (under common law, fraud consisted of "misrepresentation by word or deed"); *Sachs v. Blewett*, 206 Ind. 151, 156, 185 N.E. 856 (Ind. 1933) (under common law fraud, "[t]here must be some fraudulent, overt act, *or* failure to act when duty requires it, *or* a breach of trust or confidence") (emphasis added).

315 Mich. 403, 24 N.W. 2d 161 (1946) (stacking aluminum sheets to conceal those corroded in the middle); *Lindberg Cadillac Co. v. Aron*, 371 S.W. 2d 651 (Mo. Ct. App. 1963) (painting over cracked engine block on car). "There being no indication that Congress had something different in mind, [there is] no reason to deviate from the common law understanding" that fraud can be committed through conduct as well as statements. *Safeco*, 2007 U.S. LEXIS 6963, at **40-41.

Common law fraud also includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to "prevent[] the other [party] from acquiring material information," even in the absence of a fiduciary, statutory, or other independent duty to disclose material information. Restatement of Torts, Second, §550; *accord* W. Page Keeton et al., PROSSER AND KEETON ON TORTS §106 (5th ed. 1984) ("Any words or acts which create a false impression covering up the truth, or which remove an opportunity that might otherwise have led to the discovery of a material fact . . . are classed as misrepresentation, no less than a verbal assurance that the fact is not true"); *Colton*, 231 F.3d at 898-903 (rejecting claim defendants could not be liable for "scheme or artifice to defraud" under federal bank statute because they made no affirmative misrepresentations and owed no duty to disclose). The Defendants here are alleged to have engaged in conduct that would have constituted such fraudulent concealment at common law.

By engaging in the sham transactions at issue in this case with the knowledge and intention that investors would rely on the financial statements that reflected those transactions as genuine, Defendants' conduct amounted to an assertion regarding the financial condition of Charter that was not in accordance with the truth. Indeed, it was alleged to communicate a deliberate lie. Just as the act of rolling back an odometer is a deceptive act taken for the purpose of misrep-

resenting the car's condition as better than it actually is, the phony transactions here were deceptive acts taken for the purpose of misrepresenting Charter's condition as better than it actually was.

The court of appeals, in stating that it could find no case imposing Section 10(b) liability on a business "that entered into an arms' length non-securities transaction," missed the point. These were not "*arms' length*," *legitimate transactions*. These were *acts of deceit*, sham transactions calculated to create upon the minds of investors the distinct impression that Charter's financial condition met analysts' estimates and to conceal contrary evidence highly significant to investors' purchasing decisions. Defendants' conduct, both in its crafty design and its execution, constituted purposeful deception. It represented a falsehood just as effectively as any words could have communicated.[13] It therefore should be prohibited by Section 10(b) and Rule 10b-5.

III. THE "SPEAK NO EVIL" RULE FAILS TO RECOGNIZE THAT DECEPTIVE CONDUCT IS NOT MERE SILENCE

The "Speak No Evil" test ignores the fact that affirmative fraudulent conduct is not mere "silence" and, because it cannot be characterized legitimately as "silence," it does not require an underlying duty to be actionable under Section 10(b). The idea that our securities markets could be subjected to fraudulent devices, schemes, artifices, acts, practices, and courses of conduct of this kind is completely inconsistent with the antifraud, market integrity, and ethics-promoting purposes of the federal securities laws.

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[13] *See Speed v. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951) ("Defendant's contention that only express misrepresentations or half-truths are unlawful fails to look at the fact that an implied misrepresentation is just as fraudulent as an express one").

The common law of deceit recognized several different kinds of fraudulent misrepresentations. One of these has just been discussed above—misrepresentation by words or conduct, or what may be called "conduct fraud." Restatement of Torts, Second, §525. Two other types involve a failure to disclose: misrepresentation by means of partial statements, or what may be termed "omission fraud," *id*. at §529;[14] and simple nondisclosure, or what may be termed "pure silence fraud," *id*. at §551.[15]

Each of these types of fraud has a corresponding underlying duty. "Conduct fraud" is premised on the general tort duty not to commit affirmative fraudulent acts. "Omission fraud" is premised on one's "duty to exercise reasonable care to disclose . . . matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading." *Id*. at §551(2)(b). "Pure silence fraud" is premised on one's "duty to exercise reasonable care to disclose matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Id*. at §551(2)(a).

In enacting Section 10(b) in the wake of the stock market crash of 1929, Congress intended to expand upon the common law and enact stronger protections and higher ethical

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[14] The Restatement of Torts defines such a misrepresentation as "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." Restatement of Torts, Second, §529.

[15] "One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question." Restatement of Torts, Second, §551(1).

standards than existed previously. Accordingly, the statutory term "deceptive devices or contrivances" must at least encompass all the various types of fraud recognized under common law and cannot impose duties higher than those imposed by common law for each particular type of fraud. Properly interpreted, Rule 10b-5 aptly embraces all forms of misrepresentation and their attendant underlying duties. Subsection (b)'s proscriptions against making an "untrue statement of a material fact" and "omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" reflect "conduct fraud" and "omission fraud," respectively.[16] The prohibitions against "employ[ing] any device, scheme, or artifice to defraud" and "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit" in subsections (a) and (c) reflect both "conduct fraud" and "pure silence fraud."

Each type of fraud encompassed by Rule 10b-5 is premised on the same duty as its common law corollary. The principle announced by this Court that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak" (*Chiarella v. United States*, 445 U.S. 222, 234-35 (1980)) and "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5" (*Basic*, 485 U.S. at 244 n.22), is based on the same principle as existed under common law. *See* Restatement of Torts, Second, §551.[17] But just as the

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[16] In light of the wording of subsection (b) ("the statements made") and the wording of the common law on which it is based ("partial or ambiguous statement"), "omissions" under Rule 10b-5(b) actually require predicate statements. Therefore, the common reference to "misstatement or omission" with respect to Rule 10b-5 connotes a situation in which some affirmative statement is made. Thus, "omissions" are different from "pure silence fraud" or "conduct fraud" under subsections (a) and (c) of Rule 10b-5.

[17] In the context of pure silence, the Court in *Chiarella* unexceptionally noted that "at common law, . . . one who fails to disclose material infor-

common law principle was based on several different types of underlying duties, so is the principle under Section 10(b) and Rule 10b-5. Although courts often fail to make the proper distinctions, *not all silences are the same*. *Stewart*, 128 U.S. at 388 ("mere silence is quite different from concealment").[18] The underlying duties are also not all the same. Pure silence is different from omission silence, and both are different from silence accompanied by fraudulent conduct.

For example, insider trading cases under Section 10(b) are based on common law "pure silence fraud," which in turn is premised on the underlying duty of a fiduciary to affirmatively disclose material information prior to a transaction with a beneficiary. *See, e.g., Chiarella*, 445 U.S. at 227-28.[19] Such cases, therefore, fall under subsections (a) and (c) of Rule 10b-5 as fraudulent conduct not involving a misstatement or omission but involving a particular duty—in this instance, an insider fiduciary duty—recognized at common

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mation prior to the consummation of a transaction commits fraud only when he is under a duty to do so." 445 U.S. at 227-28.

[18] *Accord Colton*, 231 F.3d at 899 ("[T]he common law clearly distinguishes between concealment and nondisclosure. The former is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. The latter is characterized by mere silence"); *id*. at 899 n.2 (noting courts often fail to distinguish between passive nondisclosure and active concealment, leading to incorrect statements that latter requires duty to disclose); *O'Conner v. R.F. Lafferty & Co.*, 965 F.2d 893, 898 n.6 (10th Cir. 1992) (noting cases "do not always distinguish between fraud by conduct and fraud by misrepresentation or omission").

[19] As transplanted into the context of the federal securities laws, the "deception" arising from the pure silence of an insider using material, non-public information derives from the "inherent unfairness involved where one takes advantage" of "information intended to be available only for a corporate purpose and not for the personal benefit of anyone." *Dirks v. SEC*, 463 U.S. 646, 654 (1983) (quoting *In re Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 43 S.E.C. 933, 936 (1968)).

law. *See id*. at 228 (quoting Restatement of Torts, Second, §551(2)(a)). Churning, unsuitability, and unauthorized or excessive trading cases against brokers are additional examples of Section 10(b) cases falling within subsections (a) and (c) of Rule 10b-5 that are based on common law "pure silence fraud" (if no statements are made) and its corresponding fiduciary duty to disclose. *See, e.g., O'Conner*, 965 F.2d at 897-98; *Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 599-600 (2d Cir. 1978). As the SEC has found, "churning is in itself a scheme or artifice to defraud and a fraudulent and deceptive device within the meaning of Rule 10b-5." *In re Trujillo*, 1987 SEC LEXIS 1978, **60-61 (April 23, 1987); *id*. at *61 (same for unsuitable trading).

On the other hand, scheme, practice, or course of conduct cases under Section 10(b) are based on common law "conduct fraud," which is not based on a fiduciary duty but rather the independent, general duty not to commit deceit upon others. *See United States v. Hunt*, 2006 U.S. Dist. LEXIS 64887, **9-19 (S.D.N.Y. Sept. 6, 2006) (liability under subsections (a) and (c) of Rule 10b-5 does not depend on fiduciary duty); *SEC v. Santos*, 355 F. Supp. 2d 917, 919-20 (N.D. Ill. 2003) (same).

There has never been any indication by this Court that "conduct fraud" has no place under Section 10(b) and that, in moving from common law to the federal securities laws, an entire category of fraud did not make the trip. The court of appeals' fundamental error is that it failed to apprehend that conduct beyond statements or omissions can be "deceptive," and that *this is not a "pure silence fraud" case but rather a "conduct fraud" case.* This led it to apply the *wrong duty to the wrong type of fraud.* The court of appeals found devices or contrivances could not be "deceptive" absent "some misstatement or a failure to disclose by one who has a duty to disclose," 443 F.3d at 992, yet it failed to ascertain whether a duty arose from Defendants' affirmative conduct. The court

apparently assumed this was a "pure silence fraud" case and that the only duty it had to look for was the type of duty applicable to such cases—a fiduciary duty or similar duty of trust and confidence. *But the Chiarella-type duty applicable to pure silence cases is not applicable here*. *See Colton*, 231 F.3d at 899 ("common-law principle that, in the absence of an independent disclosure duty, 'nondisclosure is not fraudulent, presupposes mere silence, and is not applicable where, by words or conduct, a false representation is intimated or any deceit practiced'") (quoting 37 Am. Jur. 2d FRAUD AND DECEIT §174 (1968)).

The court of appeals, therefore, mistakenly applied a "pure silence fraud" duty to a "conduct fraud" claim. Defendants' fraudulent conduct amounted to a misrepresentation and concealment under well-established common law principles. Defendants had as much a duty to refrain from fraudulent conduct as they did to refrain from fraudulent statements. Under the circumstances alleged here, their actions conveyed a lie as effectively as any words could have.[20]

Just as one who becomes an insider inherits a duty to disclose or abstain from trading and one who speaks inherits a duty to speak truthfully, one who acts inherits a duty to act nondeceptively. Requiring the more stringent fiduciary-type duty applicable to "pure silence fraud" cases for the fraudulent conduct at issue here would be to impose upon plaintiffs a higher burden than would be imposed upon them at common law. It also would limit liability to a greater extent than

[20] This case is distinguishable from an insider trading case, which is appropriately analyzed as a "pure silence fraud" case because mere trading while in the possession of material, non-public information is not itself deceptive in nature. No false assertion is conveyed. On the contrary, acts that are themselves deceptive because they convey "an assertion not in accordance with the truth," Restatement of Torts, Second, §525, comment b, such as Defendants' acts here, do not constitute mere silence but rather affirmative misrepresentation.

at common law. "There being no indication that Congress had something different in mind," there is "no reason to deviate from the common law understanding" that liability for fraudulent conduct does not depend on a pre-existing fiduciary duty. *Safeco*, 2007 U.S. LEXIS 6963, at **40-41.

IV. THIS COURT HAS REJECTED THE "SPEAK NO EVIL" RULE

The court of appeals relied on two of this Court's decisions for its view that the Court has limited the term "deceptive" to misstatements or omissions. One of these cases, *Santa Fe*, 430 U.S. 462, did not say or address anything of the kind. The other case, *Affiliated Ute*, 406 U.S. 128, actually held precisely the opposite.[21]

In *Santa Fe*, this Court addressed the issue whether a short-form merger transaction that allegedly lacked a legitimate business purpose and was unfair to minority shareholders could be actionable as a "device, scheme, or artifice to defraud" and an "act, practice or course of business which operates or would operate as a fraud or deceit" under subsections (a) and (c) of Rule 10b-5. *See* 430 U.S. at 467-68. The Court ruled that the statutory words "manipulative or deceptive" used in conjunction with "device or contrivance" meant that the statute only reached conduct that included "some element of deception" (under its commonly accepted meaning) or "manipulation" (under its term of art meaning). *See id*. at 472-77. Significantly, the Court did not, as the court of

[21] The court of appeals also cited in accord *O'Hagan*, 521 U.S. 642. In *O'Hagan*, the Court held only that a fiduciary who pretends loyalty to a principal "while secretly converting the principal's information for personal gain," engages in fraud prohibited by Section 10(b) and Rule 10b-5. *See* 521 U.S. at 653-55. In addressing this particular circumstance, this Court did not, of course, rule that misappropriation by fiduciaries is the *only* way to violate the statute and rule. It therefore does not support the court of appeals' view that the Court has limited deceptive devices or contrivances to misstatements or omissions.

appeals believed, limit Section 10(b) to misstatements and omissions or invalidate fraudulent conduct liability under subsections (a) and (c) of Rule 10b-5. It merely held that conduct under subsections (a) and (c) had to be fraudulent in nature to be actionable. Clearly, if only subsection (b) of Rule 10b-5 were valid, there would have been no need for the Court to have taken up the question it addressed at all.[22]

In *Affiliated Ute*, this Court rejected the very proposition the court of appeals attributed to it. In that case, the Court found the lower court erroneously had "viewed too narrowly" the conduct of the defendants by restricting liability to their misstatements and omissions pursuant to subsection (b) of Rule 10b-5. *See* 406 U.S. at 151-53. The Court ruled "[i]n the light of the congressional philosophy and purpose," it would "not read Rule 10b-5 so restrictively." *Id*. at 151, 152. Because the defendants' *conduct* amounted to a course of business or scheme that operated as a fraud, they could be held additionally liable under subsections (a) and (c) of Rule 10b-5, even without misrepresentations or omissions. *Id*. at 151-53.

In concluding in *Affiliated Ute* that, although "the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact," "*[t]he first and third subparagraphs are not so restricted*," the Court upheld subsection (a) and (c) liability for fraudulent conduct not involving misstatements or omissions. *Id*. at 152-53 (emphasis added) ("It is no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation. . . ."); *accord Hochfelder*, 425 U.S. at 199 n.20 ("scheme to defraud" falls

[22] The Court acknowledged the case came to it "on the premise that the complaint failed to allege a material misrepresentation or material failure to disclose." *Santa Fe*, 430 U.S. at 474. The Court also acknowledged liability under the statute could be premised upon "deception, misrepresentation, *or* nondisclosure." *Id*. at 476 (emphasis added).

within meaning of "manipulative or deceptive device or contrivance" language of §10(b)).[23] In doing so, the Court's interpretation of liability under Section 10(b) and Rule 10b-5 accords with the common law principle that fraud requires either a representation or a failure to disclosure by one who is under a duty to disclose, but that a "representation" may be communicated either by words or conduct.[24]

The SEC also has consistently interpreted Section 10(b) as proscribing more than misstatements or omissions. In *In re Robert W. Armstrong, III*, the SEC stated:

> *Schemes used to artificially inflate the price of stocks by creating phantom revenue* fall squarely within both the language of section 10(b) and its broad purpose, to 'prevent *practices* that impair the function of stock markets in enabling people to buy and sell securities at prices that reflect undistorted (though not necessarily accurate) estimates of the underlying economic value of the securities traded,' and nothing in the language of section 10(b) or Rule 10b-5 or in the case law interpret-

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[23] The Court has recognized that the conduct proscribed under subsections (a) and (c) of Rule 10b-5 is within the scope of the statute's prohibition against "manipulative and deceptive devices and contrivances." *Zandford*, 535 U.S. at 816 n.1 ("The scope of Rule 10b-5 is coextensive with the coverage of §10(b)"); *Central Bank*, 511 U.S. at 172 (Rule 10b-5 "casts the proscription [of §10(b)] in similar terms").

[24] In finding that the term "manipulation" in Section 14(e) of the 1934 Act, 15 U.S.C. §78n(e), which prohibits "fraudulent, deceptive, or manipulative acts or practices" in connection with tender offers, requires some misrepresentation, the Court recognized that misrepresentation can occur by word or act. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 & n.4 (1985) ("manipulative" and "deceptive" have related meanings). The Court relied on the seminal English case of *Scott v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724, 730 (C.A.), which found deception could occur without the dissemination of false statements, quoting Lord Lopes: "I can see no substantial distinction between false rumours and false and fictitious acts." 472 U.S. at 7 n.4.

> ing them shields a defendant from liability for direct participation in such a scheme.

2005 SEC LEXIS 1497, *23 (June 24, 2005) (emphasis added) (quoting *In re Global Crossing Ltd. Secs. Litig.*, 322 F. Supp. 2d 319, 337 (S.D.N.Y. 2004)).[25] This is precisely the conduct alleged against the Defendants here—*direct participation in a scheme to artificially inflate the price of Charter's stock by creating phantom revenue.*[26]

The *Central Bank* decision did not signal any change in the Court's view of what constitutes a deceptive device or

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[25] *See also SEC v. Dibella*, 2005 U.S. Dist. LEXIS 31762, *11 (D. Conn. Nov. 29, 2005) (SEC arguing subsections (a) and (c) do not involve omissions of any kind, but rather prohibit schemes to defraud, and such fraudulent conduct alone constitutes primary violation regardless whether any material omissions were made); *Robert W. Armstrong*, 2005 SEC LEXIS 1497, at *23 ("A person's conduct as part of a scheme constitutes a primary violation when the person directly or indirectly engages in a manipulative or deceptive act as part of the scheme") (rejecting claim "deception" requires material misstatement or omission); *Cady, Roberts*, 40 S.E.C. at 911 ("These anti-fraud provisions [of Rule 10b-5] are not intended as a *specification of specific acts or practices* which constitute fraud, but rather are designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others") (emphasis added); *id*. at 911 n.12 ("It might be said of fraud that age cannot wither it, nor custom stale its infinite variety").

[26] The SEC has repeatedly used its antifraud rulemaking authority under Section 10(b) to prohibit more than misstatements or omissions. In addition to Rule 10b-5, Rule 10b-1, 17 C.F.R. §240.10b-1, prohibits certain "act[s] or omission[s]" with respect to exempted securities, Rule 10b-3,17 C.F.R. §240.10b-3, prohibits certain "act[s], practice[s], or course[s] of business" by brokers or dealers, Rules 10b-5-1, 17 C.F.R. §240.10b-5-1, and 10b-5-2, 17 C.F.R. §240.10b-5-2, prohibit insider trading and misappropriation, Rule 10b-10, 17 C.F.R. §240.10b-10, prohibits certain broker transactions without proper disclosures, Rule 10b-16, 17 C.F.R. §240.10b-16, prohibits brokers or dealers from extending credit to customers without certain disclosures, and Rule 10b-17, 17 C.F.R. §240.10b-17, prohibits issuers from taking certain actions without making certain disclosures.

contrivance. While *Central Bank* swept away decades of precedent upholding aiding and abetting liability, it did not sweep away the broad antifraud purposes of the federal securities laws or strike down any language in Section 10(b) or Rule 10b-5.

The court of appeals erroneously concluded that *Central Bank* altered the definition of "deceptive" conduct. It did not even address the definition. *Central Bank* stands merely for the proposition that, to be held liable, a defendant must commit a manipulative or deceptive device or contrivance *itself* rather than merely assist *another* to do so. But the decision *did not change the types of conduct that constitute manipulative or deceptive devices or contrivances*. In other words, *Central Bank* concerned the *relationship or connection* between the defendant and the deceptive conduct; it did not alter the *definition* of "deceptive" conduct. *See* 511 U.S. at 166 (question presented was "whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation"); *id*. at 184 ("Aiding and abetting is 'a method by which courts create secondary liability' in persons other than the violator of the statute").

This Court confirmed after *Central Bank* (and consistent with *Affiliated Ute* and *Hochfelder*) that liability may be premised on fraudulent acts, practices, schemes, and courses of business under subsections (a) or (c) of Rule 10b-5, without a public statement by the defendant. As the Court stated in *Zandford*, "neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act." 535 U.S. at 820 (holding a broker who did not make a misstatement liable under subsections (a) and (c)).[27] The Court has recog-

[27] Lower federal courts also have held that an affirmative public statement is not required for liability under Section 10(b) and subsections (a) and (c) of Rule 10b-5. *See Colton*, 231 F.3d 890; *SEC v. First Jersey*

nized that, although one cannot be held liable under Section 10(b) for engaging in nondeceptive acts that merely assist others to commit securities fraud, one can be held liable for one's own deceptive conduct in a scheme, practice, or course of conduct to defraud, regardless whether those acts perpetrate the misrepresentation through words or acts.

CONCLUSION

The decision of the court below should be reversed and the matter remanded to the district court for further proceedings.

Respectfully submitted,

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Sec., 101 F.3d 1450, 1471-72 (2d Cir. 1996); *SEC v. Seaboard*, 677 F.2d 1301, 1312 (9th Cir. 1982); *Shores v. Sklar*, 647 F.2d 462, 468 (5th Cir. 1981) (*en banc*); *Competitive Assocs., Inc. v. Laventhol, Krekstein, Horwath & Horwath*, 516 F.2d 811, 814-15 (2d Cir. 1975); *Blackie*, 524 F.2d at 903 n.19; *Richardson v. MacArthur*, 451 F.2d 35, 40 (10th Cir. 1971); *Hunt*, 2006 U.S. Dist. LEXIS 64887, at **9-19; *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 869 (S.D. Tex. 2001); *Wenneman v. Brown*, 49 F. Supp. 2d 1283 (D. Utah 1999); *Adam v. Silicon Valley Bancshares*, 884 F. Supp. 1398, 1400 (N.D. Cal. 1995); *In re ZZZZ Best Secs. Litig.*, 864 F. Supp. 960, 964-72 (C.D. Cal. 1994); *Hill v. Hanover Energy, Inc.*, 1991 U.S. Dist. LEXIS 18566 (D.D.C. Dec. 16, 1991); *Duckworth v. Duckworth*, 1991 U.S. Dist. LEXIS 16527, at *16-*18 (S.D. Ga. Oct. 17, 1991); *Cohen v. Prudential-Bache Sec., Inc.*, 713 F. Supp. 653, 661 (S.D.N.Y. 1989); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 676 F. Supp. 458, 467-70 (S.D.N.Y. 1987); *Clark v. Kidder, Peabody & Co., Inc.*, 636 F. Supp. 195, 198 (S.D.N.Y. 1986).