No. 06-1341

IN THE

Supreme Court of the United States

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

MERRILL LYNCH PIERCE FENNER & SMITH INC.; MERRILL LYNCH & CO., INC.; CREDIT SUISSE FIRST BOSTON (USA), INC.; CREDIT SUISSE FIRST BOSTON LLC; PERSHING LLC; BARCLAYS PLC; BARCLAYS BANK PLC; BARCLAYS CAPITAL INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

RICHARD W. CLARY
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel of Record for Respondents Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston LLC and Pershing LLC

STUART J. BASKIN
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Counsel of Record for Respondents Merrill Lynch Pierce Fenner & Smith Incorporated and Merrill Lynch & Co., Inc.

[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DAVID H. BRAFF
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel of Record for Respondents Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

No. 06-1341

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

MERRILL LYNCH PIERCE FENNER & SMITH INC.; MERRILL LYNCH & CO., INC.; CREDIT SUISSE FIRST BOSTON (USA), INC.; CREDIT SUISSE FIRST BOSTON LLC; PERSHING LLC; BARCLAYS PLC; BARCLAYS BANK PLC; BARCLAYS CAPITAL INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 15.8 of this Court, Respondents Merrill Lynch Pierce Fenner & Smith Incorporated; Merrill Lynch & Co., Inc.; Credit Suisse First Boston (USA), Inc.; Credit Suisse First Boston LLC; Pershing LLC; Barclays PLC; Barclays Bank PLC; Barclays Capital Inc. (collectively, "respondents") respectfully submit this Supplemental Brief in support of their Brief in Opposition to a writ of certiorari, filed June 1, 2007. In light of *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, No. 06-43

(Jan. 15, 2008) ("*Stoneridge*"), certiorari should be denied.

1. A remand would be inappropriate because *Stoneridge* did not remotely create "a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (citation omitted). In fact, *Stoneridge* adopted the legal premises on which the Fifth Circuit decision in this case relied, and rejected the theory of "scheme liability" that petitioner has advanced in this case because that theory fails to satisfy the element of reliance. *See Stoneridge*, slip op. at 8 (citing *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 439 F. Supp. 2d 692, 723 (S.D. Tex. 2006)). Like *Stoneridge*, the Fifth Circuit's decision to reverse class certification is based on an absence of reliance. Pet. App. 32a ("[O]ur analysis of reliance disposes of this appeal."). Indeed, the Fifth Circuit's decision in this case relied extensively on the Eighth Circuit decision now affirmed by *Stoneridge*. *See id.* at 21a-22a. Petitioner has never disputed, and cannot dispute, the Fifth Circuit's ruling that *Stoneridge* involved "facts extraordinarily similar to the facts that are present here." *Id.* at 22a. Rather, petitioner's lead counsel said to the Associated Press, after the *Stoneridge* argument, that "[i]f the court rules against [the Stoneridge] investors, 'it will mean the end of the case' for Enron shareholders and the banks that were primarily liable." Pete Yost, *Skeptical Court Considers Investors Case*, USA Today Oct. 10, 2007, www.usatoday.com/news/washington/2007-10-09-2706193307_x.htm. Similarly, petitioner's website states:

> The Supreme Court's decision in the Stoneridge case will determine if the investors defrauded in

> the Enron scandal can proceed with their claims and recover their losses from the banks . . . .

Facts About the Univ. of Cal., Background on the Enron and Stoneridge Cases (2007), http://www.universityofcalifornia.edu/news/enron/stoneridgefactsheet.pdf.

2. Both *Stoneridge* and the Fifth Circuit decision below concluded that neither of the two presumptions on which reliance may be based applied to the alleged "scheme liability." First, defendants in *Stoneridge* had no duty to disclose to Charter's shareholders. *Stoneridge*, slip op. at 8. So too here. The Fifth Circuit and the district court agreed that respondents owed no duty of disclosure to Enron shareholders given the absence of any fiduciary duty or special relationship between respondents and those investors. Pet. App. 15a, 125a. Petitioner did not argue otherwise in its petition for certiorari.

Second, the fraud-on-the-market presumption of reliance does not apply when the defendants' "deceptive acts were not communicated to the public." *Stoneridge*, slip op. at 8. The Fifth Circuit rejected the fraud-on-the-market presumption-of-reliance on the same ground. Pet. App. 17a (respondents did not make "public and material misrepresentations"); *id.* at 29a ("[T]he banks [respondents] did not act directly in the market for Enron securities."); *id.* at 32a ("[T]he facts alleged do not constitute misrepresentations on which an efficient market may be presumed to rely."). Petitioner's "scheme" theory is that respondents' transactions enabled Enron to report its own earnings in financial statements that omitted any reference to respondents. *See, e.g.*, Pet. 25 (asserting reliance because the market "was impacted by the company's falsified financial state-

ments"). That is exactly the theory of reliance rejected in *Stoneridge*. *See* slip op. at 9 ("Were this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule.").

3. Finally, like the "scheme" claim rejected in *Stoneridge*, *id.* at 9, 15-16, the "scheme" claim here was based on respondents' business transactions with Enron, *not* on any analyst statements or underwriting activities. *See* Pet. App. 2a-3a. Rather, petitioner's "scheme" theory attacked respondents for commercial activities in which many businesses could engage. *See id.*

Petitioner has raised a red herring by suggesting in this Court that certain of the respondents should be liable for statements made by their employees when commenting on Enron's stock in analyst reports. *See* Br. for the Regents of the Univ. of Cal. as Amicus Curiae Supporting Appellant, *Stoneridge*, No. 06-43, at 6, 25 nn.29, 30. Because petitioner never made that argument in the Fifth Circuit as a basis for class certification or reliance, it certainly provides no ground to remand for reconsideration in light of the reliance ruling in *Stoneridge*. In fact, the *district court*, which favored "scheme liability," *dismissed* the §10(b) claims that were premised on statements of research analysts on the entirely independent ground that petitioner had not alleged that the specific employees associated with the analyst reports had acted with scienter. *See* Pet. App. 230a-231a; *Southland Sec. Corp. v. INSpire Ins. Solutions*, *Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) ("For purposes of determining whether a statement made by the corporation was made by it with the requisite Rule

10(b) scienter we believe it appropriate to look to the state of mind of the individual corporate official or officials who make or issue the statement . . . rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment.") After that ruling, petitioner stopped pursuit of another §10(b) claim based on certain respondents' underwriting activities. Petitioner did not cross-appeal the district court's scienter ruling to the Fifth Circuit, or even mention the dismissal of their analyst claims in the court of appeals. And petitioner's question presented in this Court conceded that respondents "ma[de] no affirmative misrepresentations to the market." Pet. at i. Nothing in *Stoneridge* supports a remand for the petitioner to raise arguments that were rejected below for reasons unrelated to the reliance issue decided by *Stoneridge*, and that were not offered as a basis for class certification or reliance when this case was extensively briefed in the Fifth Circuit in 2006 and 2007. *See Stoneridge*, slip op. at 4-5 (describing Fifth Circuit as holding that there is no private claim against "a party that neither makes a public statement nor violates a duty to disclose").

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RICHARD W. CLARY
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Counsel of Record for Respondents Credit Suisse First Boston (USA), Inc., Credit Suisse First Boston LLC and Pershing LLC

DAVID H. BRAFF
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel of Record for Respondents Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.

STUART J. BASKIN
SHEARMAN & STERLING LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

Counsel of Record for Respondents Merrill Lynch Pierce Fenner & Smith Incorporated and Merrill Lynch & Co., Inc.

January 16, 2008