TAGLaw Spring Conference

Berlin, Germany
May 5-7, 2008

****

PARALLEL LEGAL SESSION

Investment Opportunities Amid Financial Turmoil

Carl F. Schwartz and Patrick D. Sweeney
Herrick, Feinstein LLP
New York

REFERENCE MATERIALS

A The Subprime Primer.

B *Stoneridge Investment Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. ___ (2008).

C *BT Triple Crown Merger Co., Inc. et al. v. Citigroup Global Markets Inc., et al.*, Verified Comp., March 26, 2008.

D Irwin A. Kishner and Brooke E. Crescenti, "US private equity firms forced to re-evaluate strategies", *Financier Worldwide,* Mar. 2008.

E Executive Summary, *The Department of Treasury Blueprint for a Modernized Financial Regulatory Structure,* Mar. 2008.

F Pooled Investment Vehicles Rule, 17 C.F.R . §275.206(4)-8 (2007).

G *LaRue v. DeWolff, Boberg & Associates, Inc., et al.,* 128 S. Ct. 1020 (2008).

EXHIBIT A

The Subprime[1] Primer[2]

---

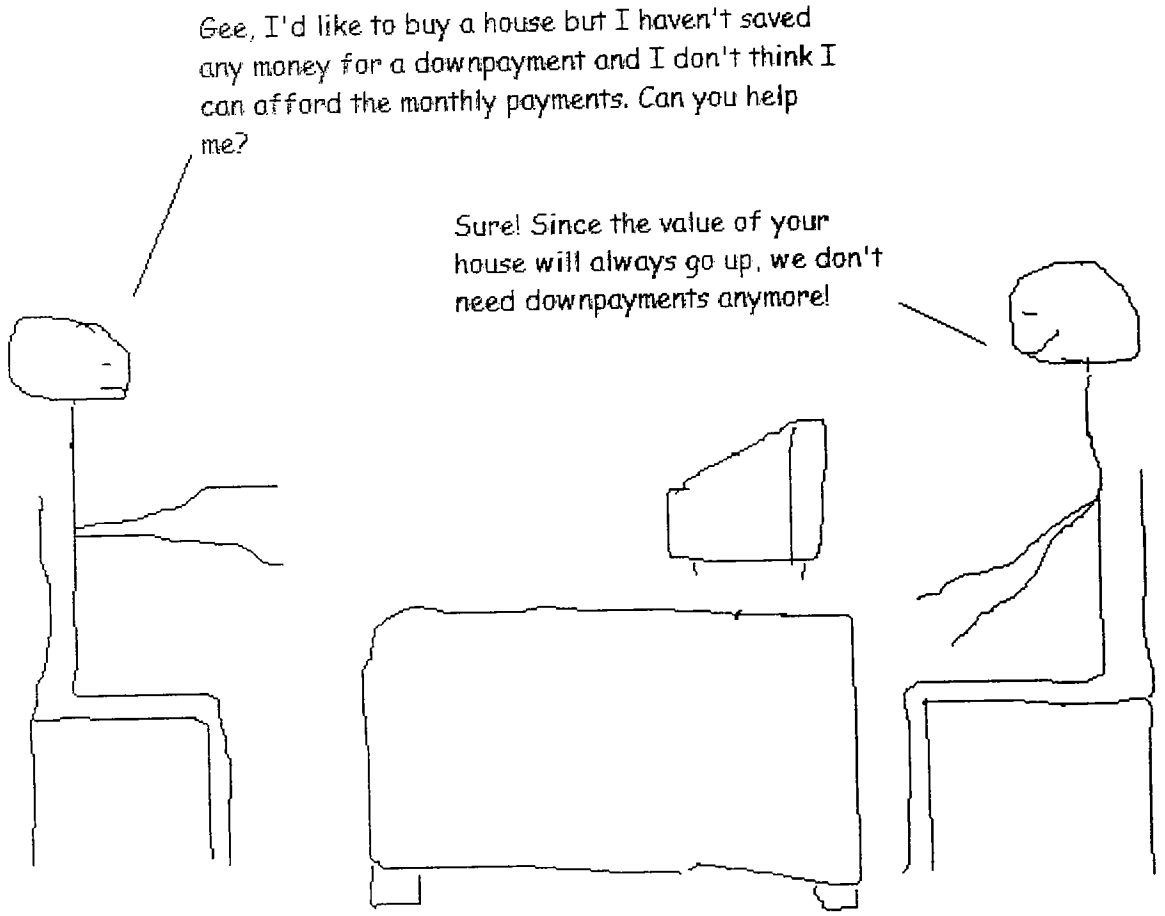
1 The original text has been edited to delete certain scatological language.

2 Herrick, Feinstein LLP assumes no responsibility for the content of this presentation, with the exception of the text editing described in note 1.

At the Mortgage Broker's .....

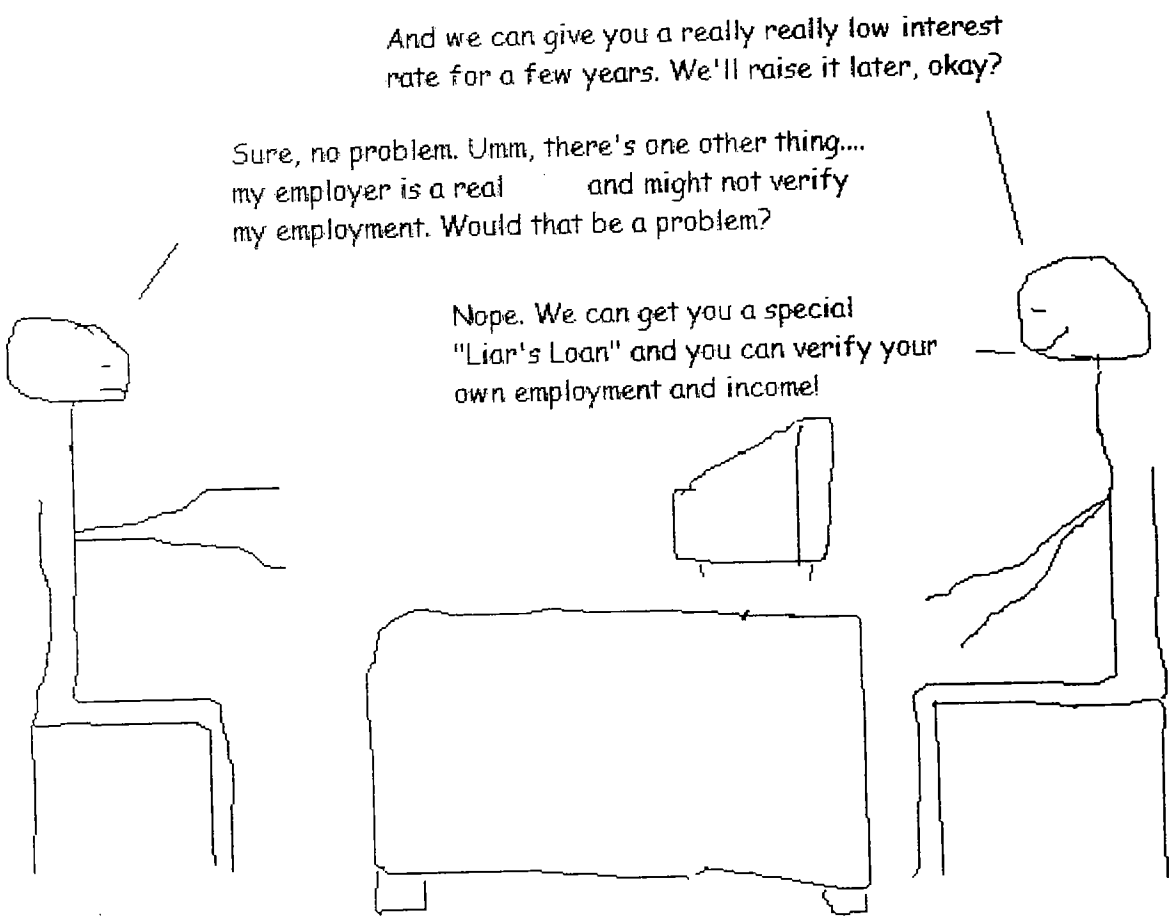
Ace Mortgage Brokers

"We Make Your Dreams Come True"



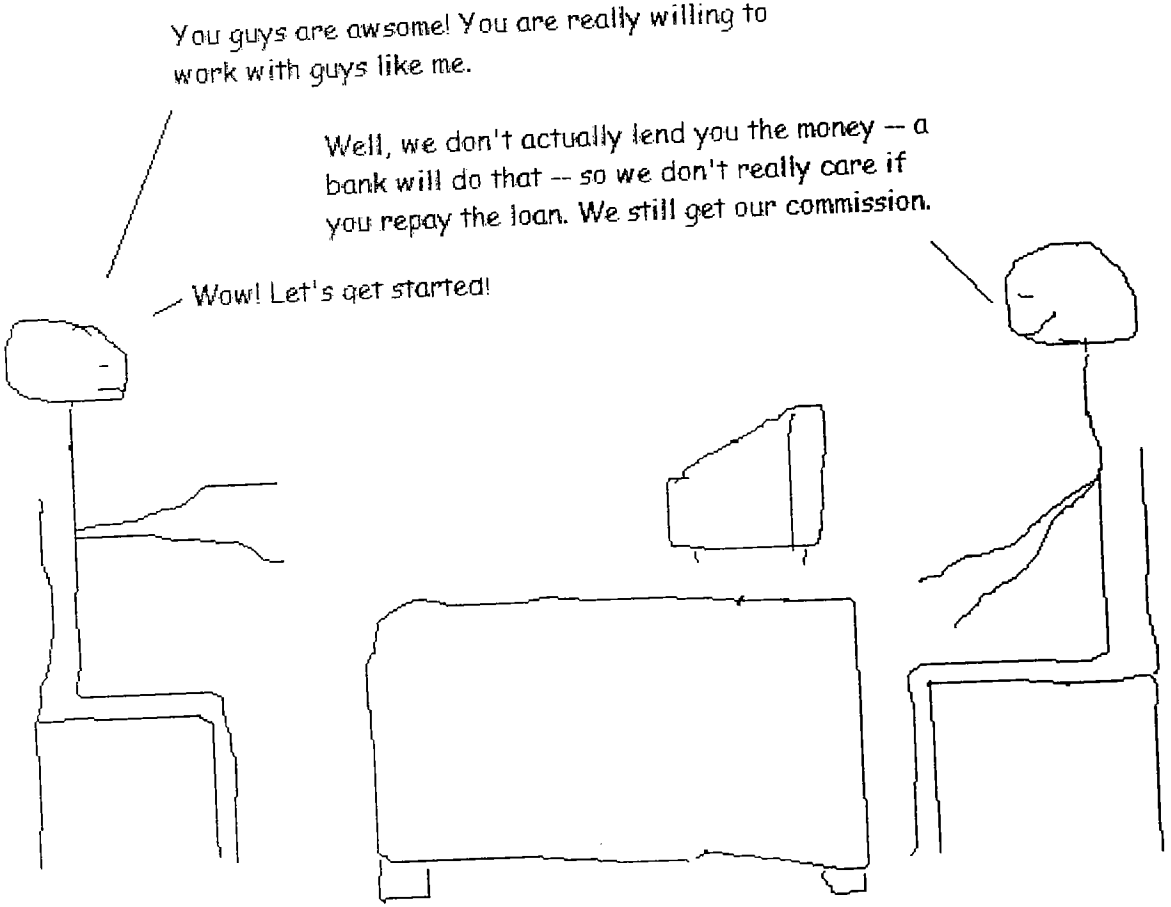
Ace Mortgage Brokers

"We Make Your Dreams Come True"



Ace Mortgage Brokers

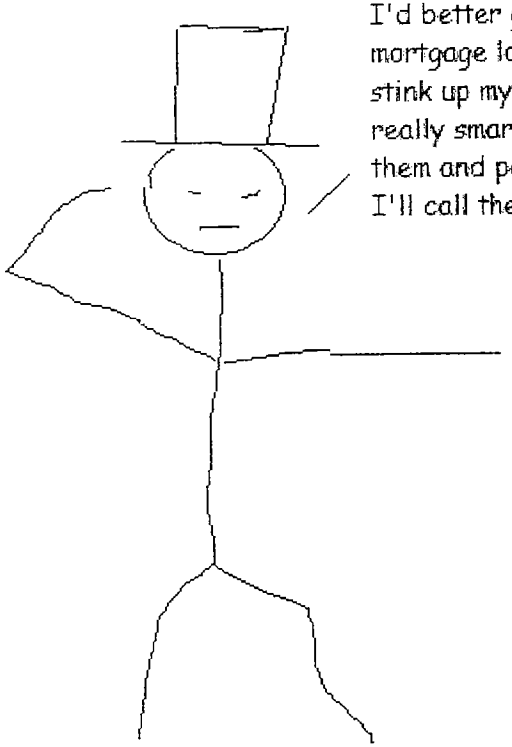
"We Make Your Dreams Come True"



A Few Weeks Later, at the Bank .....

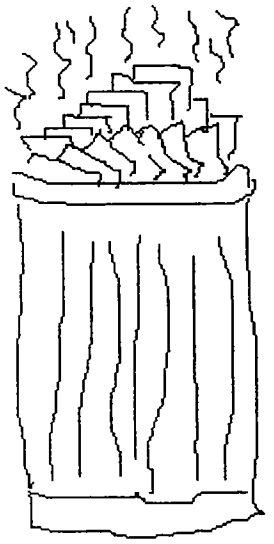
First Bank of Bankland, Inc

"Open Your Christmas Club Account Today"



I'd better get rid of these crappy mortgage loans. They are starting to stink up my office. Thankfully the really smart guys in New York will buy them and perform their financial magic! I'll call them right away!

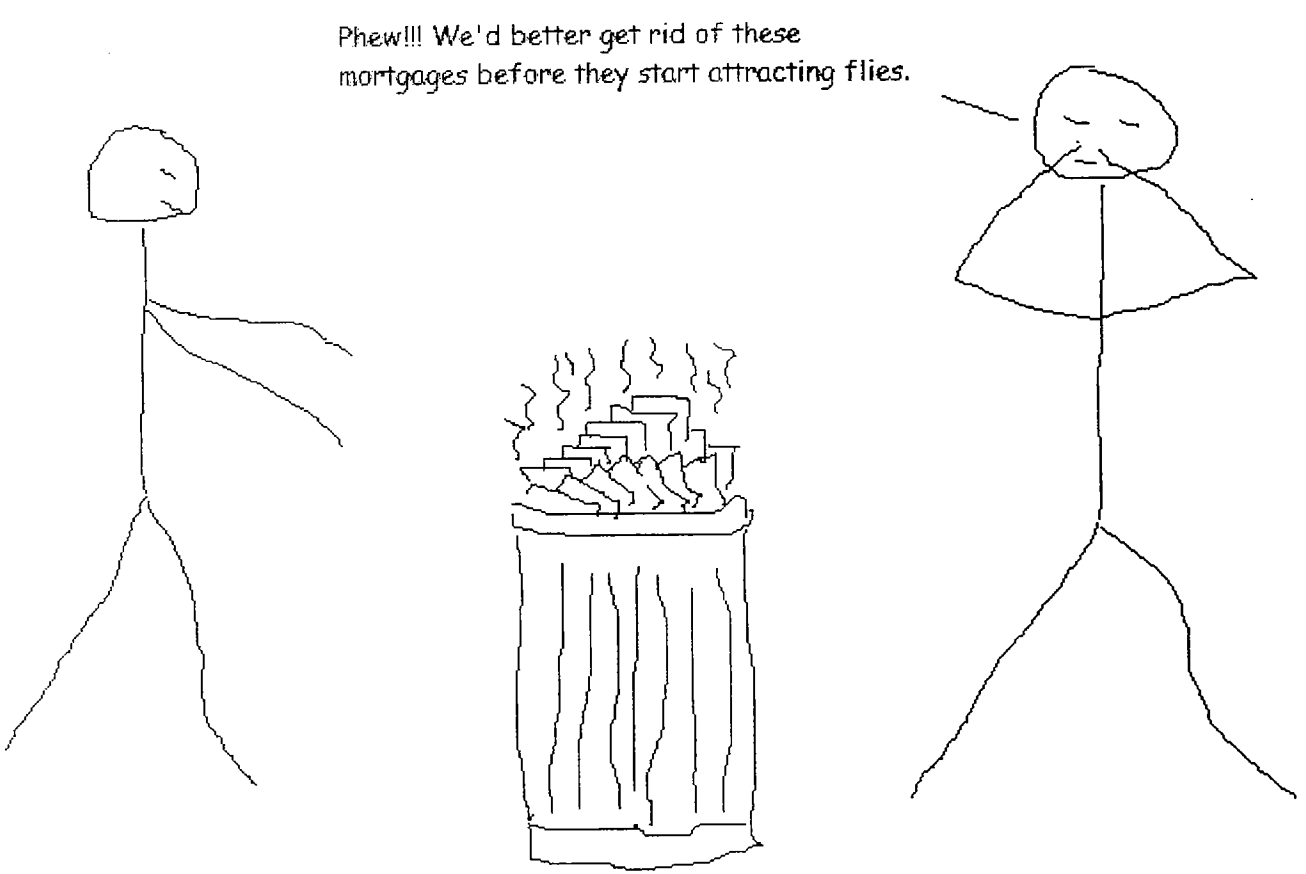
NEW MORTGAGE FILE



Let's See What the Smart Guys Are Doing...

RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"



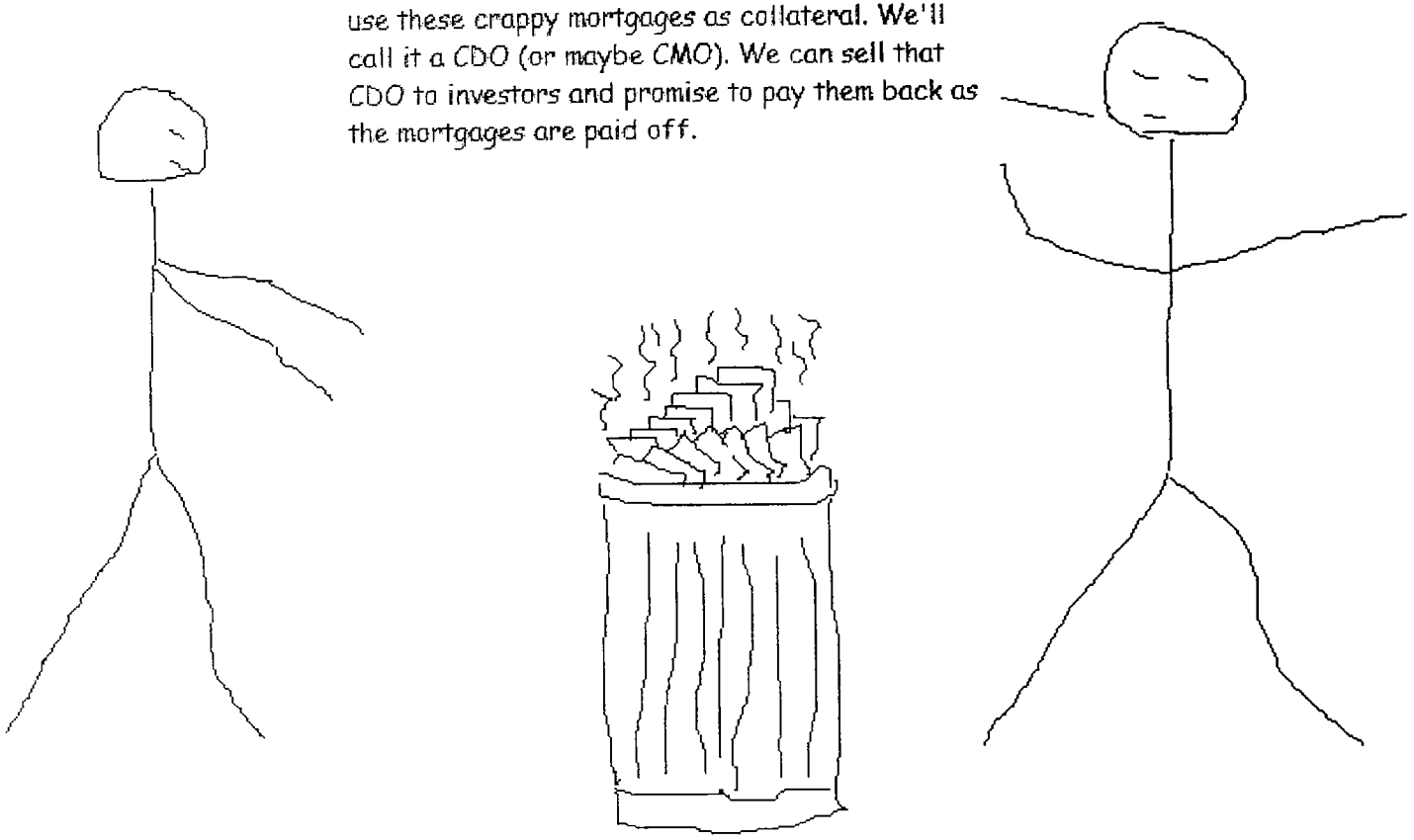
RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

I've got it! First We'll create a new security and use these crappy mortgages as collateral. We'll call it a CDO (or maybe CMO). We can sell that CDO to investors and promise to pay them back as the mortgages are paid off.



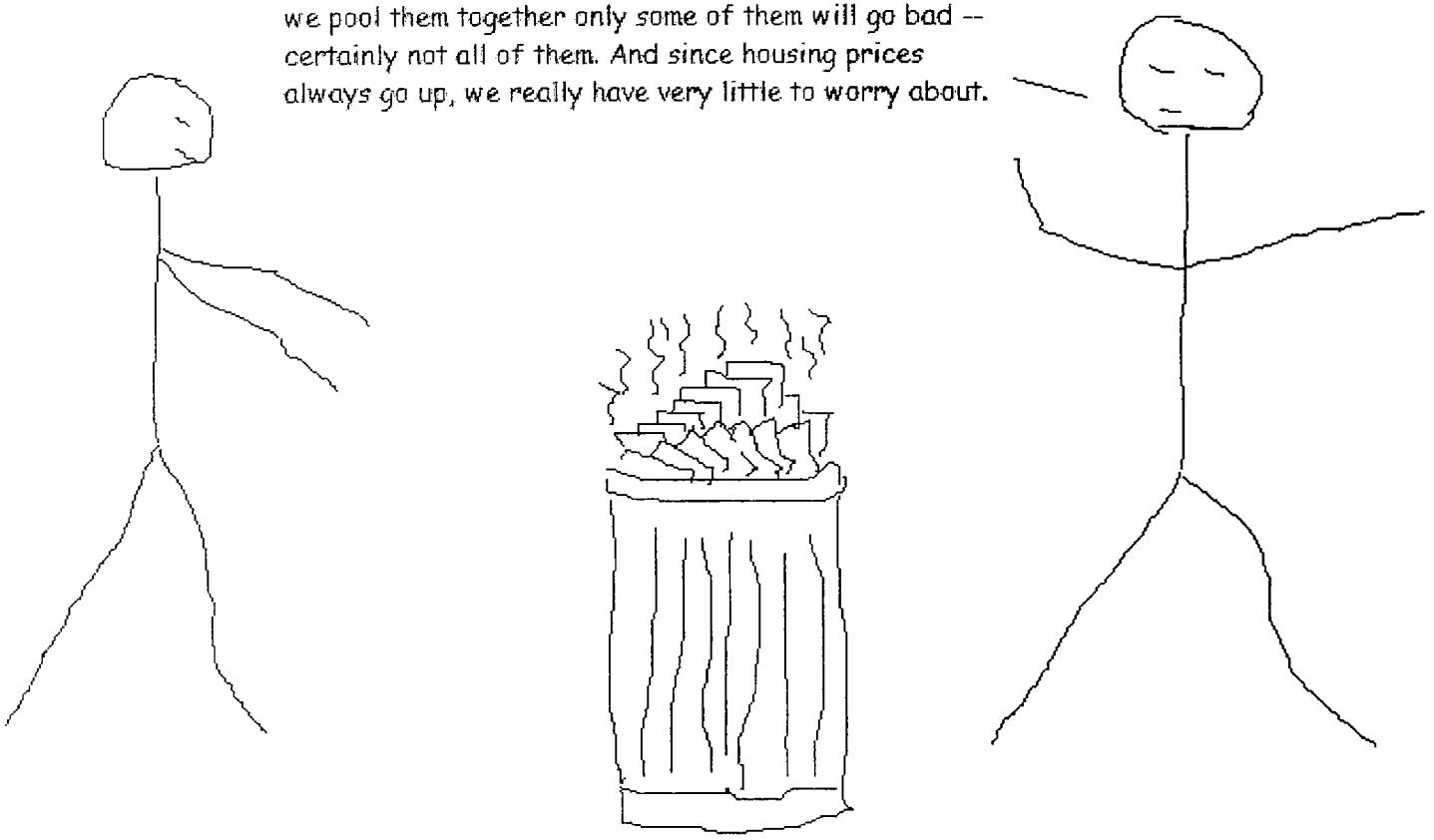
RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

Sure, individually these are pretty crappy loans, but if we pool them together only some of them will go bad -- certainly not all of them. And since housing prices always go up, we really have very little to worry about.



RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

RSG Investment Bank of Wall Street

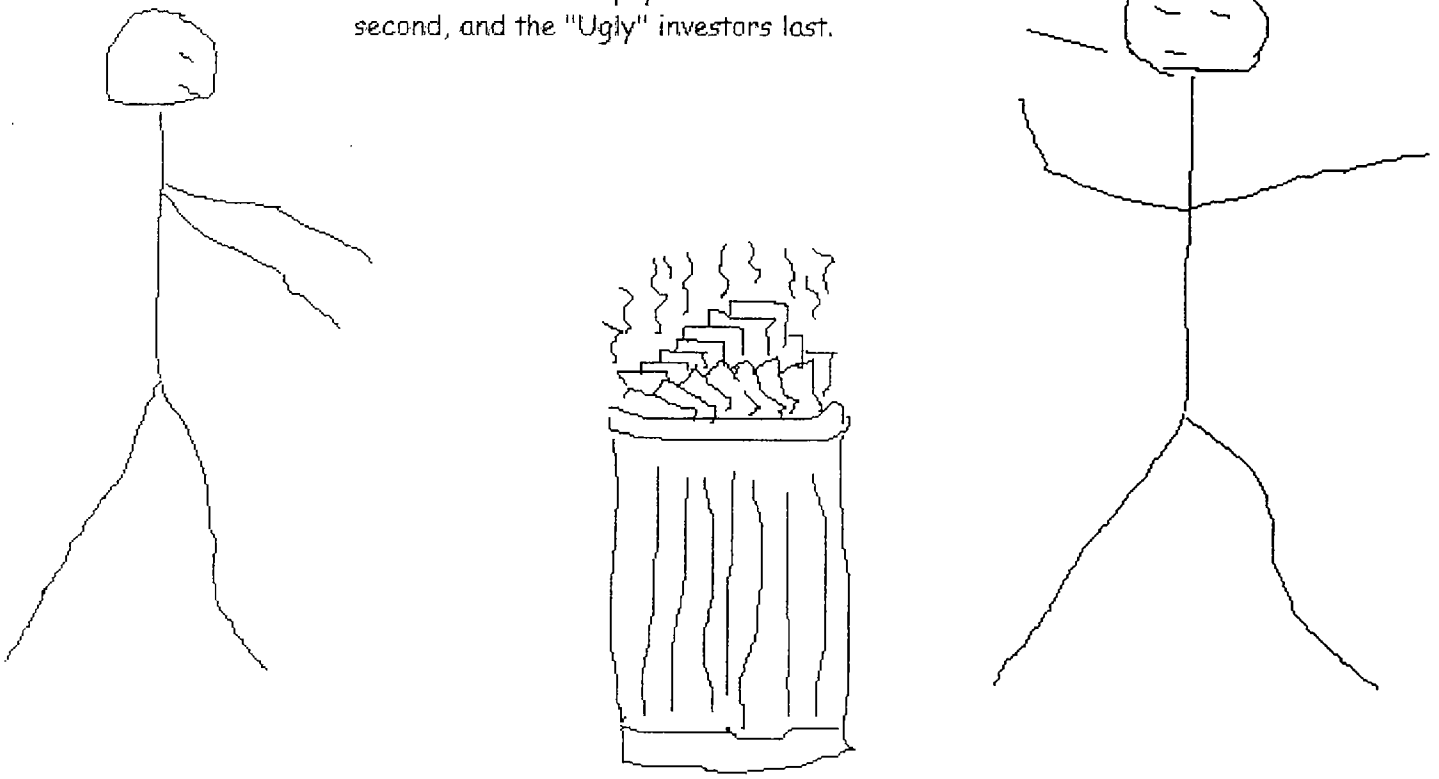
"Trust the 'Really Smart Guys' for All Your Investment Needs"

The new CDO will work like this: It will be made up of three pieces (or "traunches") and we'll call them "The Good", "The Not-So-Good" and "The Ugly".

RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

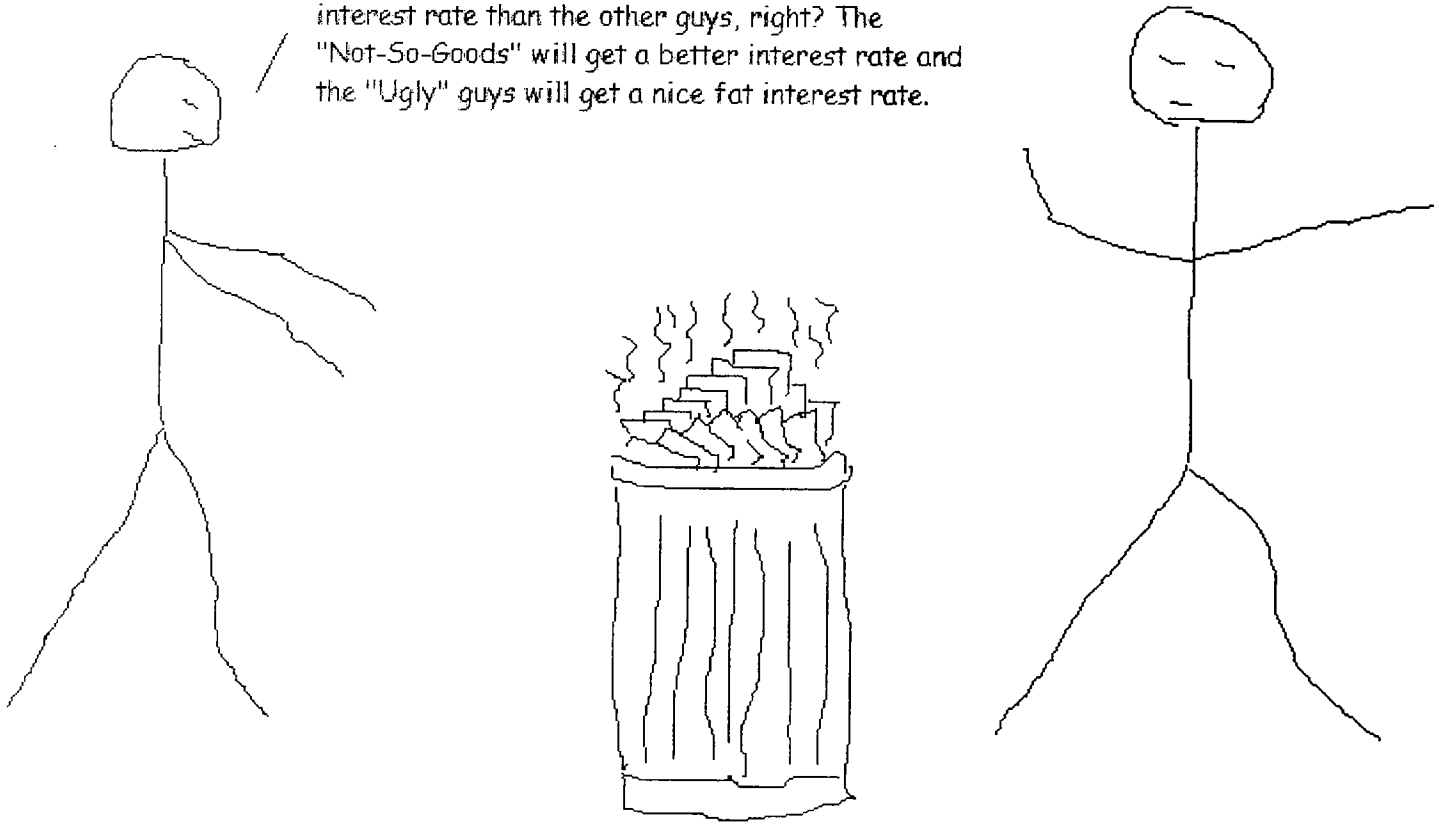
If some of the mortgages fail, as surely some might, we will promise to pay investors holding the "Good" traunch first. We'll pay the "Not-So-Good investors second, and the "Ugly" investors last.



RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

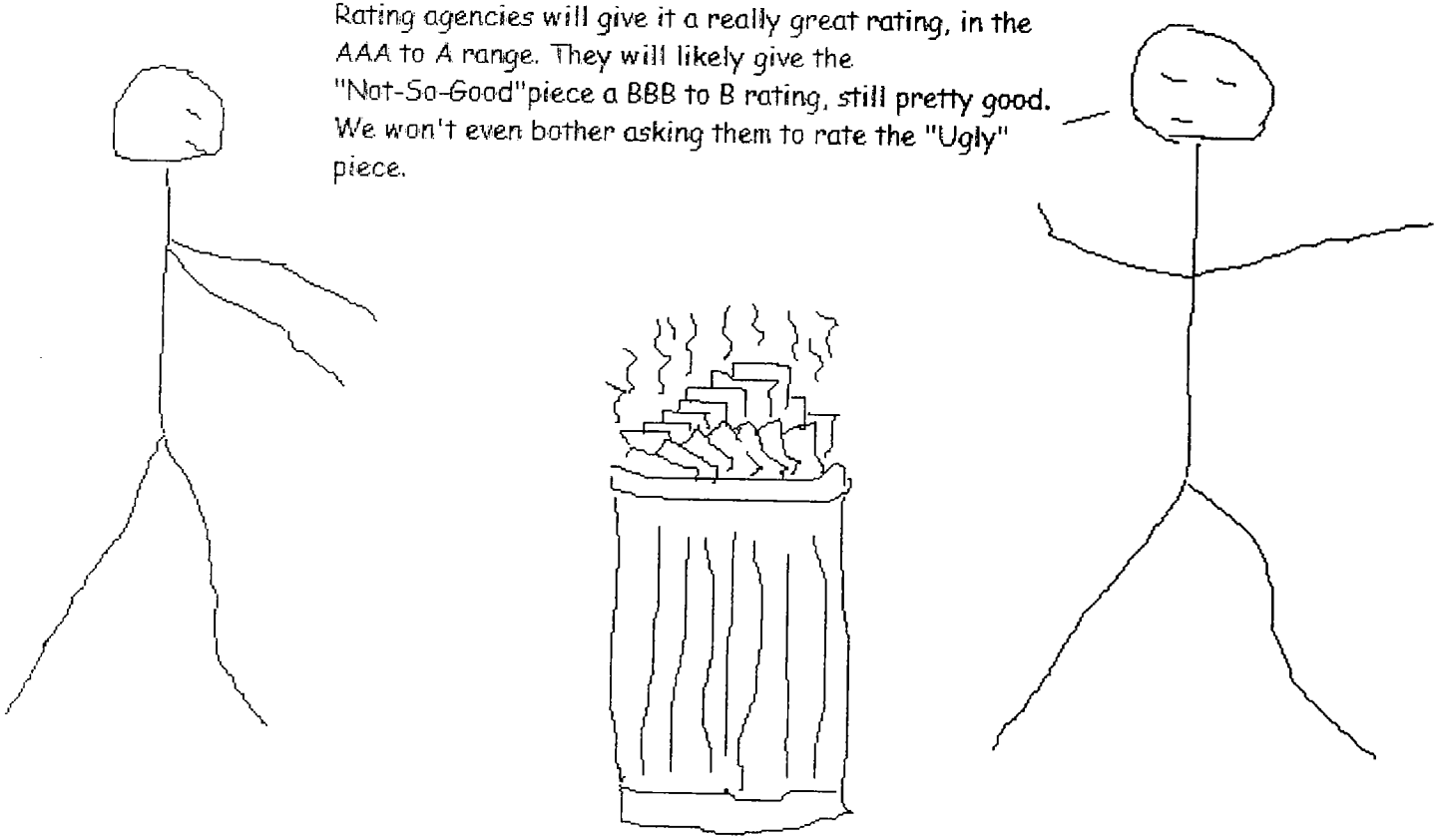
I'm starting to get it. And because the "Good" investors have the least risk, we'll pay them a lower interest rate than the other guys, right? The "Not-So-Goods" will get a better interest rate and the "Ugly" guys will get a nice fat interest rate.



RSG Investment Bank of Wall Street

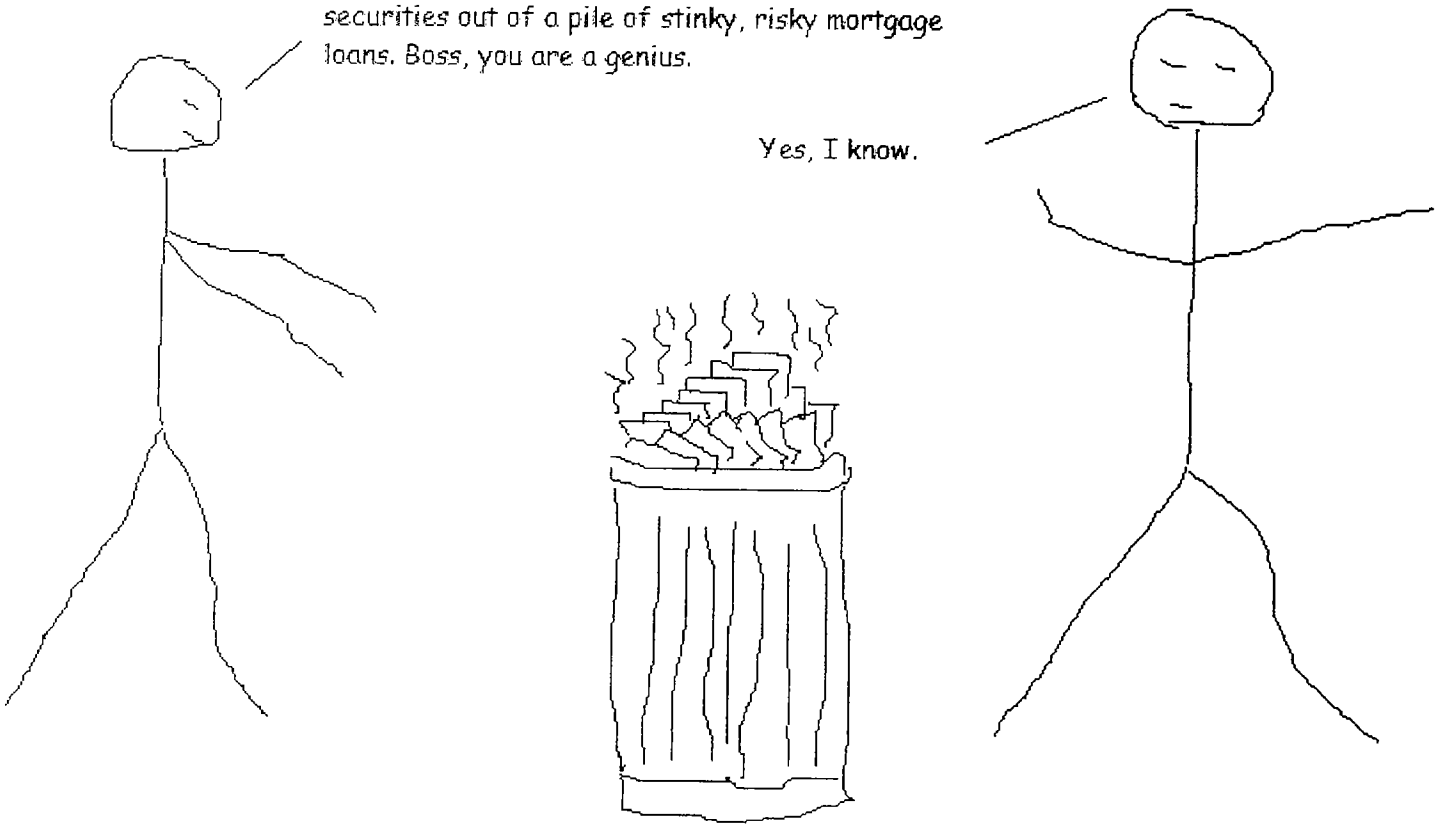
"Trust the 'Really Smart Guys' for All Your Investment Needs"

Exactly. But wait, it gets better. We will buy bond insurance for the "Good" piece. If we do that, the Rating agencies will give it a really great rating, in the AAA to A range. They will likely give the "Not-So-Good"piece a BBB to B rating, still pretty good. We won't even bother asking them to rate the "Ugly" piece.



RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

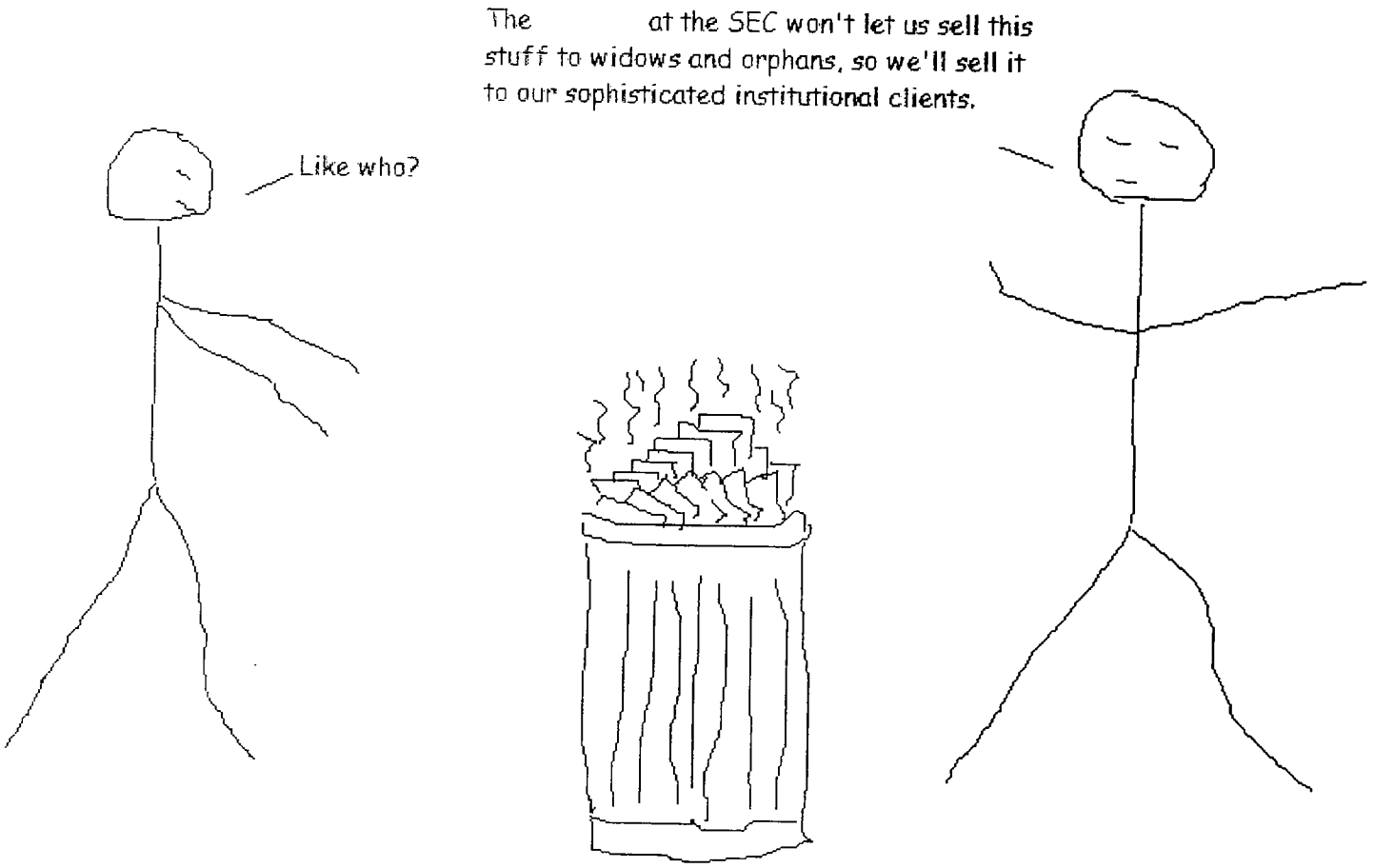


RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"

RSG Investment Bank of Wall Street

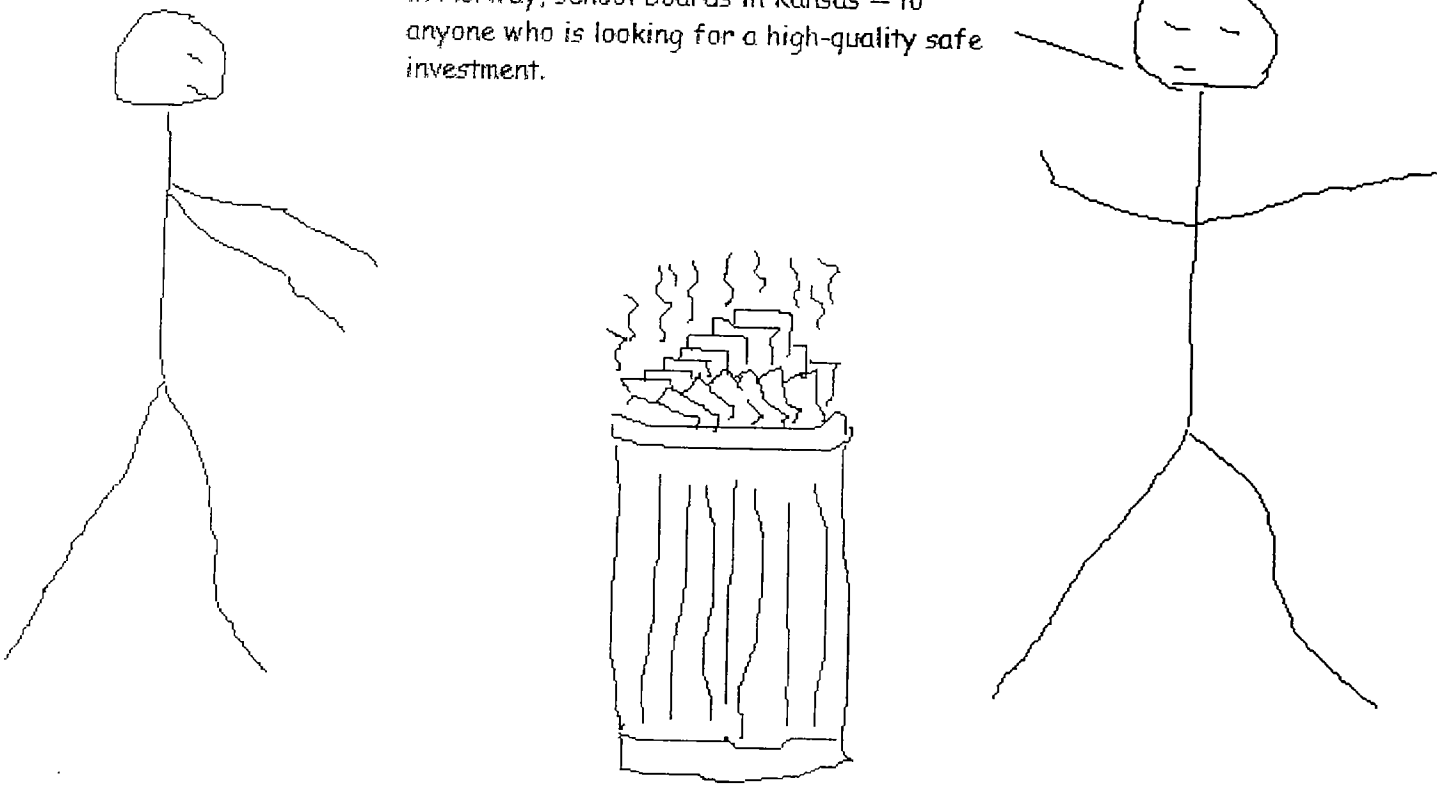
"Trust the 'Really Smart Guys' for All Your Investment Needs"



RSG Investment Bank of Wall Street

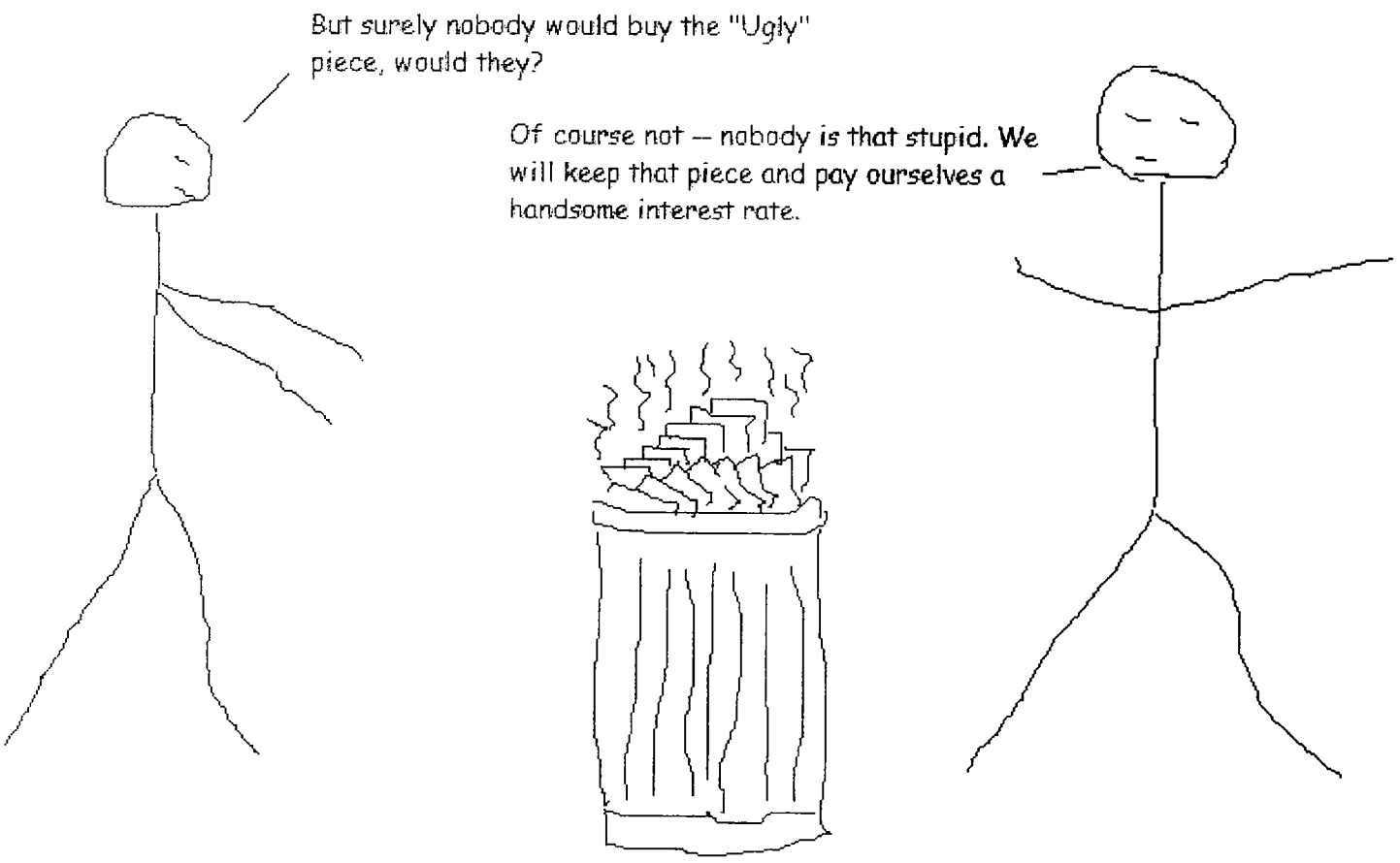
"Trust the 'Really Smart Guys' for All Your Investment Needs"

Like insurance companies, banks, small towns in Norway, school boards in Kansas – to anyone who is looking for a high-quality safe investment.



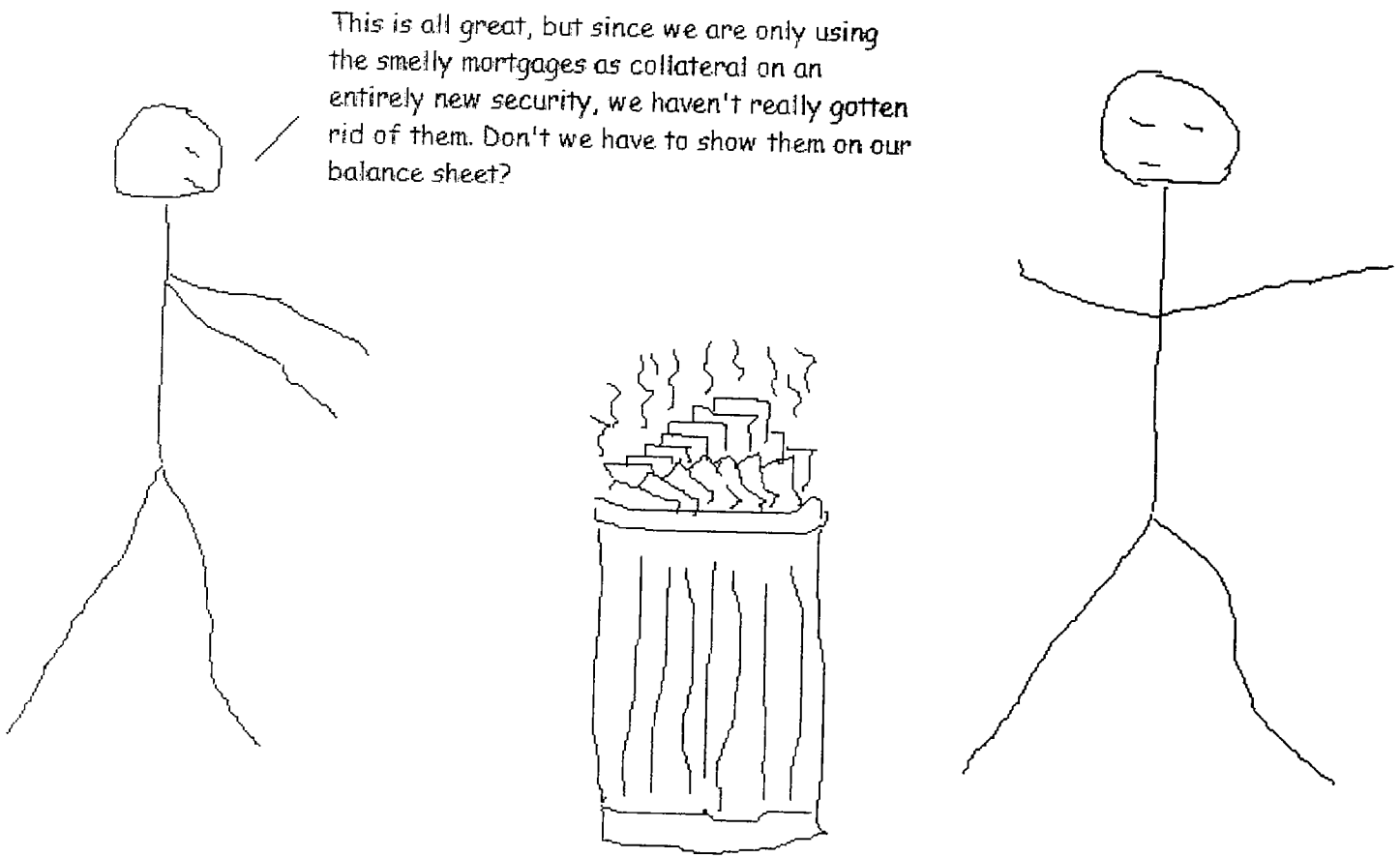
RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"



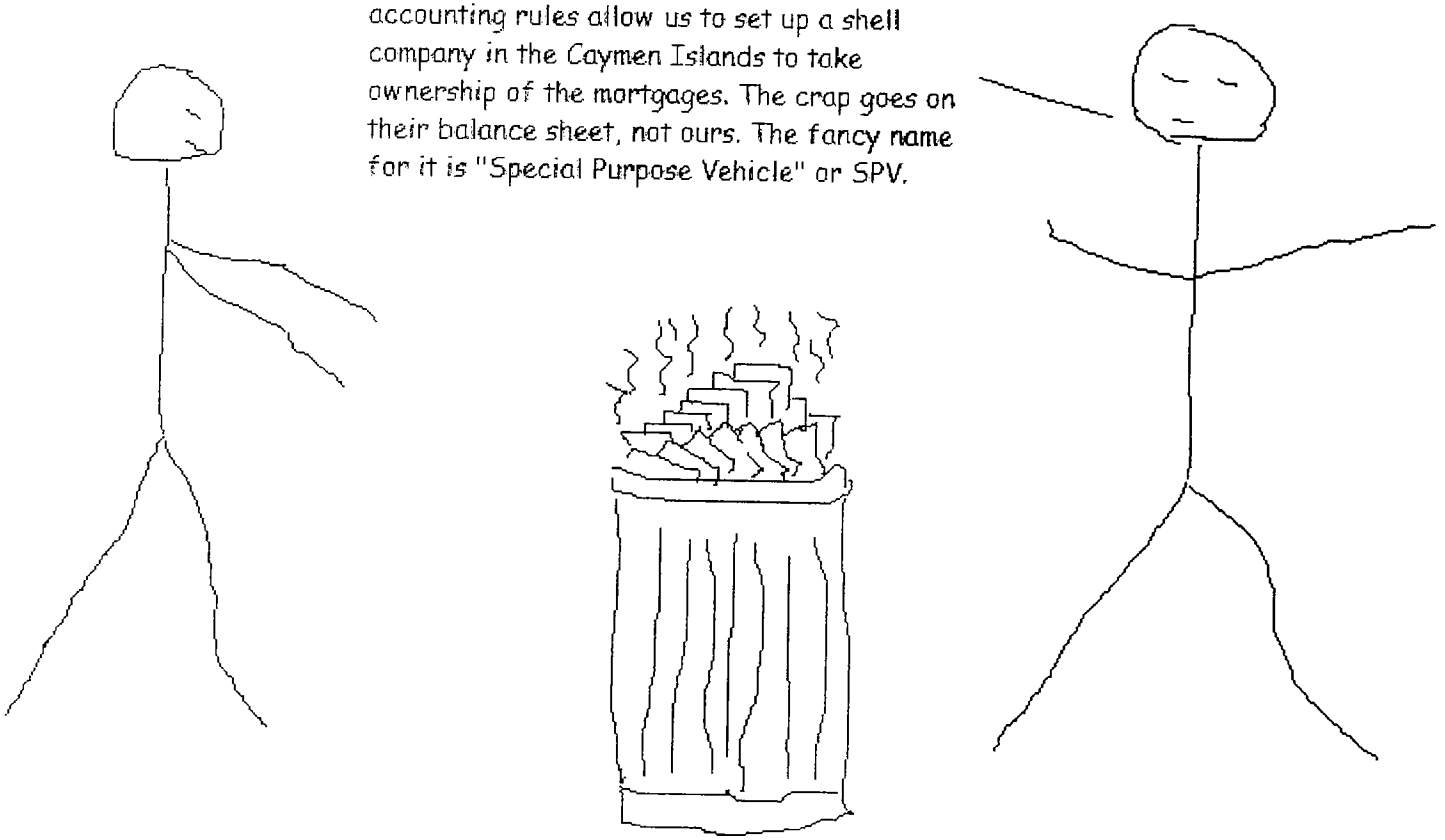
RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"



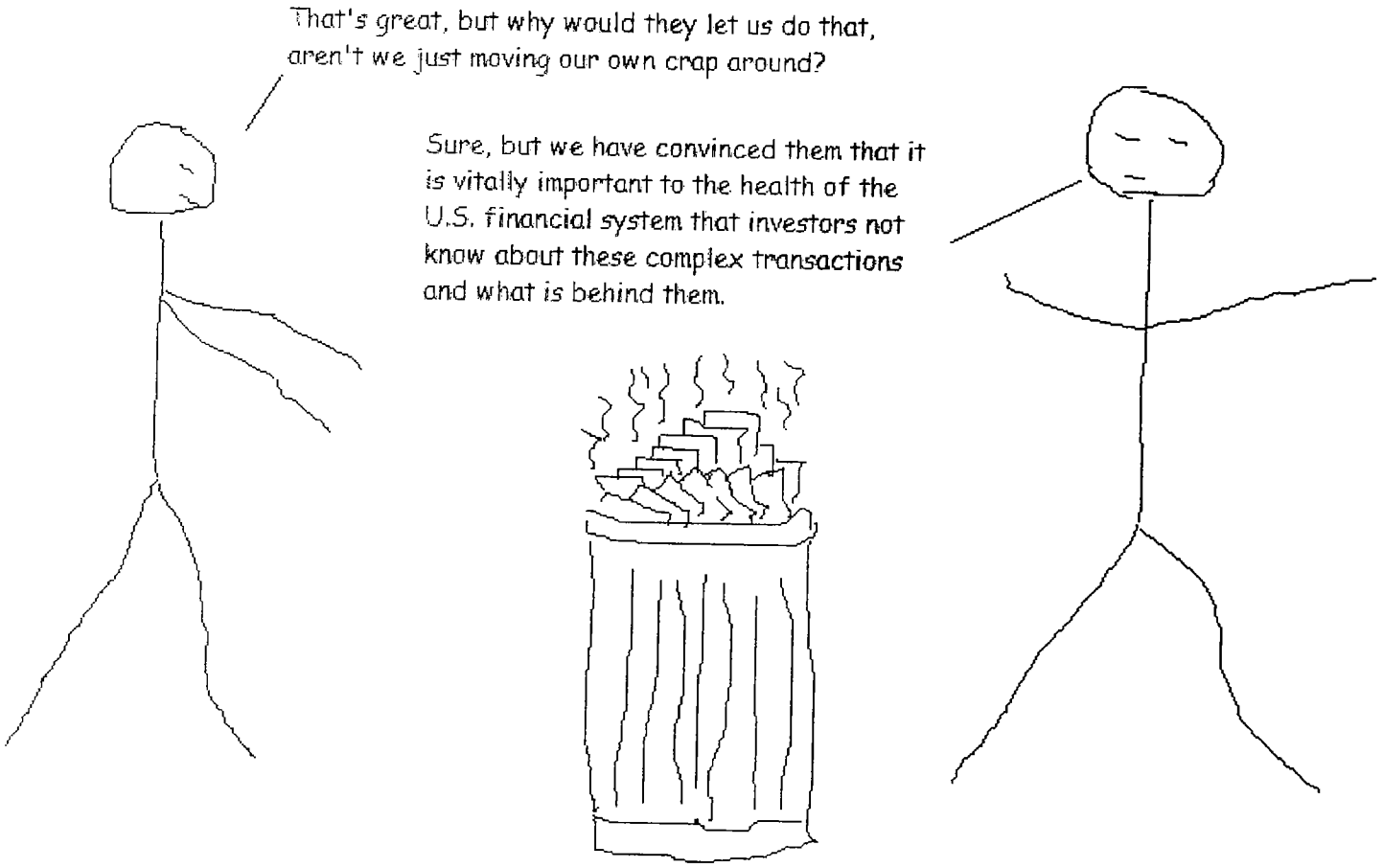
RSG Investment Bank of Wall Street

"Trust the 'Really Smart Guys' for All Your Investment Needs"



RSG Investment Bank of Wall Street

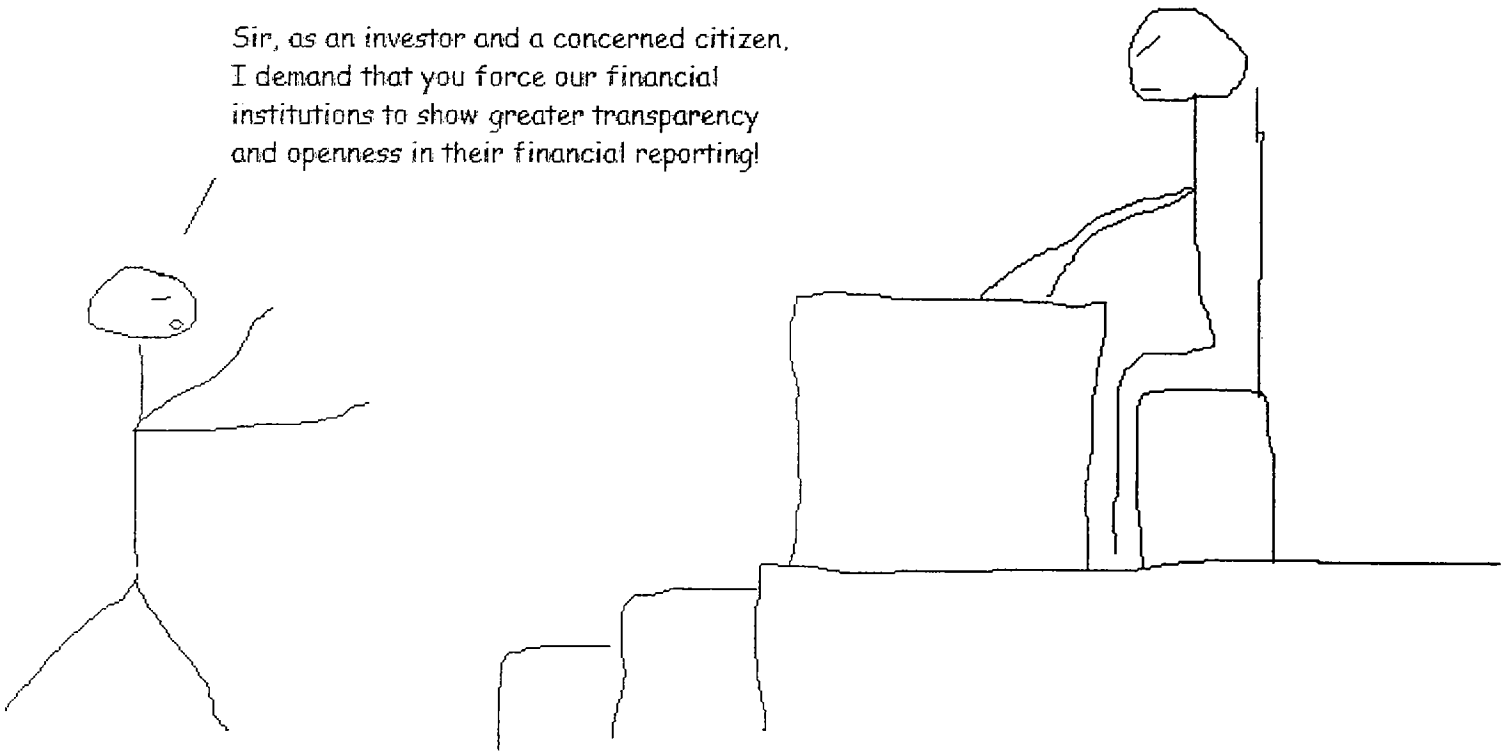
"Trust the 'Really Smart Guys' for All Your Investment Needs"



Let's drop in to see the Accountants.....

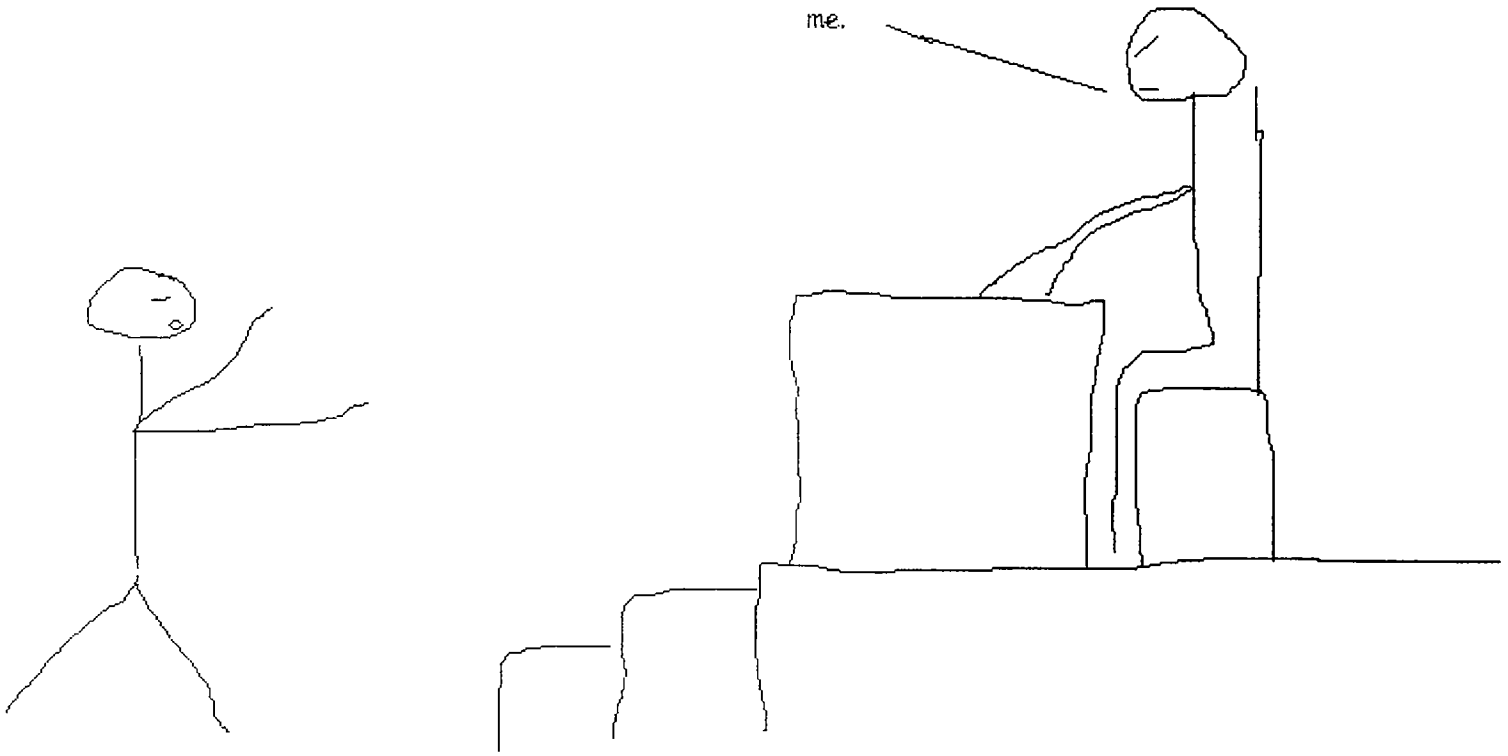
Office of the Czar of Accounting

"No Nit Too Small to Pick"



Office of the Czar of Accounting

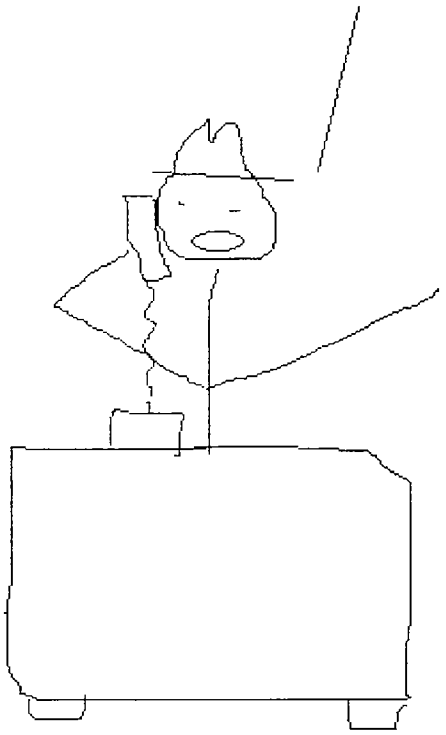
"No Nit Too Small to Pick"



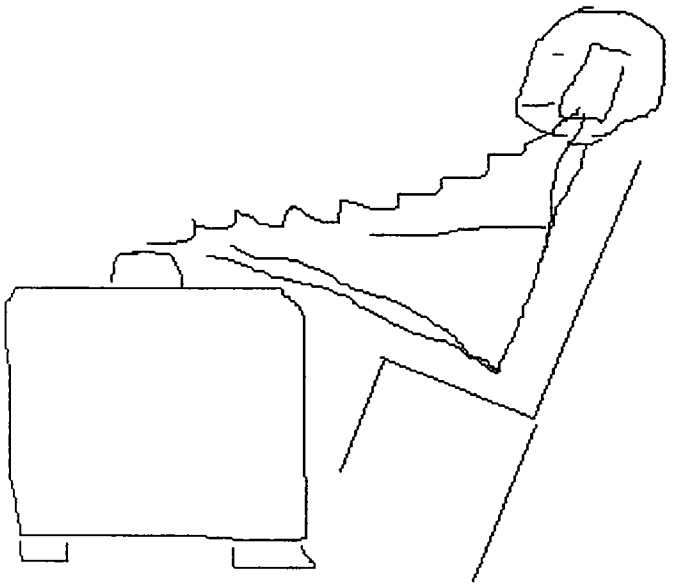
Gee, We Never Saw it Coming.....

Norwegian Village Pension Fund

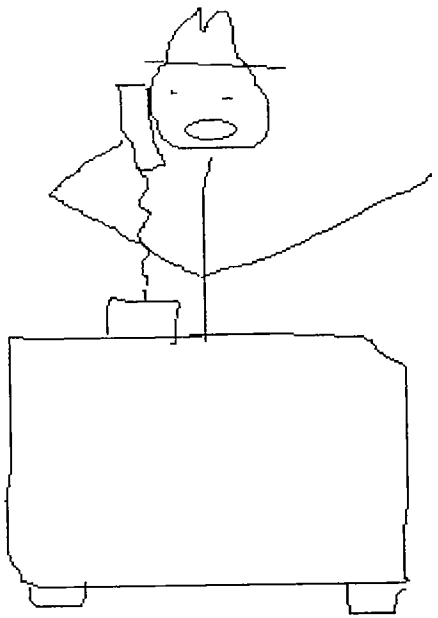
Hey man, what the hell is up? We're not receiving our monthly payments!



RSG Investment Bank

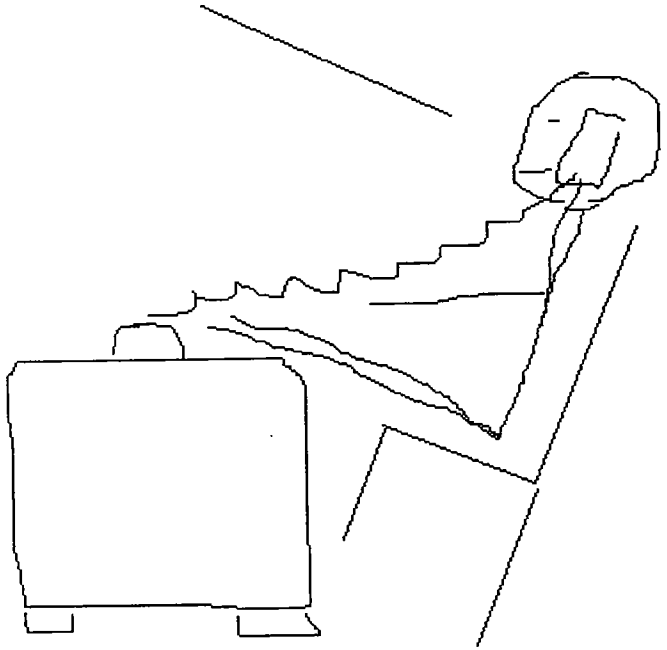


Norwegian Village Pension Fund



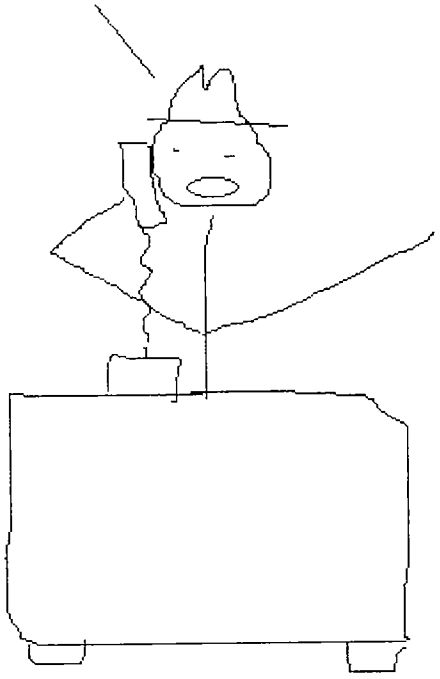
RSG Investment Bank

Yeah, I meant to call you but it's been really crazy around here. It seems that the [redacted] who took out the mortgages backing your CDO aren't able to pay them off.

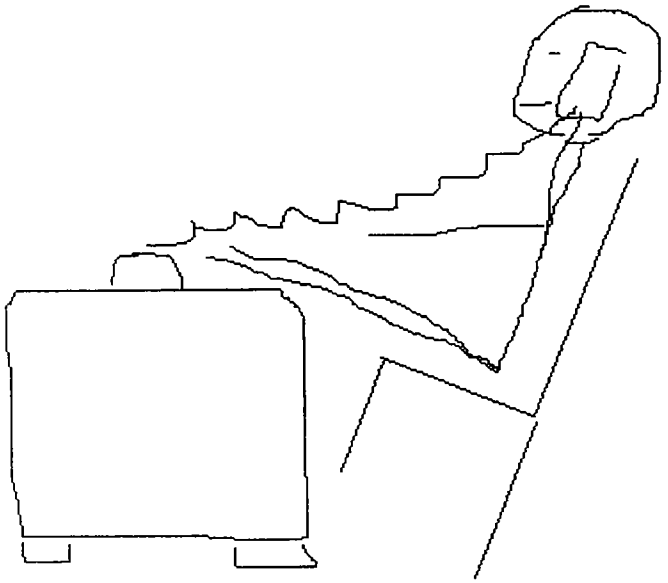


Norwegian Village Pension Fund

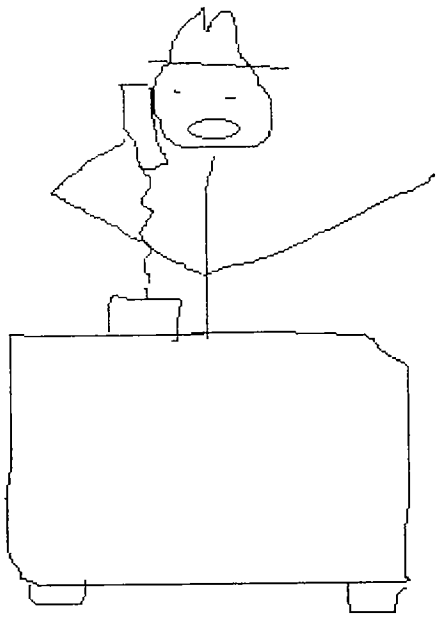
Wait a minute! We bought the *AAA* "Good" piece of the CDO. You know? The safe one. We're supposed to be getting paid first.



RSG Investment Bank

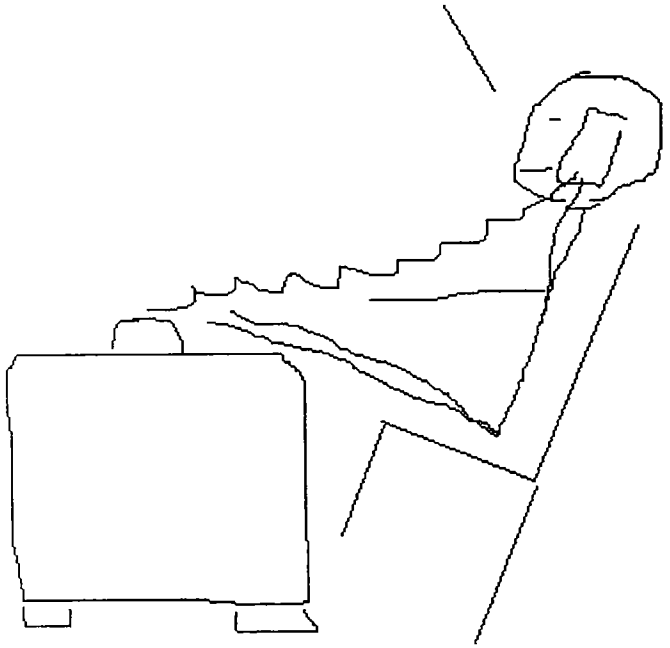


Norwegian Village Pension Fund



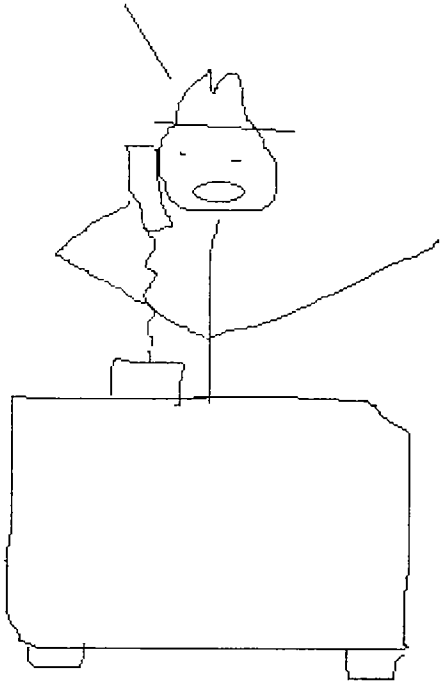
RSG Investment Bank

Well unfortunately the loans were quite a bit crappier than we originally thought and there is very little cash coming in. Frankly, I assure you that we are as disappointed as you are.

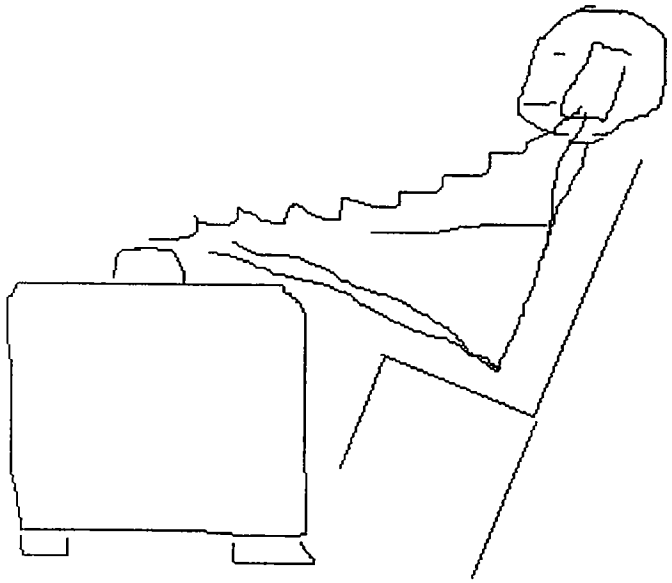


Norwegian Village Pension Fund

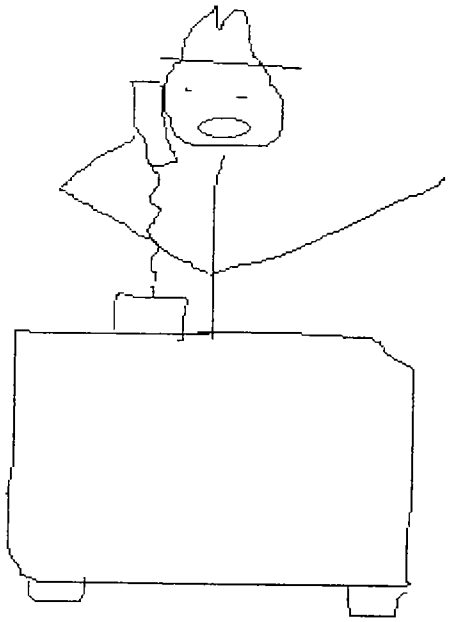
But you told me that housing prices always go up and that your borrowers could always refinance their mortgages!



RSG Investment Bank

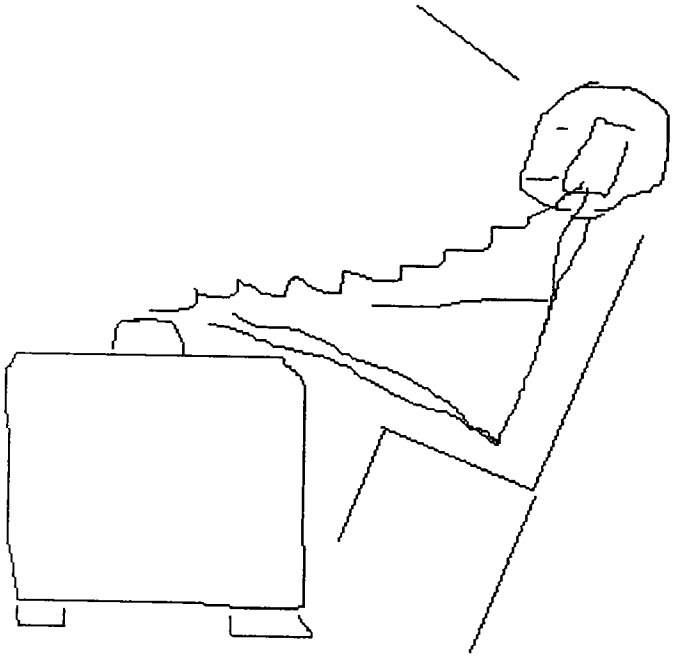


Norwegian Village Pension Fund



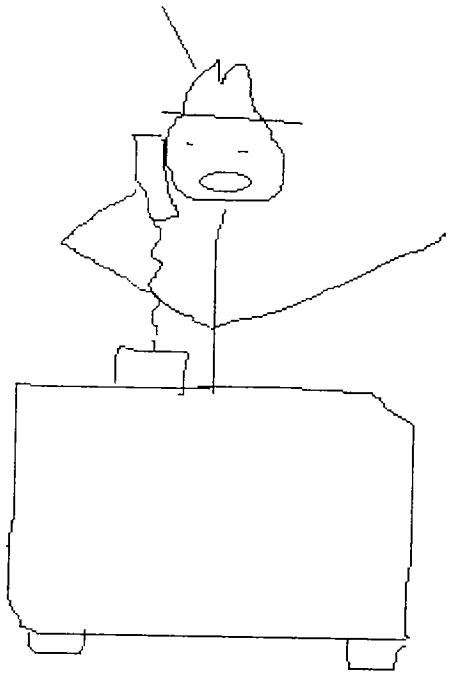
RSG Investment Bank

Yeah, that was a bad assumption.
We up. Sorry.

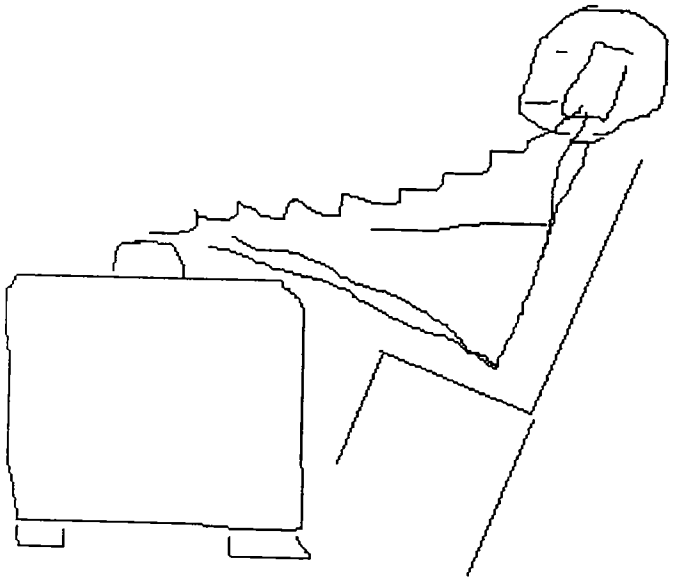


Norwegian Village Pension Fund

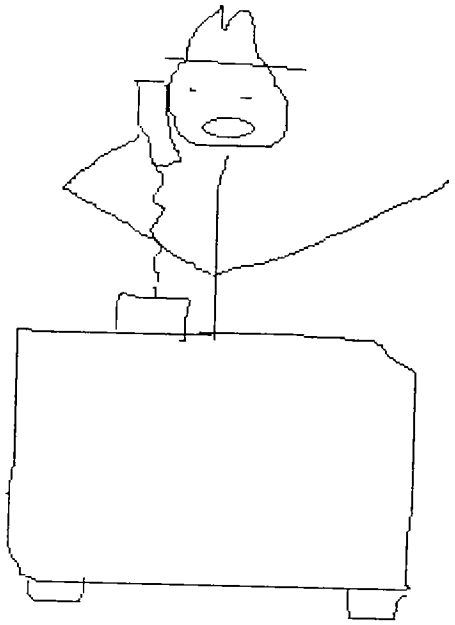
Bad assumption my frigid Norwegian ass! What about the *AAA* rating from the agencies?



RSG Investment Bank

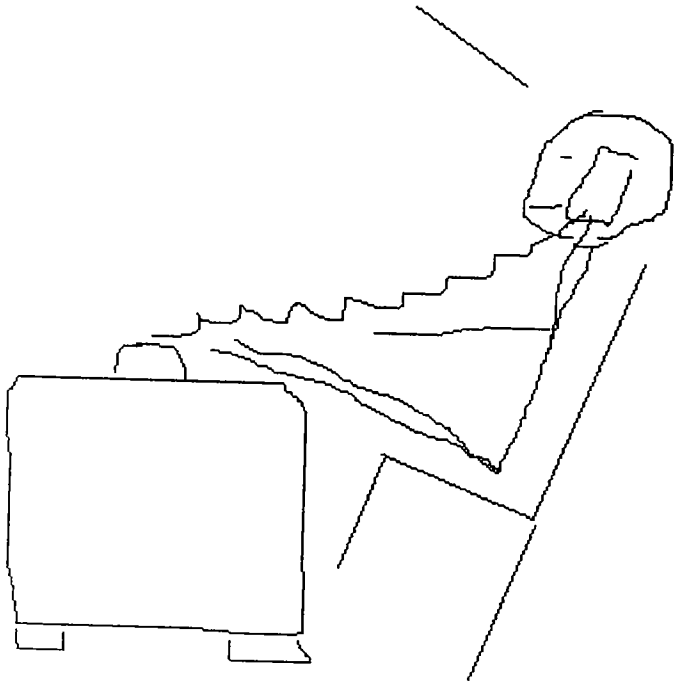


Norwegian Village Pension Fund



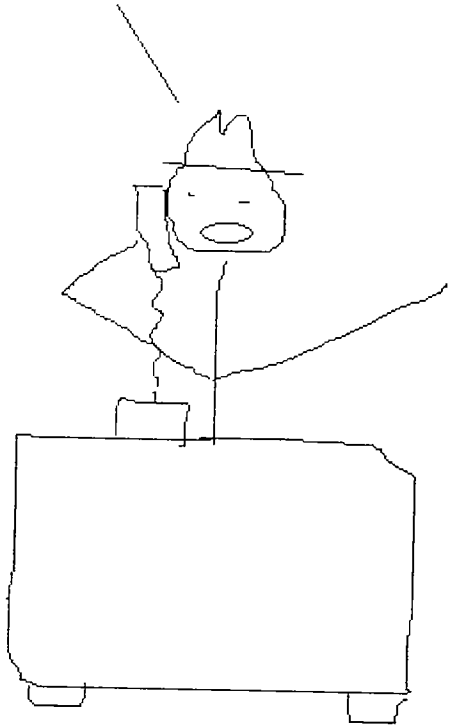
RSG Investment Bank

They up too.

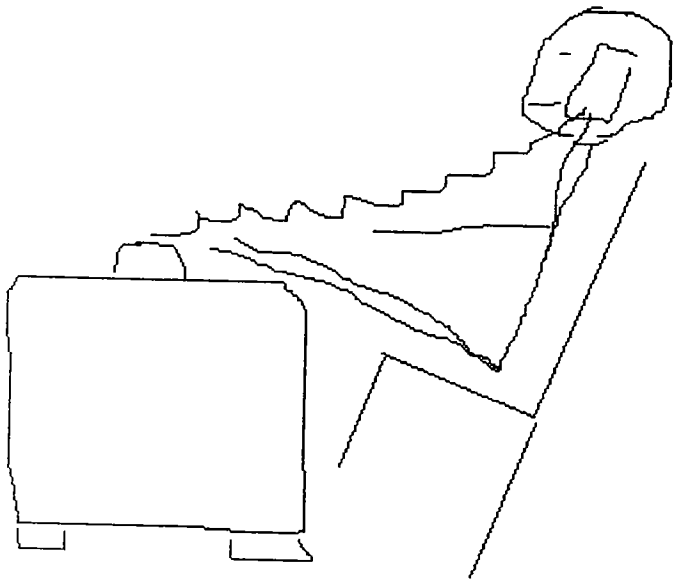


Norwegian Village Pension Fund

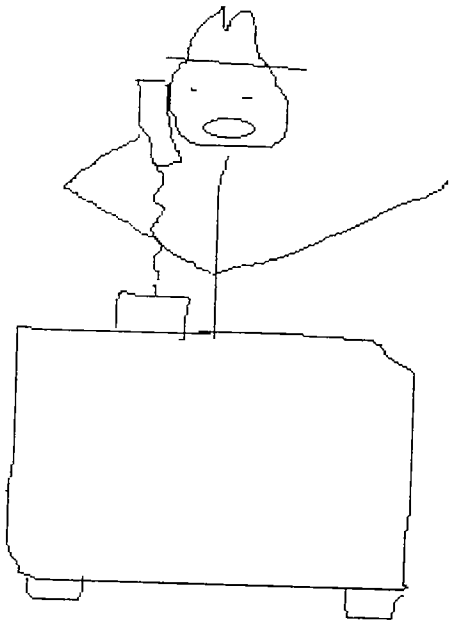
But this security was insured! What about the insurers?



RSG Investment Bank

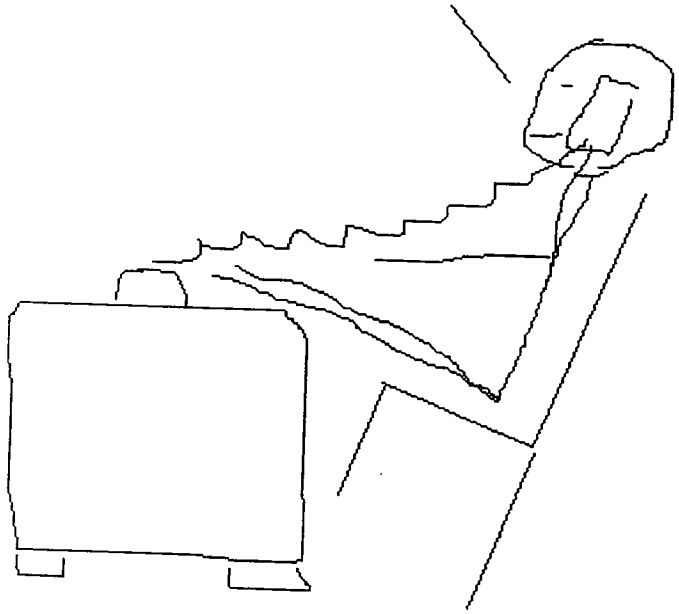


Norwegian Village Pension Fund



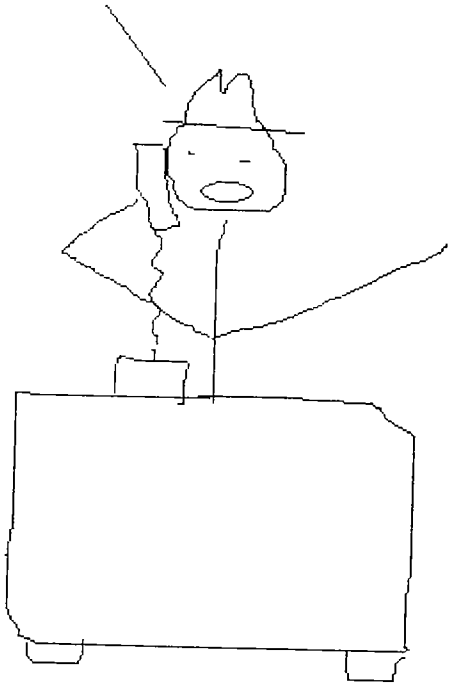
RSG Investment Bank

Are you kidding? There's no way they have enough money set aside to cover this mess. They up.

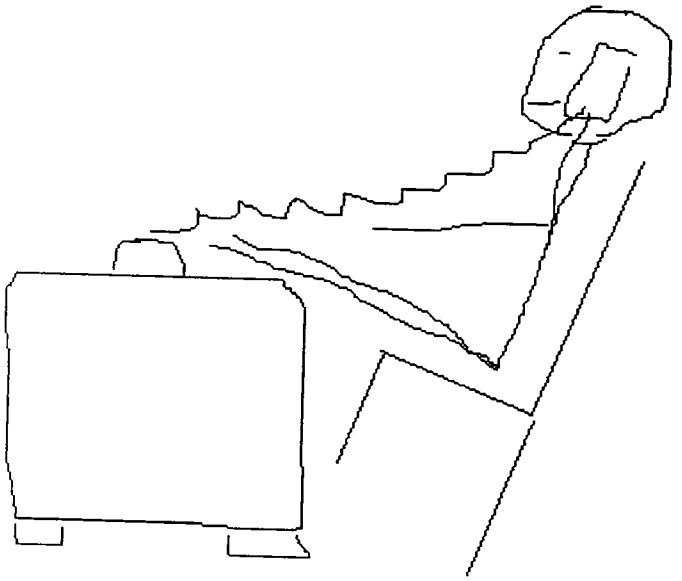


Norwegian Village Pension Fund

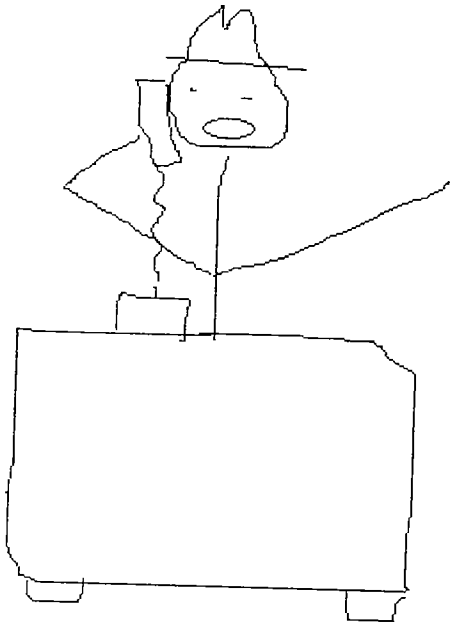
Well that's just great,
What am I supposed to tell my villagers?



RSG Investment Bank

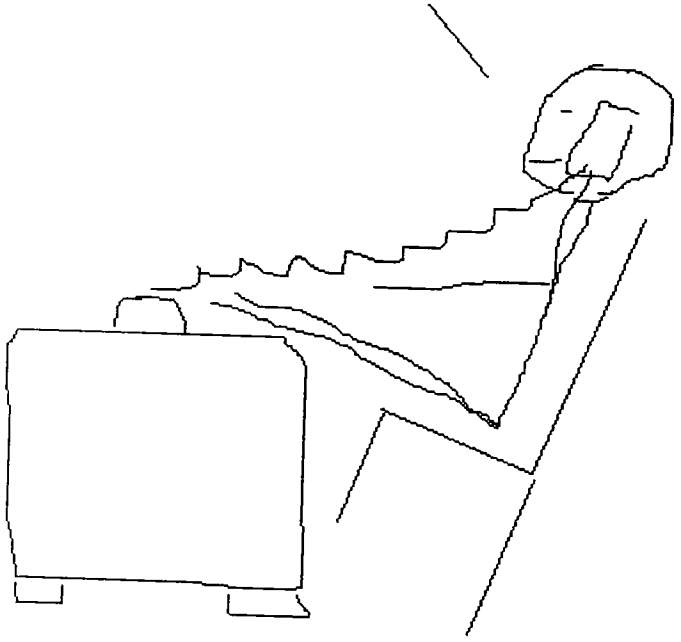


Norwegian Village Pension Fund



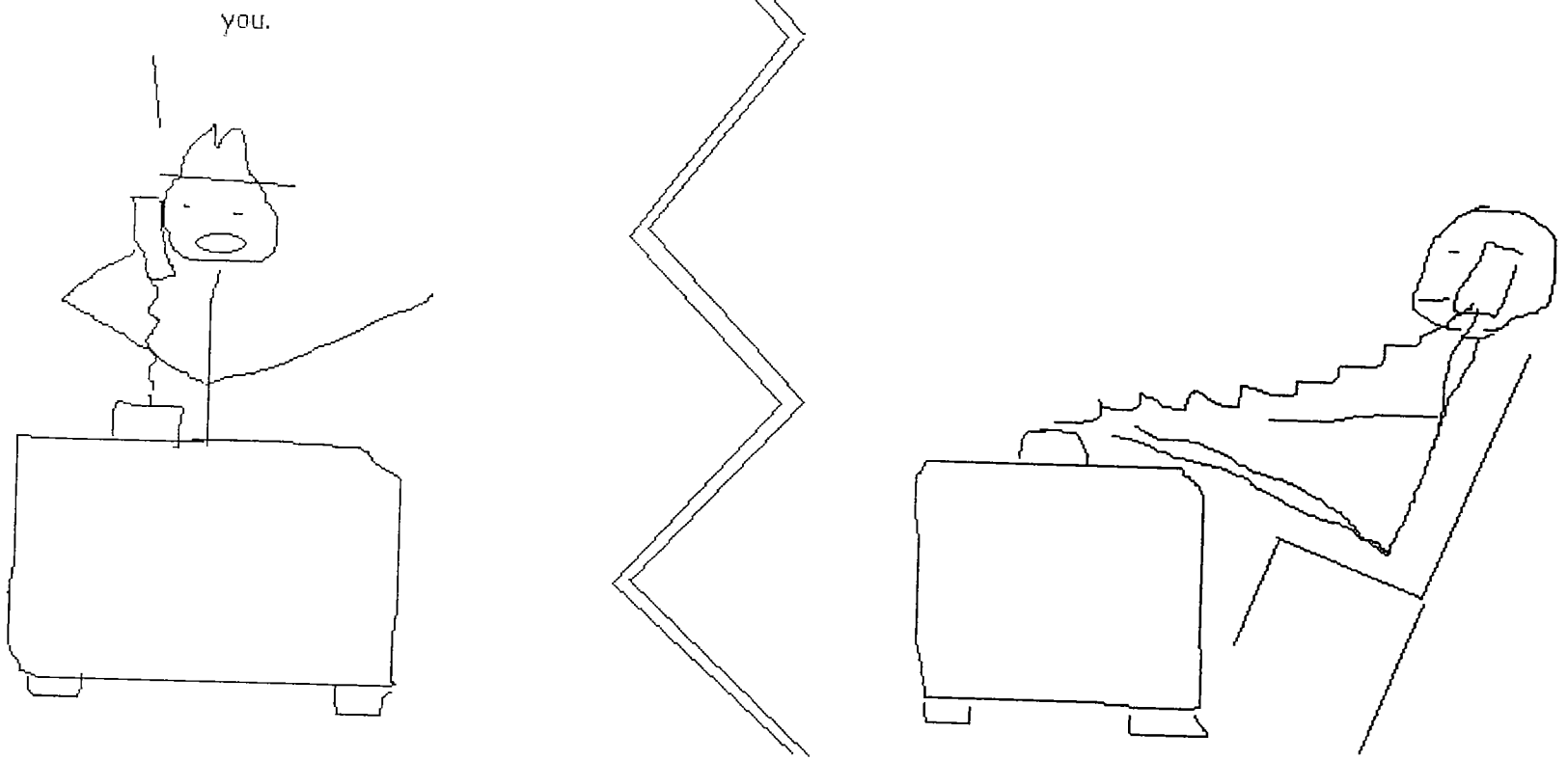
RSG Investment Bank

Tell them you up.

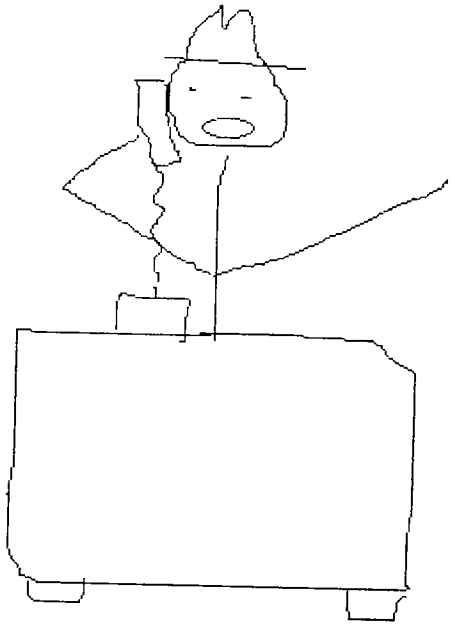


Norwegian Village Pension Fund

RSG Investment Bank

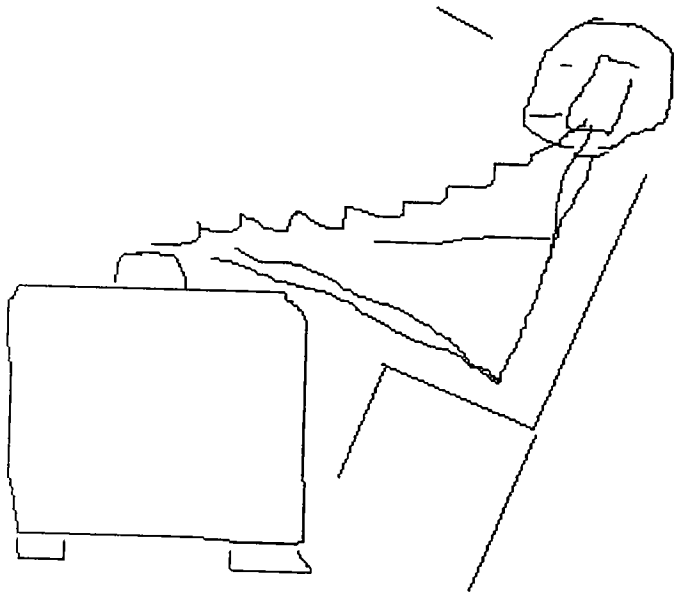


Norwegian Village Pension Fund



RSG Investment Bank

you.



The End

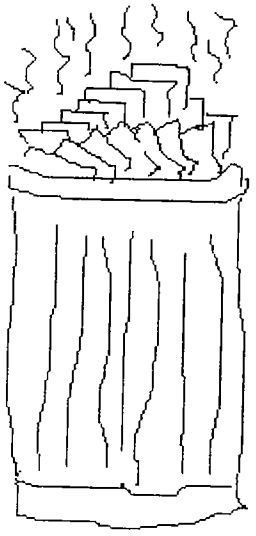


EXHIBIT B

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

STONERIDGE INVESTMENT PARTNERS, LLC *v.* SCIENTIFIC-ATLANTA, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 06–43. Argued October 9, 2007—Decided January 15, 2008

Alleging losses after purchasing Charter Communications, Inc., common stock, petitioner filed suit against respondents and others under §10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b–5. Acting as Charter's customers and suppliers, respondents had agreed to arrangements that allowed Charter to mislead its auditor and issue a misleading financial statement affecting its stock price, but they had no role in preparing or disseminating the financial statement. Affirming the District Court's dismissal of respondents, the Eighth Circuit ruled that the allegations did not show that respondents made misstatements relied upon by the public or violated a duty to disclose. The court observed that, at most, respondents had aided and abetted Charter's misstatement, and noted that the private cause of action this Court has found implied in §10(b) and Rule 10b–5, *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9, does not extend to aiding and abetting a §10(b) violation, see *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 191.

Held: The §10(b) private right of action does not reach respondents because Charter investors did not rely upon respondents' statements or representations. Pp. 5–16.

(a) Although *Central Bank* prompted calls for creation of an express cause of action for aiding and abetting, Congress did not follow this course. Instead, in §104 of the Private Securities Litigation Reform Act of 1995 (PSLRA), it directed the SEC to prosecute aiders and abettors. Thus, the §10(b) private right of action does not extend to aiders and abettors. Because the conduct of a secondary actor

must therefore satisfy each of the elements or preconditions for §10(b) liability, the plaintiff must prove, as here relevant, reliance upon a material misrepresentation or omission by the defendant. Pp. 5–7.

(b) The Court has found a rebuttable presumption of reliance in two circumstances. First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance. *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 153–154. Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. Neither presumption applies here: Respondents had no duty to disclose; and their deceptive acts were not communicated to the investing public during the relevant times. Petitioner, as a result, cannot show reliance upon any of respondents' actions except in an indirect chain that is too remote for liability. P. 8.

(c) Petitioner's reference to so-called "scheme liability" does not, absent a public statement, answer the objection that petitioner did not in fact rely upon respondents' deceptive conduct. Were the Court to adopt petitioner's concept of reliance—*i.e.*, that in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect—the implied cause of action would reach the whole marketplace in which the issuing company does business. There is no authority for this rule. Reliance is tied to causation, leading to the inquiry whether respondents' deceptive acts were immediate or remote to the injury. Those acts, which were not disclosed to the investing public, are too remote to satisfy the reliance requirement. It was Charter, not respondents, that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did. The Court's precedents counsel against petitioner's attempt to extend the §10(b) private cause of action beyond the securities markets into the realm of ordinary business operations, which are governed, for the most part, by state law. See, *e.g.*, *Marine Bank* v. *Weaver*, 455 U. S. 551, 556. The argument that there could be a reliance finding if this were a common-law fraud action is answered by the fact that §10(b) does not incorporate common-law fraud into federal law, see, *e.g.*, *SEC* v. *Zandford*, 535 U. S. 813, 820, and should not be interpreted to provide a private cause of action against the entire marketplace in which the issuing company operates, cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 733, n. 5. Petitioner's theory, moreover, would put an unsupportable interpretation on Congress' specific response to *Central Bank* in PSLRA §104 by, in substance, reviving the implied cause of

Syllabus

action against most aiders and abettors and thereby undermining Congress' determination that this class of defendants should be pursued only by the SEC. The practical consequences of such an expansion provide a further reason to reject petitioner's approach. The extensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies. See, *e.g., Blue Chip, supra,* at 740–741. It would also expose to such risks a new class of defendants—overseas firms with no other exposure to U. S. securities laws—thereby deterring them from doing business here, raising the cost of being a publicly traded company under U. S. law, and shifting securities offerings away from domestic capital markets. Pp. 8–13.

(d) Upon full consideration, the history of the §10(b) private right of action and the careful approach the Court has taken before proceeding without congressional direction provide further reasons to find no liability here. The §10(b) private cause of action is a judicial construct that Congress did not direct in the text of the relevant statutes. See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U. S. 350, 358–359. Separation of powers provides good reason for the now-settled view that an implied cause of action exists only if the underlying statute can be interpreted to disclose the intent to create one, see, *e.g., Alexander* v. *Sandoval,* 532 U. S. 275, 286–287. The decision to extend the cause of action is thus for the Congress, not for this Court. This restraint is appropriate in light of the PSLRA, in which Congress ratified the implied right of action after the Court moved away from a broad willingness to imply such private rights, see, *e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U. S. 353, 381–382, and n. 66. It is appropriate for the Court to assume that when PSLRA §104 was enacted, Congress accepted the §10(b) private right as then defined but chose to extend it no further. See, *e.g., Alexander, supra,* at 286–287. Pp. 13–15.

443 F. 3d 987, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined. BREYER, J., took no part in the consideration or decision of the case.

SUPREME COURT OF THE UNITED STATES

No. 06–43

STONERIDGE INVESTMENT PARTNERS, LLC, PETITIONER *v.* SCIENTIFIC-ATLANTA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 15, 2008]

JUSTICE KENNEDY delivered the opinion of the Court.

We consider the reach of the private right of action the Court has found implied in §10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. §78j(b), and SEC Rule 10b–5, 17 CFR §240.10b–5 (2007). In this suit investors alleged losses after purchasing common stock. They sought to impose liability on entities who, acting both as customers and suppliers, agreed to arrangements that allowed the investors' company to mislead its auditor and issue a misleading financial statement affecting the stock price. We conclude the implied right of action does not reach the customer/supplier companies because the investors did not rely upon their statements or representations. We affirm the judgment of the Court of Appeals.

I

This class-action suit by investors was filed against Charter Communications, Inc., in the United States District Court for the Eastern District of Missouri. Stoneridge Investment Partners, LLC, a limited liability com-

pany organized under the laws of Delaware, was the lead plaintiff and is petitioner here.

Charter issued the financial statements and the securities in question. It was a named defendant along with some of its executives and Arthur Andersen LLP, Charter's independent auditor during the period in question. We are concerned, though, with two other defendants, respondents here. Respondents are Scientific-Atlanta, Inc., and Motorola, Inc. They were suppliers, and later customers, of Charter.

For purposes of this proceeding, we take these facts, alleged by petitioner, to be true. Charter, a cable operator, engaged in a variety of fraudulent practices so its quarterly reports would meet Wall Street expectations for cable subscriber growth and operating cash flow. The fraud included misclassification of its customer base; delayed reporting of terminated customers; improper capitalization of costs that should have been shown as expenses; and manipulation of the company's billing cutoff dates to inflate reported revenues. In late 2000, Charter executives realized that, despite these efforts, the company would miss projected operating cash flow numbers by $15 to $20 million. To help meet the shortfall, Charter decided to alter its existing arrangements with respondents, Scientific-Atlanta and Motorola. Petitioner's theory as to whether Arthur Andersen was altogether misled or, on the other hand, knew the structure of the contract arrangements and was complicit to some degree, is not clear at this stage of the case. The point, however, is neither controlling nor significant for our present disposition, and in our decision we assume it was misled.

Respondents supplied Charter with the digital cable converter (set top) boxes that Charter furnished to its customers. Charter arranged to overpay respondents $20 for each set top box it purchased until the end of the year, with the understanding that respondents would return the

overpayment by purchasing advertising from Charter. The transactions, it is alleged, had no economic substance; but, because Charter would then record the advertising purchases as revenue and capitalize its purchase of the set top boxes, in violation of generally accepted accounting principles, the transactions would enable Charter to fool its auditor into approving a financial statement showing it met projected revenue and operating cash flow numbers. Respondents agreed to the arrangement.

So that Arthur Andersen would not discover the link between Charter's increased payments for the boxes and the advertising purchases, the companies drafted documents to make it appear the transactions were unrelated and conducted in the ordinary course of business. Following a request from Charter, Scientific-Atlanta sent documents to Charter stating—falsely—that it had increased production costs. It raised the price for set top boxes for the rest of 2000 by $20 per box. As for Motorola, in a written contract Charter agreed to purchase from Motorola a specific number of set top boxes and pay liquidated damages of $20 for each unit it did not take. The contract was made with the expectation Charter would fail to purchase all the units and pay Motorola the liquidated damages.

To return the additional money from the set top box sales, Scientific-Atlanta and Motorola signed contracts with Charter to purchase advertising time for a price higher than fair value. The new set top box agreements were backdated to make it appear that they were negotiated a month before the advertising agreements. The backdating was important to convey the impression that the negotiations were unconnected, a point Arthur Andersen considered necessary for separate treatment of the transactions. Charter recorded the advertising payments to inflate revenue and operating cash flow by approximately $17 million. The inflated number was shown on

financial statements filed with the Securities and Exchange Commission (SEC) and reported to the public.

Respondents had no role in preparing or disseminating Charter's financial statements. And their own financial statements booked the transactions as a wash, under generally accepted accounting principles. It is alleged respondents knew or were in reckless disregard of Charter's intention to use the transactions to inflate its revenues and knew the resulting financial statements issued by Charter would be relied upon by research analysts and investors.

Petitioner filed a securities fraud class action on behalf of purchasers of Charter stock alleging that, by participating in the transactions, respondents violated §10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5.

The District Court granted respondents' motion to dismiss for failure to state a claim on which relief can be granted. The United States Court of Appeals for the Eighth Circuit affirmed. *In re Charter Communications, Inc., Securities Litigation*, 443 F. 3d 987 (2006). In its view the allegations did not show that respondents made misstatements relied upon by the public or that they violated a duty to disclose; and on this premise it found no violation of §10(b) by respondents. *Id.*, at 992. At most, the court observed, respondents had aided and abetted Charter's misstatement of its financial results; but, it noted, there is no private right of action for aiding and abetting a §10(b) violation. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 191 (1994). The court also affirmed the District Court's denial of petitioner's motion to amend the complaint, as the revised pleading would not change the court's conclusion on the merits. 443 F. 3d, at 993.

Decisions of the Courts of Appeals are in conflict respecting when, if ever, an injured investor may rely upon §10(b) to recover from a party that neither makes a public

misstatement nor violates a duty to disclose but does participate in a scheme to violate §10(b). Compare *Simpson* v. *AOL Time Warner Inc.*, 452 F. 3d 1040 (CA9 2006), with *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F. 3d 372 (CA5 2007). We granted certiorari. 549 U. S. ___ (2007).

II

Section 10(b) of the Securities Exchange Act makes it

> "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. §78j.

The SEC, pursuant to this section, promulgated Rule 10b–5, which makes it unlawful

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security." 17 CFR §240.10b–5.

Rule 10b–5 encompasses only conduct already prohibited by §10(b). *United States* v. *O'Hagan*, 521 U. S. 642, 651

(1997). Though the text of the Securities Exchange Act does not provide for a private cause of action for §10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation. *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971). In a typical §10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341–342 (2005).

P to prove:

In *Central Bank*, the Court determined that §10(b) liability did not extend to aiders and abettors. The Court found the scope of §10(b) to be delimited by the text, which makes no mention of aiding and abetting liability. 511 U. S., at 177. The Court doubted the implied §10(b) action should extend to aiders and abettors when none of the express causes of action in the securities Acts included that liability. *Id.*, at 180. It added the following:

> "Were we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions. See also *Chiarella* [v. *United States*, 445 U. S. 222, 228 (1980)]. Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b–5 recovery mandated by our earlier cases." *Ibid.*

The decision in *Central Bank* led to calls for Congress to create an express cause of action for aiding and abetting within the Securities Exchange Act. Then-SEC Chairman Arthur Levitt, testifying before the Senate Securities Subcommittee, cited *Central Bank* and recommended that aiding and abetting liability in private claims be estab-

lished. S. Hearing No. 103–759, pp. 13–14 (1994). Congress did not follow this course. Instead, in §104 of the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 757, it directed prosecution of aiders and abettors by the SEC. 15 U. S. C. §78t(e).

The §10(b) implied private right of action does not extend to aiders and abettors. The conduct of a secondary actor must satisfy each of the elements or preconditions for liability; and we consider whether the allegations here are sufficient to do so.

III

The Court of Appeals concluded petitioner had not alleged that respondents engaged in a deceptive act within the reach of the §10(b) private right of action, noting that only misstatements, omissions by one who has a duty to disclose, and manipulative trading practices (where "manipulative" is a term of art, see, *e.g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 476–477 (1977)) are deceptive within the meaning of the rule. 443 F. 3d, at 992. If this conclusion were read to suggest there must be a specific oral or written statement before there could be liability under §10(b) or Rule 10b–5, it would be erroneous. Conduct itself can be deceptive, as respondents concede. In this case, moreover, respondents' course of conduct included both oral and written statements, such as the backdated contracts agreed to by Charter and respondents.

A different interpretation of the holding from the Court of Appeals opinion is that the court was stating only that any deceptive statement or act respondents made was not actionable because it did not have the requisite proximate relation to the investors' harm. That conclusion is consistent with our own determination that respondents' acts or statements were not relied upon by the investors and that, as a result, liability cannot be imposed upon respondents.

Conclusion

A

Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the §10(b) private cause of action. It ensures that, for liability to arise, the "requisite causal connection between a defendant's misrepresentation and a plaintiff's injury" exists as a predicate for liability. *Basic Inc.* v. *Levinson*, 485 U. S. 224, 243 (1988); see also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 154 (1972) (requiring "causation in fact"). We have found a rebuttable presumption of reliance in two different circumstances. First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance. *Id.*, at 153–154. Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. The public information is reflected in the market price of the security. Then it can be assumed that an investor who buys or sells stock at the market price relies upon the statement. *Basic, supra*, at 247.

Neither presumption applies here. Respondents had no duty to disclose; and their deceptive acts were not communicated to the public. No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times. Petitioner, as a result, cannot show reliance upon any of respondents' actions except in an indirect chain that we find too remote for liability.

B

Invoking what some courts call "scheme liability," see, *e.g.*, *In re Enron Corp. Securities, Derivative, & "ERISA" Litigation*, 439 F. Supp. 2d 692, 723 (SD Tex. 2006), petitioner nonetheless seeks to impose liability on respondents even absent a public statement. In our view this approach does not answer the objection that petitioner did not in

fact rely upon respondents' own deceptive conduct.

Liability is appropriate, petitioner contends, because respondents engaged in conduct with the purpose and effect of creating a false appearance of material fact to further a scheme to misrepresent Charter's revenue. The argument is that the financial statement Charter released to the public was a natural and expected consequence of respondents' deceptive acts; had respondents not assisted Charter, Charter's auditor would not have been fooled, and the financial statement would have been a more accurate reflection of Charter's financial condition. That causal link is sufficient, petitioner argues, to apply *Basic*'s presumption of reliance to respondents' acts. See, *e.g.*, *Simpson*, 452 F. 3d, at 1051–1052; *In re Parmalat Securities Litigation*, 376 F. Supp. 2d 472, 509 (SDNY 2005).

In effect petitioner contends that in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect. 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.

As stated above, reliance is tied to causation, leading to the inquiry whether respondents' acts were immediate or remote to the injury. In considering petitioner's arguments, we note §10(b) provides that the deceptive act must be "in connection with the purchase or sale of any security." 15 U. S. C. §78j(b). Though this phrase in part defines the statute's coverage rather than causation (and so we do not evaluate the "in connection with" requirement of §10(b) in this case), the emphasis on a purchase or sale of securities does provide some insight into the deceptive acts that concerned the enacting Congress. See Black, Securities Commentary: The Second Circuit's Approach to the 'In Connection With' Requirement of Rule 10b–5, 53 Brooklyn L. Rev. 539, 541 (1987) ("[W]hile the 'in connec-

tion with' and causation requirements are analytically distinct, they are related to each other, and discussion of the first requirement may merge with discussion of the second"). In all events we conclude respondents' deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance. It was Charter, not respondents, that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did.

The petitioner invokes the private cause of action under §10(b) and seeks to apply it beyond the securities markets—the realm of financing business—to purchase and supply contracts—the realm of ordinary business operations. The latter realm is governed, for the most part, by state law. It is true that if business operations are used, as alleged here, to affect securities markets, the SEC enforcement power may reach the culpable actors. It is true as well that a dynamic, free economy presupposes a high degree of integrity in all of its parts, an integrity that must be underwritten by rules enforceable in fair, independent, accessible courts. Were the implied cause of action to be extended to the practices described here, however, there would be a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees. Our precedents counsel against this extension. See *Marine Bank* v. *Weaver*, 455 U. S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud"); *Santa Fe*, 430 U. S., at 479–480 ("There may well be a need for uniform federal fiduciary standards . . . . But those standards should not be supplied by judicial extension of §10(b) and Rule 10b–5 to 'cover the corporate universe'" (quoting Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83

Yale L. J. 663, 700 (1974))). Though §10(b) is "not 'limited to preserving the integrity of the securities markets,'" *Bankers Life*, 404 U. S., at 12, it does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way.

These considerations answer as well the argument that if this were a common-law action for fraud there could be a finding of reliance. Even if the assumption is correct, it is not controlling. Section 10(b) does not incorporate common-law fraud into federal law. See, *e.g.*, *SEC* v. *Zandford*, 535 U. S. 813, 820 (2002) ("[Section 10(b)] must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation"); *Central Bank*, 511 U. S., at 184 ("Even assuming . . . a deeply rooted background of aiding and abetting tort liability, it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts"); see also *Dura*, 544 U. S., at 341. Just as §10(b) "is surely badly strained when construed to provide a cause of action . . . to the world at large," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 733, n. 5 (1975), it should not be interpreted to provide a private cause of action against the entire marketplace in which the issuing company operates.

Petitioner's theory, moreover, would put an unsupportable interpretation on Congress' specific response to *Central Bank* in §104 of the PSLRA. Congress amended the securities laws to provide for limited coverage of aiders and abettors. Aiding and abetting liability is authorized in actions brought by the SEC but not by private parties. See 15 U. S. C. §78t(e). Petitioner's view of primary liability makes any aider and abettor liable under §10(b) if he or she committed a deceptive act in the process of providing assistance. Reply Brief for Petitioner 6, n. 2; Tr. of Oral Arg. 24. Were we to adopt this construction of §10(b), it would revive in substance the implied cause of action

against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud; and we would undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants. See *Alexander* v. *Sandoval*, 532 U. S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others"); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 143 (2000) ("At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings"); see also *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980) ("[W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure" (citations omitted)).

This is not a case in which Congress has enacted a regulatory statute and then has accepted, over a long period of time, broad judicial authority to define substantive standards of conduct and liability. Cf. *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. ___, ___ (2007) (slip op., at 19–20). And in accord with the nature of the cause of action at issue here, we give weight to Congress' amendment to the Act restoring aiding and abetting liability in certain cases but not others. The amendment, in our view, supports the conclusion that there is no liability.

The practical consequences of an expansion, which the Court has considered appropriate to examine in circumstances like these, see *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1104–1105 (1991); *Blue Chip*, 421 U. S., at 737, provide a further reason to reject petitioner's approach. In *Blue Chip*, the Court noted that extensive discovery and the potential for uncertainty and

disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies. *Id.*, at 740–741. Adoption of petitioner's approach would expose a new class of defendants to these risks. As noted in *Central Bank*, contracting parties might find it necessary to protect against these threats, raising the costs of doing business. See 511 U. S., at 189. Overseas firms with no other exposure to our securities laws could be deterred from doing business here. See Brief for Organization for International Investment et al. as *Amici Curiae* 17–20. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets. Brief for NASDAQ Stock Market, Inc., et al. as *Amici Curiae* 12–14.

C

The history of the §10(b) private right and the careful approach the Court has taken before proceeding without congressional direction provide further reasons to find no liability here. The §10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 358–359 (1991); *Blue Chip, supra*, at 729. Though the rule once may have been otherwise, see *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432–433 (1964), it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one, see, *e.g., Alexander, supra*, at 286–287; *Virginia Bankshares, supra*, at 1102; *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575 (1979). This is for good reason. In the absence of congressional intent the Judiciary's recognition of an implied private right of action

> "necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that '[t]he

> jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . ,' *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17 (1951), and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Cannon* v. *University of Chicago*, 441 U. S. 677, 746 (1979) (Powell, J., dissenting) (citations and footnote omitted).

The determination of who can seek a remedy has significant consequences for the reach of federal power. See *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509, n. 9 (1990) (requirement of congressional intent "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes").

Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the §10(b) private right should not be extended beyond its present boundaries. See *Virginia Bankshares, supra*, at 1102 ("[T]he breadth of the [private right of action] once recognized should not, as a general matter, grow beyond the scope congressionally intended"); see also *Central Bank, supra*, at 173 (determining that the scope of conduct prohibited is limited by the text of §10(b)).

This restraint is appropriate in light of the PSLRA, which imposed heightened pleading requirements and a loss causation requirement upon "any private action" arising from the Securities Exchange Act. See 15 U. S. C. §78u–4(b). It is clear these requirements touch upon the implied right of action, which is now a prominent feature of federal securities regulation. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U. S. 71, 81–82 (2006); *Dura*, 544 U. S., at 345–346; see also S. Rep. No. 104–98,

p. 4–5 (1995) (recognizing the §10(b) implied cause of action, and indicating the PSLRA was intended to have "Congress . . . reassert its authority in this area"); *id.*, at 26 (indicating the pleading standards covered §10(b) actions). Congress thus ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382, and n. 66 (1982); cf. *Borak*, *supra*, at 433. It is appropriate for us to assume that when §78u–4 was enacted, Congress accepted the §10(b) private cause of action as then defined but chose to extend it no further.

IV

Secondary actors are subject to criminal penalties, see, *e.g.*, 15 U. S. C. §78ff, and civil enforcement by the SEC, see, *e.g.*, §78t(e). The enforcement power is not toothless. Since September 30, 2002, SEC enforcement actions have collected over $10 billion in disgorgement and penalties, much of it for distribution to injured investors. See SEC, 2007 Performance and Accountability Report, p. 26, http://www.sec.gov/about/secpar2007.shtml (as visited Jan. 2, 2008, and available in Clerk of Court's case file). And in this case both parties agree that criminal penalties are a strong deterrent. See Brief for Respondents 48; Reply Brief for Petitioner 17. In addition some state securities laws permit state authorities to seek fines and restitution from aiders and abettors. See, *e.g.*, Del. Code Ann., Tit. 6, §7325 (2005). All secondary actors, furthermore, are not necessarily immune from private suit. The securities statutes provide an express private right of action against accountants and underwriters in certain circumstances, see 15 U. S. C. §77k, and the implied right of action in §10(b) continues to cover secondary actors who commit primary violations. *Central Bank*, *supra*, at 191.

Here respondents were acting in concert with Charter in

the ordinary course as suppliers and, as matters then evolved in the not so ordinary course, as customers. Unconventional as the arrangement was, it took place in the marketplace for goods and services, not in the investment sphere. Charter was free to do as it chose in preparing its books, conferring with its auditor, and preparing and then issuing its financial statements. In these circumstances the investors cannot be said to have relied upon any of respondents' deceptive acts in the decision to purchase or sell securities; and as the requisite reliance cannot be shown, respondents have no liability to petitioner under the implied right of action. This conclusion is consistent with the narrow dimensions we must give to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.

The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 06–43

STONERIDGE INVESTMENT PARTNERS, LLC, PETITIONER *v.* SCIENTIFIC-ATLANTA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 15, 2008]

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

Charter Communications, Inc., inflated its revenues by $17 million in order to cover up a $15 to $20 million expected cash flow shortfall. It could not have done so absent the knowingly fraudulent actions of Scientific-Atlanta, Inc., and Motorola, Inc. Investors relied on Charter's revenue statements in deciding whether to invest in Charter and in doing so relied on respondents' fraud, which was itself a "deceptive device" prohibited by §10(b) of the Securities Exchange Act of 1934. 15 U. S. C. §78j(b). This is enough to satisfy the requirements of §10(b) and enough to distinguish this case from *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994).

The Court seems to assume that respondents' alleged conduct could subject them to liability in an enforcement proceeding initiated by the Government, *ante,* at 15, but nevertheless concludes that they are not subject to liability in a private action brought by injured investors because they are, at most, guilty of aiding and abetting a violation of §10(b), rather than an actual violation of the statute. While that conclusion results in an affirmance of the judgment of the Court of Appeals, it rests on a rejec-

tion of that court's reasoning. Furthermore, while the Court frequently refers to petitioner's attempt to "expand" the implied cause of action,[1]—a conclusion that begs the question of the contours of that cause of action—it is today's decision that results in a significant departure from *Central Bank*.

The Court's conclusion that no violation of §10(b) giving rise to a private right of action has been alleged in this case rests on two faulty premises: (1) the Court's overly broad reading of *Central Bank*, and (2) the view that reliance requires a kind of super-causation—a view contrary to both the Securities and Exchange Commission's (SEC) position in a recent Ninth Circuit case[2] and our holding in *Basic Inc.* v. *Levinson*, 485 U. S. 224 (1988). These two points merit separate discussion.

I

The Court of Appeals incorrectly based its decision on the view 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 Communications, Inc., Securities Litigation*, 443 F. 3d 987, 992 (CA8 2006). The Court correctly explains why the statute covers nonverbal as well as verbal deceptive conduct. *Ante*, at 7. The allegations in this case—that respondents produced documents falsely claim-

---

[1] See *ante*, at 10 ("[w]ere the implied cause of action to be extended to the practices described here . . . "); *ante*, at 12 ("[t]he practical consequences of an expansion"); *ante*, at 14 ("Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for the Congress, not for us").

[2] See Brief for SEC as *Amicus Curiae* in *Simpson* v. *AOL Time Warner Inc.*, No. 04–55665 (CA9), p. 21 ("The reliance requirement is satisfied where a plaintiff relies on a material deception flowing from a defendant's deceptive act, even though the conduct of other participants in the fraudulent scheme may have been a subsequent link in the causal chain leading to the plaintiff's securities transaction").

ing costs had risen and signed contracts they knew to be backdated in order to disguise the connection between the increase in costs and the purchase of advertising—plainly describe "deceptive devices" under any standard reading of the phrase.

What the Court fails to recognize is that this case is critically different from *Central Bank* because the bank in that case did not engage in any deceptive act and, therefore, did not *itself* violate §10(b). The Court sweeps aside any distinction, remarking that holding respondents liable would "revive in substance the implied cause of action against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud." *Ante*, at 11–12. But the fact that Central Bank engaged in no deceptive conduct whatsoever—in other words, that it was at most an aider and abettor—sharply distinguishes *Central Bank* from cases that do involve allegations of such conduct. 511 U. S., at 167 (stating that the 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").

The Central Bank of Denver was the indenture trustee for bonds issued by a public authority and secured by liens on property in Colorado Springs. After default, purchasers of $2.1 million of those bonds sued the underwriters, alleging violations of §10(b); they also named Central Bank as a defendant, contending that the bank's delay in reviewing a suspicious appraisal of the value of the security made it liable as an aider and abettor. *Id.*, at 167–168. The facts of this case would parallel those of *Central Bank* if respondents had, for example, merely delayed sending invoices for set-top boxes to Charter. Conversely, the facts in *Central Bank* would mirror those in the case before us today if the bank had knowingly purchased real estate in wash transactions at above-market prices in

order to facilitate the appraiser's overvaluation of the security. *Central Bank*, thus, poses no obstacle to petitioner's argument that it has alleged a cause of action under §10(b).

II

The Court's next faulty premise is that petitioner is required to allege that Scientific-Atlanta and Motorola made it "necessary or inevitable for Charter to record the transactions as it did," *ante*, at 10, in order to demonstrate reliance. Because the Court of Appeals did not base its holding on reliance grounds, see 443 F. 3d, at 992, the fairest course to petitioner would be for the majority to remand to the Court of Appeals to determine whether petitioner properly alleged reliance, under a correct view of what §10(b) covers.[3] Because the Court chooses to rest its holding on an absence of reliance, a response is required.

In *Basic Inc.*, 485 U. S., at 243, we stated that "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." The Court's view of the causation required to demonstrate reliance is unwarranted and without precedent.

In *Basic Inc.*, we held that the "fraud-on-the-market" theory provides adequate support for a presumption in private securities actions that shareholders (or former

---

[3]Though respondents did argue to the Court of Appeals that reliance was lacking, see Brief for Appellee Motorola, Inc., in No. 05–1974 (CA8), p. 15, that argument was quite short and was based on an erroneously broad reading of *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164 (1994), as discussed, *supra*, at 3 and this page. The Court of Appeals mentioned reliance only once, stating that respondents "did not issue any misstatement relied upon by the investing public." 443 F. 3d, at 992. Furthermore, that statement was made in the context of the Court of Appeals' holding that a deceptive act must be a misstatement or omission—a holding which the Court unanimously rejects.

shareholders) in publicly traded companies rely on public material misstatements that affect the price of the company's stock. *Id.*, at 248. The holding in *Basic* is surely a sufficient response to the argument that a complaint alleging that deceptive acts which had a material effect on the price of a listed stock should be dismissed because the plaintiffs were not subjectively aware of the deception at the time of the securities' purchase or sale. This Court has not held that investors must be aware of the specific deceptive act which violates §10b to demonstrate reliance.

The Court is right that a fraud-on-the-market presumption coupled with its view on causation would not support petitioner's view of reliance. The fraud-on-the-market presumption helps investors who cannot demonstrate that they, *themselves*, relied on fraud that reached the market. But that presumption says nothing about causation from the other side: what an individual or corporation must do in order to have "caused" the misleading information that reached the market. The Court thus has it backwards when it first addresses the fraud-on-the-market presumption, rather than the causation required. See, *ante*, at 8. The argument is not that the fraud-on-the-market presumption is enough standing alone, but that a correct view of causation coupled with the presumption would allow petitioner to plead reliance.

Lower courts have correctly stated that the causation necessary to demonstrate reliance is not a difficult hurdle to clear in a private right of action under §10(b). Reliance is often equated with "'transaction causation.'" *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 341, 342 (2005). Transaction causation, in turn, is often defined as requiring an allegation that but for the deceptive act, the plaintiff would not have entered into the securities transaction. See, *e.g.*, *Lentell* v. *Merrill Lynch & Co.*, 396 F. 3d 161, 172 (CA2 2005); *Binder* v. *Gillespie*, 184 F. 3d 1059, 1065–1066 (CA9 1999).

Even if but-for causation, standing alone, is too weak to establish reliance, petitioner has also alleged that respondents proximately caused Charter's misstatement of income; petitioner has alleged that respondents knew their deceptive acts would be the basis for statements that would influence the market price of Charter stock on which shareholders would rely. Second Amended Consolidated Class Action Complaint ¶¶ 8, 98, 100, 109, App. 19a, 55a–56a, 59a. Thus, respondents' acts had the foreseeable effect of causing petitioner to engage in the relevant securities transactions. The Restatement (Second) of Torts §533, pp. 72–73 (1977), provides that "[t]he maker of a fraudulent misrepresentation is subject to liability . . . if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other." The sham transactions described in the complaint in this case had the same effect on Charter's profit and loss statement as a false entry directly on its books that included $17 million of gross revenues that had not been received. And respondents are alleged to have known that the outcome of their fraudulent transactions would be communicated to investors.

The Court's view of reliance is unduly stringent and unmoored from authority. The Court first says that if the petitioner's concept of reliance is adopted the implied cause of action "would reach the whole marketplace in which the issuing company does business." *Ante,* at 9. The answer to that objection is, of course, that liability only attaches when the company doing business with the issuing company has *itself* violated §10(b).[4] The Court next relies on

[4]Because the kind of sham transactions alleged in this complaint are unquestionably isolated departures from the ordinary course of business in the American marketplace, it is hyperbolic for the Court to conclude that petitioner's concept of reliance would authorize actions "against the entire marketplace in which the issuing company oper-

what it views as a strict division between the "realm of financing business" and the "ordinary business operations." *Ante*, at 10. But petitioner's position does not merge the two: A corporation engaging in a business transaction with a partner who transmits false information to the market is only liable where the corporation *itself* violates §10(b). Such a rule does not invade the province of "ordinary" business transactions.

The majority states that "[s]ection 10(b) does not incorporate common-law fraud into federal law," citing *SEC* v. *Zandford*, 535 U. S. 813 (2002). *Ante*, at 11. Of course, not every common-law fraud action that happens to touch upon securities is an action under §10(b), but the Court's opinion in *Zandford* did not purport to jettison all reference to common-law fraud doctrines from §10(b) cases. In fact, our prior cases explained that to the extent that "the antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud," it is because common-law fraud doctrines might be too restrictive. *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 388–389 (1983). "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." *Id.*, at 389. I, thus, see no reason to abandon common-law approaches to causation in §10(b) cases.

Finally, the Court relies on the course of action Congress adopted after our decision in *Central Bank* to argue that siding with petitioner on reliance would run contrary to congressional intent. Senate hearings on *Central Bank* were held within one month of our decision.[5] Less than one year later, Senators Dodd and Domenici introduced S. 240, which became the Private Securities Litigation

---

ates." *Ante*, at 11.

[5] See S. Rep. No. 104–98, p. 2 (1995) (hereinafter S. Rep.).

Reform Act of 1995 (PSLRA), 109 Stat. 737.[6] Congress stopped short of undoing *Central Bank* entirely, instead adopting a compromise which restored the authority of the SEC to enforce aiding and abetting liability.[7] A private right of action based on aiding and abetting violations of §10(b) was not, however, included in the PSLRA,[8] despite support from Senator Dodd and members of the Senate Subcommittee on Securities.[9] This compromise surely provides no support for extending *Central Bank* in order to immunize an undefined class of actual violators of §10(b) from liability in private litigation. Indeed, as Members of Congress—including those who rejected restoring a private cause of action against aiders and abettors—made clear, private litigation under §10(b) continues to play a vital role in protecting the integrity of our securities markets.[10] That Congress chose not to restore the aiding and

---

[6] *Id.*, at 1.

[7] The opinion in *Central Bank* discussed only private remedies, but its rationale—that the text of §10(b) did not cover aiding and abetting—obviously limited the authority of public enforcement agencies. See 511 U. S., at 199–200 (STEVENS, J., dissenting); see also S. Rep., at 19 ("The Committee does, however, grant the SEC express authority to bring actions seeking injunctive relief or money damages against persons who knowingly aid and abet primary violators of the securities laws").

[8] PSLRA, §104, 109 Stat. 757; see also S. Rep., at 19 ("The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation").

[9] See *id.*, at 51 (additional views of Sen. Dodd) ("I am pleased that the Committee bill grants the Securities and Exchange Commission explicit authority to bring actions against those who knowingly aid and abet primary violators. However, I remain concerned about liability in private actions and will continue work with other Committee members on this issue as we move to floor consideration"). Senators Sarbanes, Boxer, and Bryan also submitted additional views in which they stated that "[w]hile the provision in the bill is of some help, the deterrent effect of the securities laws would be strengthened if aiding and abetting liability were restored in private actions as well." *Id.*, at 49.

[10] *Id.*, at 8 ("The success of the U. S. securities markets is largely the

abetting liability removed by *Central Bank* does not mean that Congress wanted to exempt from liability the broader range of conduct that today's opinion excludes.

The Court is concerned that such liability would deter overseas firms from doing business in the United States or "shift securities offerings away from domestic capital markets." *Ante,* at 13. But liability for those who violate §10(b) "will not harm American competitiveness; in fact, investor faith in the safety and integrity of our markets *is* their strength. The fact that our markets are the safest in the world has helped make them the strongest in the world." Brief for Former SEC Commissioners as *Amici Curiae* 9.

Accordingly, while I recognize that the *Central Bank* opinion provides a precedent for judicial policymaking decisions in this area of the law, I respectfully dissent from the Court's continuing campaign to render the private cause of action under §10(b) toothless. I would re-

---

result of a high level of investor confidence in the integrity and efficiency of our markets. The SEC enforcement program and the availability of private rights of action together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws"); see also *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U. S. 299, 310 (1985) ("Moreover, we repeatedly have emphasized that implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action'"); Brief for Former SEC Commissioners as *Amici Curiae* 4 ("[L]iability [of the kind at issue here] neither results in undue liability exposure for non-issuers, nor an undue burden upon capital formation. Holding liable wrongdoers who actively engage in fraudulent conduct that lacks a legitimate business purpose does not hinder, but rather enhances, the integrity of our markets and our economy. We believe that the integrity of our securities markets is their strength. Investors, both domestic and foreign, trust that fraud is not tolerated in our nation's securities markets and that strong remedies exist to deter and protect against fraud and to recompense investors when it occurs").

verse the decision of the Court of Appeals.

III

While I would reverse for the reasons stated above, I must also comment on the importance of the private cause of action that Congress implicitly authorized when it enacted the Securities Exchange Act of 1934. A theme that underlies the Court's analysis is its mistaken hostility towards the §10(b) private cause of action.[11] *Ante,* at 13. The Court's current view of implied causes of action is that they are merely a "relic" of our prior "heady days." *Correctional Services Corp.* v. *Malesko,* 534 U. S. 61, 75 (2001) (SCALIA, J., concurring). Those "heady days" persisted for two hundred years.

During the first two centuries of this Nation's history much of our law was developed by judges in the common-law tradition. A basic principle animating our jurisprudence was enshrined in state constitution provisions guaranteeing, in substance, that "every wrong shall have a remedy."[12] Fashioning appropriate remedies for the viola-

[11]The Court does concede that Congress has now ratified the private cause of action in the PSLRA. See *ante,* at 15.

[12]Today, the guarantee of a remedy for every injury appears in nearly three-quarters of state constitutions. Ala. Const., Art. I, §13; Ark. Const., Art. II, §13; Colo. Const., Art. II, §6; Conn. Const., Art. I, §10; Del. Const., Art. I, §9; Fla. Const., Art. I, §21; Idaho Const., Art. I, §18; Ill. Const., Art. I, §12; Ind. Const., Art. I, §12; Kan. Const., Bill of Rights, §18; Ky. Const., §14; La. Const., Art. I, §22; Me. Const., Art. I, §19; Md. Const., Declaration of Rights, Art. 19; Mass. Const., pt. I, Art. 11; Minn. Const., Art. 1, §8; Miss. Const., Art. III, §24; Mo. Const., Art. I, §14; Mont. Const., Art. II, §16; Neb. Const., Art. I, §13; N. H. Const., pt. I, Art. 14; N. C. Const., Art. I, §18; N. D. Const., Art. I, §9; Ohio Const., Art. I, §16; Okla. Const., Art. II, §6; Ore. Const., Art. I, §10; Pa. Const., Art. I, §11; R. I. Const., Art. I, §5; S. C. Const., Art. I, §9; S. D. Const., Art. VI, §20; Tenn. Const., Art. I, §17; Tex. Const., Art. I, §13; Utah Const., Art. I, §11; Vt. Const., ch. I, Art. 4; W. Va. Const., Art. III, §17; Wis. Const., Art. I, §9; Wyo. Const., Art. I, §8; see also Phillips, The Constitutional Right to a Remedy, 78 N. Y. U. L. Rev. 1309, 1310, n. 6 (2003) (hereinafter Phillips).

tion of rules of law designed to protect a class of citizens was the routine business of judges. See *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803). While it is true that in the early days state law was the source of most of those rules, throughout our history—until 1975—the same practice prevailed in federal courts with regard to federal statutes that left questions of remedy open for judges to answer. In *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916), this Court stated the following:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said

---

The concept of a remedy for every wrong most clearly emerged from Sir Edward Coke's scholarship on Magna Carta. See 1 Second Part of the Institutes of the Laws of England (1797). At the time of the ratification of the United States Constitution, Delaware, Massachusetts, Maryland, New Hampshire, and North Carolina had all adopted constitutional provisions reflecting the provision in Coke's scholarship. Del. Declaration of Rights and Fundamental Rules §12 (1776), reprinted in 2 W. Swindler, Sources and Documents of United States Constitutions 198 (1973) (hereinafter Swindler); Mass. Const., pt. I, Art. XI (1780), reprinted in 3 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 1891 (F. Thorpe ed. 1909) (reprinted 1993) (hereinafter Thorpe); Md. Const., Declaration of Rights, Art. XVII (1776), in *id.*, at 1688; N. H. Const., Art. XIV (1784), in 4 *id.*, at 2455; N. C. Const., Declaration of Rights, Art. XIII (1776), in 5 *id.*, at 2787, 2788; see also Phillips 1323–1324. Pennsylvania's Constitution of 1790 contains a guarantee. Pa. Const., Art. IX, §11, in 5 Thorpe 3101. Connecticut's 1818 Constitution, Art. I, §12, contained such a provision. Reprinted in Swindler 145.

law.' (*Per* Holt, C. J., *Anon.*, 6 Mod. 26, 27.)"

Judge Friendly succinctly described the post-*Rigsby*, pre-1975 practice in his opinion in *Leist* v. *Simplot*, 638 F. 2d 283, 298–299 (CA2 1980):

> "Following *Rigsby* the Supreme Court recognized implied causes of action on numerous occasions, see, e.g., *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 . . . (1967) (sustaining implied cause of action by United States for damages under Rivers and Harbors Act for removing negligently sunk vessel despite express remedies of *in rem* action and criminal penalties); *United States v. Republic Steel Corp.*, 362 U.S. 482 . . . (1960) (sustaining implied cause of action by United States for an injunction under the Rivers and Harbors Act); *Tunstall* v. *Locomotive Firemen & Enginemen*, 323 U.S. 210 . . . (1944) (sustaining implied cause of action by union member against union for discrimination among members despite existence of Board of Mediation); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 . . . (1969) (sustaining implied private cause of action under 42 U.S.C. §1982); *Allen v. State Board of Elections*, 393 U.S. 544 . . . (1969) (sustaining implied private cause of action under §5 of the Voting Rights Act despite the existence of a complex regulatory scheme and explicit rights of action in the Attorney General); and, of course, the aforementioned decisions under the securities laws. As the Supreme Court itself has recognized, the period of the 1960's and early 1970's was one in which the 'Court had consistently found implied remedies.' *Cannon v. University of Chicago*, 441 U.S. 677, 698 . . . (1979)."

In a law-changing opinion written by Justice Brennan in 1975, the Court decided to modify its approach to private causes of action. *Cort* v. *Ash*, 422 U. S. 66 (constraining courts to use a strict four-factor test to determine whether

Congress intended a private cause of action). A few years later, in *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979), we adhered to the strict approach mandated by *Cort* v. *Ash* in 1975, but made it clear that "our evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U. S., at 698–699. That context persuaded the majority that Congress had intended the courts to authorize a private remedy for members of the protected class.

Until *Central Bank,* the federal courts continued to enforce a broad implied cause of action for the violation of statutes enacted in 1933 and 1934 for the protection of investors. As Judge Friendly explained:

> "During the late 1940's, the 1950's, the 1960's and the early 1970's there was widespread, indeed almost general, recognition of implied causes of action for damages under many provisions of the Securities Exchange Act, including not only the antifraud provisions, §§ 10 and 15(c)(1), see *Kardon v. National Gypsum Co.*, 69 F.Supp. 512, 513–14 (E.D.Pa.1946); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 (2 Cir. 1951) (Frank, J.); *Fratt v. Robinson*, 203 F.2d 627, 631–33 (9 Cir. 1953), but many others. These included the provision, § 6(a)(1), requiring securities exchanges to enforce compliance with the Act and any rule or regulation made thereunder, see *Baird v. Franklin*, 141 F.2d 238, 239, 240, 244–45 (2 Cir.), *cert. denied*, 323 U.S. 737 . . . (1944), and provisions governing the solicitation of proxies, see *J. I. Case Co. v. Borak*, 377 U.S. 426, 431–35 . . . (1964). . . . Writing in 1961, Professor Loss remarked with respect to violations of the antifraud provisions that with one exception 'not a single judge has expressed himself to the contrary.' 3 Securities Regulation 1763–64. See also Bromberg & Lowenfels, *supra,* §2.2 (462) (describing

> 1946–1974 as the 'expansion era' in implied causes of action under the securities laws). When damage actions for violation of §10(b) and Rule 10b–5 reached the Supreme Court, the existence of an implied cause of action was not deemed worthy of extended discussion. *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 . . . (1971)." *Leist*, 638 F. 2d, at 296–297 (footnote omitted).

In light of the history of court-created remedies and specifically the history of implied causes of action under §10(b), the Court is simply wrong when it states that Congress did not impliedly authorize this private cause of action "when it first enacted the statute." *Ante*, at 16. Courts near in time to the enactment of the securities laws recognized that the principle in *Rigsby* applied to the securities laws.[13] Congress enacted §10(b) with the understanding that federal courts respected the principle that every wrong would have a remedy. Today's decision simply cuts back further on Congress' intended remedy. I respectfully dissent.

---

[13] See, *e.g.*, *Slavin* v. *Germantown Fire Ins. Co.*, 174 F. 2d 799 (CA3 1949); *Baird* v. *Franklin*, 141 F. 2d 238, 244–245 (CA2) ("The fact that the statute provides no machinery or procedure by which the individual right of action can proceed is immaterial. It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none"), cert. denied, 323 U. S. 737 (1944); *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (ED Pa. 1946) ("[T]he right to recover damages arising by reason of violation of a statute . . . is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly").

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BT TRIPLE CROWN MERGER CO., INC., B TRIPLE CROWN FINCO, LLC and T TRIPLE CROWN FINCO, LLC, Plaintiffs, - against - CITIGROUP GLOBAL MARKETS INC., CITIBANK, N.A., CITICORP USA, INC., CITICORP NORTH AMERICA, INC., MORGAN STANLEY SENIOR FUNDING, INC., CREDIT SUISSE, CAYMAN ISLANDS BRANCH, CREDIT SUISSE SECURITIES (USA) LLC, THE ROYAL BANK OF SCOTLAND PLC, RBS SECURITIES CORPORATION, WACHOVIA BANK, NATIONAL ASSOCIATION, WACHOVIA INVESTMENT HOLDINGS, LLC and WACHOVIA CAPITAL MARKETS, LLC, Defendants.	Index No. **VERIFIED COMPLAINT**

Plaintiffs BT Triple Crown Merger Co., Inc. ("Mergerco"), B Triple Crown Finco, LLC ("B Finco"), and T Triple Crown Finco, LLC ("T Finco") (collectively, the "Purchasers"), by their undersigned attorneys, for their complaint against Citigroup Global Markets Inc., Citibank, N.A., Citicorp USA, Inc., Citicorp North America, Inc. (collectively, "Citigroup"), Morgan Stanley Senior Funding, Inc. ("Morgan Stanley"), Credit Suisse, Cayman Islands Branch, Credit Suisse Securities (USA) LLC (collectively, "Credit Suisse"), The Royal Bank of Scotland plc, RBS Securities Corporation (collectively, "RBS"), Wachovia Bank, National Association, Wachovia Investment Holdings, LLC, and Wachovia Capital Markets, LLC (collectively,

"Wachovia"), allege upon knowledge as to themselves, and otherwise upon information and belief, as follows:

NATURE OF THE ACTION

1. This is an action to enforce a binding commitment made by a group of lenders to finance one of the largest leveraged buyouts in history.

2. The defendants, together with Deutsche Bank AG New York Branch, Deutsche Bank AG Cayman Islands Branch, and Deutsche Bank Securities Inc. (collectively with defendants, the "Banks") competed energetically in 2006 for the opportunity to provide more than $22 billion in financing for the Purchasers' acquisition of Clear Channel Communications, Inc. ("Clear Channel"). Eager to secure a high-profile engagement and more than $400 million in fees, the Banks offered aggressive terms and signed an initial commitment letter in November 2006, later amended in May 2007 (the "Commitment Letter," attached hereto as Exhibit 1), that set forth their obligation to provide fully underwritten, long-term financing to the Purchasers for the Clear Channel transaction.

3. The financing called for in the Commitment Letter – in scale, in pricing and in duration -- was essential to the Purchasers' bid to acquire Clear Channel, because it enabled the Purchasers to enter the merger agreement with no financing contingency and to close the transaction without threat of market risk until June 12, 2008. The Commitment Letter sets forth the material terms of the debt financing in detail -- here, there can be no uncertainty as to the key terms of the financing agreed to by the Purchasers and the Banks, because the Commitment Letter is itself a lengthy, detailed contract setting out specific financing terms – and the parties further agreed in the Letter

that the remaining provisions of any final documentation would be consistent with similar provisions appearing in documents for precedent transactions in which the private-equity sponsors of the Purchasers had participated. The use of this form was a usual and accepted way of documenting transactions for the private equity firms. Clear Channel's board of directors considered the Purchasers' offer to be superior to other bids in large part based on the strength of the Banks' commitments and recommended the Purchasers' bid to Clear Channel's shareholders on that basis.

4. Despite having made a commitment that was not subject to any market conditionality, the Banks have balked at their obligations due to a simple case of lenders' remorse. As conditions in the credit markets worsened in mid-2007 – and as the potential losses to the Banks from the financing they had agreed to provide began to outstrip the huge fees the Banks expected to earn – the Banks plotted to shift losses to the Purchasers or to escape their commitment.

(a) They threatened to disrupt the financing for an altogether separate transaction with a different company in an effort to force concessions in the Clear Channel financing.

(b) They explicitly asked the plaintiffs with "hat in hand" to recut the deal by changing key economic terms, offsetting the losses the Banks feared they would suffer of approximately $2.65 billion by shifting them to the Purchasers and to certain of Clear Channel's public stockholders who had agreed to retain a stake in the Company after the transaction.

(c) After the shareholder vote approving the transaction, they strung the Purchasers along by falsely insisting that they would honor the

Commitment Letter's terms, all the while stalling to buy time to delay the transaction.

(d) They then pretended to negotiate the final documentation in good faith, but in reality inserted into the final documents poison provisions squarely contrary to the Commitment Letter, normal sponsor precedent and communications to the Sponsors and others, knowing that the Sponsors would never agree. These terms can only have been designed ultimately to kill the deal. Chief among these was their proposed replacement of stable long-term financing (with maturities ranging from 6 to 8 years) with a commercially unreasonable and unstable package that would remove critical liquidity sources, including the use of the Company's own cash flow or the proceeds of the financing, and elimination of the Company's ability to extend inter-company financing to meet up to $4.3 billion in unanticipated accelerated refinancing obligations during the period of the permanent financing the Banks had promised – effectively transforming the long-term financing the Purchasers originally bargained for into an altogether different, unworkable two- to three-year, short-term deal.

(e) They demanded these and other terms in an attempt to blame the failure of the transaction on the Purchasers, knowing that the Purchasers could never agree – that no rational purchaser *should* ever agree – to these unprecedented terms and counting on the Purchasers to resist them.

(f) They refused in bad faith to participate in the crucial steps necessary to prepare for financing the transaction.

In the end, the Banks intentionally prevented the Purchasers from completing the Clear Channel transaction.

The Banks Have Breached Their Commitments Seeking To Kill The Clear Channel Deal

5. In December 2007 and January 2008, the Banks approached the Purchasers more than once, acknowledging that they had their "hat in hand" and sought to recut the deal. The Banks' message was plain: they claimed that the financing would result in their having to take immediate "mark to market" losses of approximately $2.65 billion on day one, and -- admitting that they had no right to re-set the terms of the Commitment Letter – they nonetheless sought to transfer some or all of those losses onto the Purchasers.

6. The Purchasers could not, and did not, accede to this request, because their tightly-negotiated Merger Agreement with Clear Channel depended on the specific terms of the Commitment Letter. This could not have surprised the Banks. When they signed the Commitment Letter (as well as prior iterations of that agreement in November 2006 and April 2007), the Banks agreed to assume the risk that market conditions might change over time. The allocation of this market risk was heavily negotiated between the parties, because the length of time between signing the Commitment Letter and closing the transaction was longer than usual due to regulatory issues presented by the deal. The Banks agreed to assume those risks to secure their participation in the deal and to gain the substantial fees that came with it. As a result, the Commitment Letter unambiguously allocates *to the Banks* the risk that conditions in the debt markets might change. This was part of the agreement from the start. Moreover, the

Banks knew that the Purchasers relied on the structure and pricing of the debt package reflected in the Commitment Letter when they agreed to pay the price they agreed with Clear Channel to pay for the Company. The Banks knew that the entirety of the transaction rested upon them honoring their fully underwritten commitment on exactly the terms that had been committed to in May 2007.

7. Rebuffed in their efforts to re-open the Commitment Letter, the banks resorted to pretext and misdirection when the time came to finally document their agreed-upon financing agreements. Their deceptive tactics have been intended to delay and then prevent outright the merger from going forward. The centerpiece of the Banks' scheme has been their demand that the Purchasers accept material terms in the final documentation that are squarely at odds with both the precise agreements the Banks made in the Commitment Letter and what the Banks knew to be the understanding of the parties. In the Commitment Letter, the parties also agreed that the provisions of the final credit agreement documentation would contain provisions that are no less advantageous than similar provisions contained in the credit documentation for other transactions involving the sponsors of the Purchasers (or what the Commitment Letter termed "Sponsors Precedent"). The unprecedented terms insisted upon by the Banks show that the Banks did not merely seek to re-negotiate their commitments; rather, they sought to avoid those commitments altogether, by making it impossible from a financial, structural and risk point of view for the Purchasers to accept their proposals, causing the financing arrangements, and thus the Clear Channel transaction, to fall apart. They also insisted upon terms that are inconsistent with the parties' agreement to negotiate terms which are no less advantageous than Sponsors Precedent.

8. For example, the Banks have demanded literally unworkable limitations on Clear Channel's ability to repay its existing indebtedness at maturity during the period of the financing, in a way that the Banks know could effectively convert the long-term financing agreed to in the Commitment Letter into a short-term 3-year bridge loan. None of the restrictions insisted upon by the Banks are contemplated in the Commitment Letter; indeed, the Banks' proposed restrictions are squarely contrary to the Commitment Letter. The Banks would restrict Clear Channel's ability to use its own cash after three years to repay existing indebtedness as it comes due -- even though the Commitment Letter expresses no such limitation whatever. Likewise, the Banks would restrict the Company's ability to use the new revolving credit facility to repay existing indebtedness -- even though the Commitment Letter expressly states that the revolving facility may be used for "general corporate purposes" and otherwise does not restrict such use.

9. The restrictions on the use of the revolving credit facility and other proceeds for repayment of existing debt insisted upon by the Banks, and the limitation they demand be placed on the Company's ability to use its own cash to do so, is utterly inconsistent with any and all plausibly relevant Sponsors Precedent. Over the past weeks, the Purchasers have shared with the Banks their analysis of Sponsors Precedent, including e*ven those deals cited by the Banks as relevant and precedential*, and demonstrated that the Banks' position simply cannot be maintained in good faith. But the Banks have refused to explain themselves and have declined to share their own analysis of precedent transactions with the Purchasers. Their refusal to do so speaks for itself.

10. The refinancing terms currently insisted upon by the Banks are inconsistent even with presentations and communications made by the Banks themselves during an earlier period, when the transaction appeared more favorable to them and they were not searching for the exits, as they surely are now. The Banks repeatedly presented financial models and other material that plainly show they understood and agreed that Clear Channel would be permitted to use proceeds of the new financing, including the revolving credit facility, to repay the existing notes as they came due through the term of the financing. These communications by the Banks are plain evidence that the demands made by the Banks in recent weeks are nothing more than an after-the-fact fabrication manufactured to provide the Banks with a way of derailing the financing, shifting the risks they had agreed to bear, and killing the Clear Channel deal.

11. The Banks' conduct is especially appalling because the financing commitments they are flouting are the glue that holds commercial transactions together. A lender's promise to supply financing prompts buyers and sellers to devote enormous amounts of time and money to make the transaction succeed. Clear Channel's shareholders have approved this merger, and regulators have cleared it. The expectations of the parties to the transaction, their employees, their shareholders, and other stakeholders all depend upon the reliability of the Banks' commitment. If the Banks' promises are not worth the paper on which they are written, commercial transactions – from the most basic to the highly complex – cannot work. Relying on the Banks' promises, Clear Channel and the Purchasers expended enormous time, energy and money on completing the transactions. The fraud and bad faith demonstrated by the Banks

cannot be allowed to stand. The Court should require the Banks to provide the financing they originally promised to provide for the Clear Channel merger.

12. By their unlawful conduct and willful breach, the Banks will have effectively succeeded in reallocating to the Purchasers (as well as to Clear Channel and its shareholders) the market risk the Banks expressly agreed in the Commitment Letter to assume unless the Court stops them.

13. More fundamentally, as a result of defendants' bad faith and willful breach of their contractual obligations, the Clear Channel transaction – which has received the approval of Clear Channel's shareholders, as well as regulators – cannot proceed. Indeed, the same deterioration in the credit markets that has rendered the funding commitment unpalatable to the Banks has made it impossible for the Purchasers to secure similar replacement financing, and alternative debt financing is not available. There essentially is no market for certain of the specialized forms of debt instruments that the Commitment Letter contemplates. The funding that the Banks pledged to provide is an indispensable component of the Purchasers' acquisition of Clear Channel.

14. Not only is the financing the Banks agreed to provide unique, but the opportunity for the Purchasers to own Clear Channel is one-of-a-kind. The Purchasers are prepared and ready to complete the transaction. Unless the Banks satisfy their obligations, the unique contractual benefits for which the Purchasers bargained will be lost.

15. The Purchasers accordingly have no adequate remedy at law. The Court should order specific performance to require defendants to honor their obligations under the Commitment Letter.

THE PARTIES

16. Plaintiff Mergerco is a Delaware corporation with its principal offices located at 111 Huntington Avenue, Boston, Massachusetts 02199 and 100 Federal Street, 35th Floor, Boston, Massachusetts 02110. Mergerco was established by Bain Capital Partners, LLC and Thomas H. Lee Partners, L.P. and certain of their affiliates (collectively, the "Sponsors").

17. Plaintiff B Finco is a Delaware limited liability company with its principal office located at 111 Huntington Avenue, Boston, Massachusetts 02199.

18. Plaintiff T Finco is a Delaware limited liability company with its principal office located at 100 Federal Street, 35th Floor, Boston, Massachusetts 02110.

19. Defendant Citigroup Global Markets Inc. is a New York corporation with its principal office located at 388 Greenwich Street, New York, New York 10013.

20. Defendant Citibank, N.A. is a national banking association with its principal office located at 399 Park Avenue, New York, New York 10043.

21. Defendant Citicorp USA, Inc. is a Delaware corporation with its principal office located at 450 Mamaroneck Avenue, Harrison, New York 10528.

22. Defendant Citicorp North America, Inc. is a Delaware corporation with its principal office located at 399 Park Avenue, New York, New York 10043.

23. Defendant Morgan Stanley Senior Funding, Inc. is a Delaware corporation with its principal office located at 1585 Broadway, New York, New York 10036.

24. Defendant Credit Suisse, Cayman Islands Branch is a branch of a Swiss bank with its principal United States office located at 11 Madison Avenue, New York, New York 10010.

25. Defendant Credit Suisse Securities (USA) LLC is a Delaware limited liability company with its principal office located at 11 Madison Avenue, New York, New York 10010.

26. Defendant The Royal Bank of Scotland plc is a British corporation with its principal United States office located at 101 Park Avenue, New York, New York 10178.

27. Defendant RBS Securities Corporation is a Delaware corporation with its principal office located at 101 Park Avenue, New York, New York 10178.

28. Defendant Wachovia Bank, National Association is a national banking association with its principal office located at 301 South College Street, Charlotte, North Carolina 28288.

29. Defendant Wachovia Investment Holdings, LLC is a Delaware limited liability company with its principal office located at 301 South College Street, Charlotte, North Carolina 28288.

30. Defendant Wachovia Capital Markets, LLC is a Delaware limited liability company with its principal office located at 301 South College Street, Charlotte, North Carolina 28288.

JURISDICTION AND VENUE

31. This Court has jurisdiction over defendants pursuant to CPLR §§ 301 and 302(a), as well as the terms of the Commitment Letter, in which each of the defendants agreed to submit to the jurisdiction of any state or federal court sitting in New York City, and agreed that all claims in respect of any action arising out of or relating to the Commitment Letter shall be heard in such court.

32. Venue is proper in New York County pursuant to CPLR § 501 because, pursuant to the terms of the Commitment Letter, each of the defendants consented to venue in any state or federal court sitting in New York City and waived any potential defense based on venue or inconvenience of this forum.

FACTUAL ALLEGATIONS

The Auction for Clear Channel

33. Clear Channel, a Texas corporation headquartered in San Antonio, is the largest radio and outdoor advertising company in the United States, and has significant international operations, with $6.8 billion in annual revenues and $2.4 billion in cash flow (as measured by Adjusted EBITDA). Clear Channel owns through subsidiaries more than 900 radio stations and a leading national radio network in the United States. It also has equity interests in various international radio broadcasting companies. In addition, Clear Channel owns or operates through subsidiaries more than 209,000 outdoor advertising displays in the United States and 688,000 internationally.

Clear Channel also owns through subsidiaries a full-service media representation firm that sells national spot advertising time for clients in the radio and television industries.

34. As described above, Clear Channel's board of directors conducted a highly competitive auction process in 2006. The board required that bidders submit a fully underwritten, "no outs" financing commitment letter along with their proposal. The board carefully reviewed the financing commitments contained in the competing proposals and, in selecting the bid submitted by the Purchasers, the board relied on the fact that the Purchasers' financing was fully committed. Indeed, each bidder knew that to win the auction, fully committed financing with little or no conditionality was an essential element of the bid. After the board accepted the proposal, the Purchasers and BT Triple Crown Capital Holdings III, Inc. (now known as CC Media Holdings, Inc.) ("New Holdco") entered into an amended Agreement and Plan of Merger dated May 17, 2007 (the "Merger Agreement") with Clear Channel, which provides for the merger of Mergerco, an entity established by the Sponsors, with and into Clear Channel.

The Parties' Binding Commitment Letter

35. When they signed the Commitment Letter (as well as prior iterations of that agreement in November 2006 and April 2007), the Banks agreed to assume the risk that market conditions might change over time. The allocation of risk of changes in market conditions was heavily negotiated between the parties; indeed, the length of the regulatory process to acquire Clear Channel was of primary concern in determining the length of their commitment and, therefore, the length of time the Banks would be exposed to the risk that conditions could change. The Banks agreed to assume those risks to secure their lucrative participation in the deal. As a result, the Commitment

Letter unambiguously allocates *to the Banks* the risk that conditions in the debt markets might change.

36. The irrevocability of the Commitment Letter regardless of market conditions was absolutely essential to the deal struck by the Purchasers with the Banks. Clear Channel had clearly indicated that without this assurance, the Purchasers would not be selected to pursue the transaction in the first instance. Under the Merger Agreement negotiated between the Purchasers and Clear Channel, the Purchasers did not have the right to terminate the transaction if their financing fell through; thus, they negotiated a deal with the Banks for "certain funds" to ensure that the financing would be in place regardless of whether market conditions might change between the time that the deal was signed and the time that the Banks were obligated to fund their commitment. The Commitment Letter plainly requires the Banks to provide funding even if they are unable to syndicate financing for the transaction. This provision demonstrates that the sophisticated parties that signed the Commitment Letter expressly contemplated the situation in which conditions in the debt markets might become so unfavorable that the Banks would have to hold their committed indebtedness on their balance sheets, and that the parties agreed unequivocally that the Banks' responsibilities would be unchanged in that event. The Banks understood and competed for the engagement by offering the Purchasers precisely the assurance they required.

37. The commitments made by the Banks played an instrumental role in allowing the Clear Channel deal to be struck. The Clear Channel board of directors specifically required that bidders submit financing commitment letters with their proposals, and the board engaged financial advisors to assist it in evaluating the terms of

those commitments. The board pointed to the tight terms of the Commitment Letter as one of the reasons they chose to accept the Sponsors' proposal over proposals submitted by the competing bidder. Later, after certain Clear Channel shareholders sought to have the Purchasers' proposal improved, the Banks devised a financing package that would require a comparatively small amount of collateral – a so-called "collateral-lite" structure – and they persuaded the Purchasers that this structure was superior. It was only after the Banks competed for the right to provide this *additional* long-term, fully committed financing, as reflected in the Commitment Letter, that the Purchasers, in April 2007, were able to increase their offer by approximately $800 million. That increased offer in turn allowed the Purchasers to secure the final approval of Clear Channel's board of directors and, ultimately, its shareholders for the acquisition. .

38. In the Commitment Letter, the Banks agreed to provide $22.125 billion in financing to Mergerco to fund the acquisition of Clear Channel, through three types of credit facilities:

(a) $18.525 billion in senior secured credit facilities (the "Senior Secured Facilities") with maturities up to 7 1/2 years, including a $2 billion revolving credit facility;

(b) $1 billion senior secured receivables-backed 6-year revolving credit facility (the "Receivables Facility"); and

(c) $2.6 billion senior unsecured 8-year bridge facility (the "Senior Bridge Facility"), pending the issuance by Mergerco or Clear Channel of Senior Notes yielding proceeds in that amount.

39. In particular, the Commitment Letter provides that the following entities will fund the following credit facilities in the following amounts:

Bank	*Percent Share*	*Senior Secured Facilities*	*Receivables Facility*	*Senior Bridge Facility*	*Totals*
Citigroup Global Markets Inc.	18.750%	$3,473,437,500	$187,500,000	$487,500,000	$4,148,437,500
Morgan Stanley Senior Funding Inc.	18.750%	3,473,437,500	187,500,000	487,500,000	4,148,437,500
Credit Suisse, Cayman Islands Branch	14.583%	2,701,500,750	145,830,000	379,158,000	3,226,488,750
The Royal Bank of Scotland plc	14.583%	2,701,500,750	145,830,000	379,158,000	3,226,488,750
Wachovia Bank, National Association	14.584%	2,701,686,000	145,840,000	379,184,000	3,226,710,000
Deutsche Bank AG New York Branch	18.750%	3,473,437,500	187,500,000	487,500,000	4,148,437,500
Totals	100.000%	$18,525,000,000	$1,000,000,000	$2,600,000,000	$22,125,000,000

40. The Commitment Letter is a fully negotiated and enforceable agreement. The terms and conditions of the financing, set forth in the exhibits to the Commitment Letter, include all of the material terms and otherwise provide that the terms of the financing will be no less favorable to the Purchasers than terms contained in credit agreement documentation in similar transactions involving the same private-equity firms that serve as the sponsors of the Purchasers. The Commitment Letter does not permit the Banks to insist on terms less favorable than customary because of changes in the credit markets. Specifically, the Commitment Letter provides that the documentation for the various credit facilities:

> shall contain the terms and conditions set forth in this Commitment Letter and shall be customary for affiliates of the Sponsors . . . . The [documentation] shall contain only those mandatory prepayments, representations, warranties, covenants and events of default expressly set forth in this Exhibit . . . and with standards, qualifications, thresholds, exceptions, "baskets" and grace and cure periods to be mutually agreed but in no event less favorable than customary for facilities and transactions of this type with affiliates of the Sponsors ("Sponsors Precedent").

41. The purpose of this language is to provide further assurances, both to the parties, as well as to the Clear Channel board, that there is a meeting of the minds on how the gaps in the final documentation – that is, those provisions other than the material terms specifically spelled out in the Commitment Letter – will be filled in. Clear Channel's board of directors placed heavy reliance on this aspect of the Commitment Letter. In reviewing and comparing the competing bids and financing commitments, the board's financial advisor informed the Board that the inclusion of this "Sponsors Precedent" language provided a further assurance that the deal would close as agreed.

42. In exchange for these commitments, the Banks are entitled to receive over $400 million in fees from Mergerco, calculated as a percentage of the total commitments they agreed to provide, as well as other fees and payments.

43. The Banks' commitment to fund the facilities is subject to only limited and specific conditions, as described in the Commitment Letter (including the exhibits thereto). The paragraph of the Commitment Letter dealing with the assurance of funding is expressly referred to in the Commitment Letter as the "Certain Funds Provision," underscoring the parties' agreement on the certainty of funding. That paragraph explicitly states:

> Notwithstanding anything in this Commitment Letter, the Fee Letter, the Credit Facilities Documentation or any other letter agreement or other undertaking concerning the financing of the transactions contemplated hereby to the contrary, the only conditions to availability of the Credit Facilities on the Closing Date are set forth in each of the relevant Term Sheets under the heading "Initial Conditions" and in Exhibit E.

44. Expressly excepted from the "conditions to the availability of the Credit Facilities" is the change in market conditions risk. The Commitment Letter

allocates that risk to the Banks. Although Exhibit E contains a limited exception for Material Adverse Effect, that exception is limited to events disproportionately affecting the Company of a kind not applicable here.

45. Furthermore, as noted, the length of time covered by the Commitment Letter – extending to June 12, 2008 – is unusually long, because the parties anticipated that a significant period of time would be required to seek and obtain the appropriate regulatory approvals for the transaction. The need for a long-term commitment, with the attendant risks the parties would bear as a result, formed an essential part of the bargain represented in the Commitment Letter. The Banks took additional risk owing to the duration of the commitment.

Defendants Seek to Renege
on Their Obligations Under the Commitment Letter

46. Almost immediately after they executed the Commitment Letter – and although the Commitment Letter contains no "out" that would excuse the Banks' performance due to market conditions -- the Banks revealed their intention either to expose the Purchasers to risk the Banks had assumed under their commitments or to deny financing altogether. Precipitated by events in the market beginning in June 2007, credit conditions tightened substantially and financial institutions began demanding higher interest rates and more restrictive covenants in their lending arrangements. The Banks realized that if they closed the Clear Channel-related loans on the terms to which they had committed in the Commitment Letter, they would be unable to syndicate much, if any, of the debt and would potentially face billions of dollars in "mark-to-market" losses.

47. As early as July 2007, an internal analysis from one of the Banks revealed the Banks' unilateral expectation that the existing and *still binding* terms of the Commitment Letter would be changed to "make us whole." But the parties had specifically negotiated the allocation of risk in the event that market conditions changed. The parties agreed in the Commitment Letter that the Banks could not refuse to finance the transaction even if market conditions made it impossible to syndicate the debt; likewise, if the markets were to make the terms of the Commitment Letter less favorable than current market terms to the Purchasers, the Purchasers had no right to renegotiate more favorable terms.

48. And so the Banks undertook a concerted scheme to avoid their contractual obligations to plaintiffs by numerous methods, including attempting to renegotiate previously agreed-upon rates and terms, pretextual arguments, continual delay, insistence on terms contrary to Sponsors Precedent, and refusals to agree upon transaction documentation on terms consistent with the Commitment Letter. On information and belief, these tactics were authorized at senior levels of the Banks. They were part of a coordinated effort among defendants to seek to walk away from or modify their commitments with respect to the Clear Channel transaction.

49. In their effort to re-cut the deal, the Banks resorted to coercive threats. In September 2007, as lead financing bank Citigroup prepared to provide financing to one of the Sponsors for an entirely different transaction between separate parties, it communicated to that Sponsor that, unless Citigroup received meaningful concessions that reduced its exposure on the looming Clear Channel transaction, Citigroup would refuse to commit to its share of a fully-negotiated financing for the

unrelated deal that was then presented. The Purchasers rejected this illegitimate demand, and Citigroup's threat evaporated.

50. The Banks then took a different tack. As credit market conditions continued to deteriorate, they continually delayed delivery of draft financing documentation despite numerous requests by the Purchasers. Despite knowing that the closing could be imminent, the Banks still had not delivered drafts of the Credit Agreement and Description of Notes by late November 2007.

51. On December 11, 2007, the Banks came to the Sponsors' offices in Boston and tried to renegotiate the terms of the binding Commitment Letter, which they had no legal right to do. In fact, acknowledging that they had no right to change the terms of the Commitment Letter, the Banks explicitly described their request as "hat in hand." The presentation highlighted the challenging debt marketplace, the purported difficulties the Banks faced in syndicating the debt, and the more than $1.67 billion in "mark-to-market" write-downs the Banks expected to suffer unless, they said, the Purchasers agreed to restructure the deal. The Banks proposed, although they acknowledged they had no right to do so under the Commitment Letter, to shift more than $600 million of that loss to the Purchasers, the Sponsors, and the public shareholders of Clear Channel who have committed to roll over their existing equity into the transaction, in an attempt to renegotiate a deal to which they had firmly committed months earlier. Having entered into a tightly-negotiated Merger Agreement with Clear Channel in reliance on the terms in the Commitment Letter, which allocated this market risk to the Banks, the Purchasers did not agree to restructure the deal with the Banks. Undeterred, the Banks emailed the Purchasers in January 2008 an "updated" presentation, in which

they then estimated that if the Banks honored their commitments in the Commitment Letter, they would suffer "mark-to-market" losses in excess of $2.65 billion because of further deterioration in the credit markets.

52. Finally, after the Sponsors rejected Citigroup's threat and the Banks' "hat in hand" requests for changes in the financing terms, the Banks resorted to pretextual negotiations, in which they fraudulently represented that they intended to live up to their commitments, when, in fact, they had no real intention of doing so. The Banks insisted upon inserting terms into the final documentation that were wholly inconsistent with the Commitment Letter and were designed to make it impossible for the Purchasers to proceed with the transaction. These "new" terms from the Banks were inconsistent even with the understanding of the Commitment Letter that the Banks themselves had evidenced in the period of months prior to the change in market conditions – that is, during the period in which the Banks remained eager to participate in the transaction. In short, the Banks' proposals were not genuine proposals at all, but instead were demanded in bad faith, and the Banks did not negotiate, even as they purported to take part in the back-and-forth between the two sides. Instead, the Banks balked.

53. After a lengthy delay, on February 8, 2008, the Banks presented to the Sponsors drafts of the Credit Agreement to be entered into between Mergerco (or the surviving corporation Clear Channel) and the Banks and a Description of Notes for new senior notes to be issued by Mergerco (or the surviving corporation, Clear Channel). These documents signaled that the Banks were not serious about completing the deal: both documents were totally inconsistent with the material terms that had been agreed

upon in the Commitment Letter and with the Sponsors Precedent that had been incorporated by reference into the Commitment Letter.

54. Defendants knew that the draft Credit Agreement and Description of Notes they presented to the Sponsors did not comport with the binding obligations the Banks had assumed in the Commitment Letter. In fact, in advance of sending them over, a representative of the Banks told the Sponsors, in an unguarded moment, "You will hate them." That was an understatement. The Banks' drafts reflected unprecedented and literally commercially unacceptable terms that flatly contradicted the plain terms of the agreement that parties had reached.

Defendants Insist on Improper
Barriers to Refinancing Clear Channel's Existing Notes

55. For example, Clear Channel has approximately $1.8 billion of existing notes that will remain outstanding after the closing of the acquisition coming due during the term of the financing and, under the Banks's proposal, have no means to refinance.

56. The draft Credit Agreement and Description of Notes prepared by the Banks contain provisions that would prohibit the refinancing of $1.8 billion of these notes when they mature beginning in 2011, except in circumstances that defendants know or should know will not occur. Under the restrictions insisted upon by the Banks, Clear Channel will experience a liquidity crisis within three years of the acquisition. No such prohibitions or conditions were included in the Commitment Letter, which included as exhibits detailed terms and conditions for each part of the financing.

57. Nonetheless, the Banks' insistence on terms inconsistent with the Commitment Letter would prevent Clear Channel from using its cash or the revolving credit facility (or a so-called accordion expanding credit line) after 2010 to repay existing indebtedness. The Banks' draft Credit Agreement purports to do so by restricting use of cash flow, revolver and accordion proceeds to repay the debt unless Clear Channel has a "Leverage Ratio" of total consolidated indebtedness to consolidated operating cash flow (or consolidated EBITDA) of less than 6 to 1. This is a standard the Banks know the Company will not meet when the notes must be refinanced. Models prepared by the Banks and the Sponsors show that Clear Channel will not achieve a Leverage Ratio of less than 6 to 1 when the notes must be refinanced. The Banks' provision for this use of cash flow, revolving credit facility and accordion is, therefore, illusory.

58. There is no language in the Commitment Letter permitting the Banks to restrict Clear Channel's ability to use its own cash to repay its existing indebtedness (or "Existing Notes"). Nor is this restriction supported by the understanding that the parties reached at the time the agreement was struck.

59. There also is no support in the Commitment Letter for the entirely unworkable restriction the Banks sought to impose on Clear Channel's use of its revolving credit line. The Commitment Letter includes a $2 billion revolving credit facility in order to create the flexibility to use that facility to repay existing indebtedness as it matures. It states that:

> [t]he proceeds of the Revolving Loans will be used (i) to finance a portion of the Transactions, (ii) to finance the working capital needs of the Borrower and its subsidiaries, (iii) *for general corporate purposes of the Borrower* and its subsidiaries and (iv) *for any other purpose not*

> *prohibited* by the Senior Secured Credit Documentation, including restricted payments.

Commitment Letter, Ex. B, at 8 (emphasis added).

60. The Commitment Letter states that:

> The proceeds of loans in respect of the [accordion] will be used to finance the working capital needs, *general corporate purposes* and for any other purpose not prohibited by the Senior Secured Credit Documentation, including restricted payments; provided, that the amount of Incremental Term Loans [under the accordion] in excess of the Initial Incremental Amount *will only be used to refinance the Retained Existing Notes* (and if applicable, any remaining Repurchased Existing Notes) (whether at maturity thereof or through tender, redemption or otherwise).

Commitment Letter, Ex. B, at 9 (emphasis added). The proviso at the end of the quoted language explicitly provides that a portion of the accordion may be used to refinance the Existing Notes and may not be used for any other purpose. In addition, because the proviso limits the general corporate purposes for which a portion of the accordion may be used, it makes clear that the parties intended that general corporate purposes (for which both the revolver and accordion may be used) include the repayment of the Existing Notes.

61. The Commitment Letter explicitly provides that the revolving credit facility and the accordion may be used for "general corporate purposes," and for "any other purpose not prohibited by the Senior Secured Credit Documentation . . . ." This includes the basic corporate function of repaying the Company's debt as is matures. This is so fundamental that the parties would be expected to state any limitation on the use of funds for the repayment of existing indebtedness in explicit terms in the Commitment Letter.

62. The Commitment Letter does not state that the Banks could limit and effectively prevent the Company from using the revolving credit facility or the accordion to repay its existing indebtedness. Nevertheless, the Banks have sought to fabricate a basis for their position, citing language in the Commitment Letter that contemplates restrictions on "certain permitted financings" of the Company's Existing Notes and, therefore, they say, contemplates the restrictions they have proposed on the use of the revolving credit facility and the accordion line of credit. This is a sham. "Certain permitted refinancings" refers to a category of indebtedness that customarily is specified in credit agreements as new debt that is permitted to be incurred later, but is not specifically contemplated by the documentation itself or by the commitments of the lending banks. It is clear, therefore, that "certain permitted refinancings" do not include the revolving credit facility or the accordion. The Banks' suggestion that the revolving credit facility and the accordion should be included as "certain permitted refinancings" is flatly inconsistent with the definition of "permitted refinancings" in all relevant Sponsors Precedent and the course of dealings between the parties prior to February 2008.

63. In fact, the plain text of the Commitment Letter shows that any restrictions on the use of proceeds were specifically negotiated at the time the Commitment Letter was signed. The Commitment Letter expressly provides, for example, that borrowings under the accordion up to $1.5 billion may be used "to finance the working capital needs, general corporate purposes and for any other purpose not prohibited by the Senior Secured Credit Documentation, including restricted payments" and that borrowings in excess of $1.5 billion "will only be used to refinance the Retained Existing Notes." The parties never intended to restrict the use of the revolving credit

facility and accordion to repay the Existing Notes; had they so intended, the Commitment Letter would have stated so in plain terms. It does not. In fact, it says just the opposite. Moreover, even under the sham interpretation proffered by the Banks, the Commitment Letter does not restrict the Company's ability to use its cash to repay the Existing Notes at maturity. The draft Credit Agreement prepared by the Banks, however, would do just that.

64. The positions now taken by the Banks are contrary to the positions the Banks themselves consistently took prior to delivering their initial draft Credit Agreement on February 8, 2008. Before February 8, 2008, as documented extensively in various bank presentations and communications between the parties, the Banks showed that they understood that the cash flow, revolving credit facility and the accordion would and could be used by Clear Channel to repay its existing indebtedness. In a series of presentations and communications, the Banks repeatedly expressed in clear terms their understanding that the Commitment Letter provided for the repayment of Clear Channel's Existing Notes with its own cash as well as its revolving line of credit and the accordion.

65. It is now apparent, however, that the Banks have either changed their position on the refinancing of existing debt in hopes of killing the deal or they never intended that Clear Channel could repay the Existing Notes with the revolving line of credit despite the terms of the Commitment Letter they signed. The Banks' conduct is in bad faith, a naked effort to avoid what the Banks knew, communicated and understood to

be the terms of the financing arrangements, with the goal of derailing the Clear Channel merger.

The Banks' Proposals Also Are Inconsistent With Sponsors Precedent

66. As noted above, the Commitment Letter provides that the terms of the financing will be no less favorable than customary for facilities and transactions of this type with affiliates of the Sponsors, defined in the Commitment Letter as "Sponsors Precedent."

67. This was a key term of the Commitment Letter. The Banks repeatedly sought to negotiate for provisions that would remove the reference to Sponsors Precedent, or that would at least restrict its force by carving out exceptions to the general provision stating that the terms of eventual documentation would be consistent with the terms that the Sponsors had obtained in precedent transactions. The Banks even sought to impose restrictions on the treatment of Clear Channel's Existing Notes that would be inconsistent with Sponsors Precedent. But the Sponsors rejected that language, and it was not included in the Commitment Letter. Despite the language in the Commitment Letter, however, the Banks insisted on language in their draft credit agreements restricting the use of the revolving credit facility for the repayment of the Existing Notes, contrary to Sponsors Precedent.

68. The Sponsors have participated in a number of transactions in which the acquired company had outstanding notes at the time of the acquisition that would mature during the term of the credit facility, including Univision Communications, Aramark, HCA, Nielsen, SunGard, Toys R US and AMC Entertainment. In each of these

Sponsors Precedents, the governing commitment letter contained general language with respect to the use of revolving credit facility proceeds that permitted the revolver to be used for general corporate purposes, and the eventual definitive documents, negotiated prior to the closing of the transaction, permitted the company to use cash flow, revolver borrowings, and incremental borrowings to refinance the maturing notes.

69. The Purchasers have evaluated the relevant Sponsors Precedent and demonstrated that these transactions are consistent with the treatment of cash, the revolving credit facility and the accordion that they have proposed. In a show of good faith, they have shared that analysis with the Banks. But the Banks have refused to provide the Sponsors with any support for their unprincipled insistence on terms inconsistent with the Commitment Letter, and have declined to explain how their analysis of Sponsors Precedent would support the Banks' position.

70. The restrictions that the Banks sought to impose with respect to the Existing Notes would fundamentally alter the contemplated transaction. Had the parties contemplated imposing such restrictions on Clear Channel, they would have had to change the terms in the Commitment Letter and replace them with an express exclusion. The Banks know that the Purchasers cannot accept these terms. They insisted on these restrictions for the sole purpose of derailing the transaction.

71. As another example, the Banks would require Clear Channel's subsidiary, Clear Channel Outdoor ("CCO") to refinance with third-party lenders approximately $2.5 billion of inter-company indebtedness when such indebtedness matures in 2010, and apply the proceeds to pay down the Banks' term loans. Just as the attempted restrictions of the use of the revolver would require Clear Channel to refinance

its debt at a far earlier time than originally bargained for in the Commitment Letter, this part of the Banks' draft effectively would rewrite the Commitment Letter by also requiring that the CCO inter-company note be refinanced. The Banks know full well that their position is inconsistent with the plain terms of the Commitment Letter, not something to which the parties agreed, and not something to which the Purchasers could agree.

72. Just as the Banks' communications prior to their February 8, 2008 proposal are squarely contrary to their position on the refinancing of the Existing Notes, the Banks' pre-February 8 communications also make clear that the Banks clearly understood and agreed that the inter-company note would be extended. The Banks' communications covering more than a year expose their present negotiating posture as pure bad faith, as well as a fraudulent effort to mislead the Purchasers concerning the Banks' intentions, thereby depriving the Purchasers of the opportunity to obtain alternative financing when such financing was still available.

73. As noted above, the Purchasers bargained for a long-term 6 to 8 year financing package, and the Commitment Letter expressed a plain agreement on the part of the Banks to provide that financing. The Banks' attempted after-the-fact alteration of the agreed-upon terms is a transparent attempt to manufacture issues and back out of the financing to which they already had committed, by seeking to prevent Clear Channel from using its own cash and the Banks' committed financing to refinance approximately $1.8 billion of maturing existing notes and forcing Clear Channel to use the proceeds of an early repayment of the $2.5 billion inter-company note to reduce indebtedness to the Banks. This is not the deal to which the Banks agreed. None of these

terms was present in the Commitment Letter. Each change standing alone would represent not merely a substantial revision to the deal that was struck when the Commitment Letter was signed, but also such a fundamental change to the financing terms that the Purchasers would be unable to complete the transaction.

74. The Banks' drafts were prepared in bad faith, with the knowledge that their utter impracticability would preclude definitive documentation from being executed. They would have the effect of converting the extended, long-term financing the Banks had agreed to into a 3-year, short-term loan, at the end of which Clear Channel would require equity infusions, a complete refinancing of the credit facilities and new senior notes, or substantial amendments to the terms of the financing. Any inability to obtain such equity, refinancing, or amendments would have materially adverse consequences for Clear Channel. No company or sponsor could agree to such a structure. The Banks knew this, and that is why, in their drafts of the final documentation, they insisted upon it.

75. The Banks know that allowing Clear Channel to use its own cash, as well as its revolving credit facility and accordion, to pay down its existing debt securities as they mature is fundamental to the transaction and is consistent with the Commitment Letter. Yet they have demanded an altogether different arrangement from the one that the parties negotiated and agreed to, and one that effectively would prevent the Purchasers from completing the Clear Channel transaction. Over the course of the past month, the Purchasers have patiently demonstrated to the Banks inconsistencies that render indefensible the Banks' position and reveal their true motivations. First, the Purchasers have shown that the Banks' demands flatly contradict the Commitment Letter.

Second, the Purchasers have shown that in every relevant Sponsors Precedent – the definitive standard in the Commitment Letter – the companies in transactions led by Sponsors have been permitted to refinance existing indebtedness as it comes due with cash flow and proceeds of the new financing. Third, the Purchasers have shown that the Banks repeatedly and clearly demonstrated their understanding that Clear Channel would use the new credit facilities to refinance the existing indebtedness. The Banks, for their part, have refused to provide a plausible explanation for the terms on which they have insisted, nor have they been willing to explain how their "new" terms comport with the Commitment Letter's language or the Sponsors Precedent the parties agreed would govern, presumably because they cannot. But their motivation is unmistakable: now that providing financing for the Clear Channel acquisition is no longer as favorable to the Banks in economic terms, they have no intention of funding their commitments on the terms to which they agreed.

Defendants Insist on Artificially Low Limits on Permitted Indebtedness and Other "Baskets"

76. In blatant violation of the Commitment Letter, the draft Credit Agreement and Description of Notes prepared by the Banks also reflect debt "baskets" that are inconsistent with Sponsors Precedent.

77. For example, the draft Credit Agreement and Description of Notes proposed by the Banks contain "baskets" (*i.e.*, permitted amounts) of indebtedness, investments, and asset sales that are far lower than would be indicated based on Sponsors Precedent. Baskets allow a company to deploy cash and assets and engage in other transactions (up to certain amounts) in specified ways that are deemed to be consistent

with the terms of the financing. In the precedent transactions (including those cited by the Banks), these baskets were closely correlated with the size of the Company (as measured by, for example, the borrower's total pro forma assets and adjusted EBITDA). The baskets reflected by the Sponsors in their draft final documentation are entirely consistent with these established relationships, and in or below the ranges called for by Sponsors Precedent, whereas the baskets set forth by the Banks are far below the levels dictated by Sponsors Precedent.

78. As one example, the Banks told the Sponsors in January 2008 that "Univision's term loan [is] the most comparable credit with respect to industry and leverage." Yet, even though Univision is a company with assets approximately half those of Clear Channel and EBITDA approximately one-third the size of Clear Channel's, the baskets presented in the Banks' Credit Agreement were far lower than those included in the Univision financing. The baskets set by the Banks for the Clear Channel financing in their documentation are a fraction of the basket size set in a far smaller precedent transaction. By demanding terms that are squarely at odds with even the Sponsors Precedent that the Banks cite as most relevant, the Banks have breached the Commitment Letter. And by insisting on basket amounts that would be far too small for a company of Clear Channel's size to operate successfully, the Banks sent a clear signal that they did not want the acquisition to which they had committed financing to succeed.

79. Here as well, defendants have proceeded in bad faith, in a manner that seeks to delay and avoid their contractual obligations and, by refusing to provide the agreed-upon financing, force Mergerco to abandon the acquisition.

The Banks Refuse to Fund the Transaction

80. On March 26, 2008, the Purchasers delivered to the Banks the Credit Agreement for the Senior Secured Facilities, the Credit Agreement for the Receivables Facility and the Loan Agreement for the Senior Bridge Facility (based on the required terms for the Description of Notes) that the Purchasers were prepared to execute, consistent with the Commitment Letter.

81. All of the conditions to funding under the Commitment Letter which can be satisfied to date, have been satisfied, other than execution of final documents which have not been signed due solely to the Banks' unlawful conduct and breach.

82. Nonetheless, on March 25, 2008, and again on March 26, 2008, the Banks refused to participate in pre-closing steps that are necessary to the effectuation of the transaction and claimed that the conditions necessary to trigger the obligations of the Banks had not been satisfied, effectively signaling that they would not provide financing or participate in a closing on March 27.

83. The total new equity and debt funding necessary to complete the acquisition of Clear Channel and related transactions is anticipated to be approximately $20.2 billion. The failure of Mergerco to obtain financing from the Banks will result in the failure of the acquisition.

Need for Immediate Relief and Specific Performance

84. Since the execution of the Commitment Letter on May 17, 2007, the credit markets have experienced widely reported dislocations. Investor demand has materially eroded for the debt instruments that have customarily been provided by banks

to finance leveraged acquisition transactions. Indeed, there essentially is no market for certain of the forms of unique debt instruments that the Commitment Letter contemplates, including loans secured by limited amounts of collateral (known as "Collateral Lite" debt instruments) and "PIK Toggle" notes that permit the issuer, at its option, to pay interest either in cash or "in kind" with additional notes that add to the outstanding principal balance. The Banks' unfair and deceptive conduct will effectively prevent the Purchasers from securing the specific financing that they bargained for in the Commitment Letter, unless the Banks are required to make good on their commitments. That conduct will also deprive the Purchasers of the unique opportunity to acquire the largest radio and outdoor advertising company in the United States – a one-of-a-kind revenue producing asset for which the Purchasers fairly bargained.

85. In the recent market turmoil, the Banks have been reported to take large write-downs in order to account for the potential losses resulting from their financing commitments. Of course, the Purchasers do not believe that these loans will ultimately result in any loss to the Banks, as evidenced by their willingness to commit substantial equity capital behind the debt in order to complete the acquisition. But, in any event, if the Banks breach their obligations under the Commitment Letter, they will seek to reverse those write-downs, showing an immediate, massive gain on their income statements. Their willful breach of contract is an attempt to shift those substantial losses onto the Purchasers, as well as onto Clear Channel and its shareholders.

86. By their conduct, defendants have violated both the express terms of their contract with plaintiffs and the covenant of good faith and fair dealing inherent in that contract.

FIRST CAUSE OF ACTION

Breach of Contract

87. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 86 as if fully set forth herein.

88. The Purchasers and defendants are parties to the Commitment Letter, a valid and binding contract.

89. The Commitment Letter sets forth defendants' obligation to provide financing for the acquisition of Clear Channel. The Purchasers and New Holdco relied upon defendants' commitments when they entered into the Merger Agreement with Clear Channel.

90. Plaintiffs have substantially performed under the Commitment Letter and are willing and able to perform their remaining obligations.

91. Defendants are able to perform their obligations under the Commitment Letter.

92. Defendants breached the Commitment Letter, as well as the implied covenant of good faith and fair dealing inherent in the Commitment Letter, by inserting financing terms in definitive documents that are inconsistent with the terms of the Commitment Letter, terms that are inconsistent with Sponsors Precedent, and provisions that would make the merger impracticable, and by negotiating in bad faith.

93. Defendants breached the Commitment Letter, as well as the implied covenant of good faith and fair dealing inherent in the Commitment Letter, by making clear their refusal to execute definitive documents consistent with the

Commitment Letter and fund on March 27, 2008, thereby preventing the acquisition from being consummated on that date.

94. The failure to close the acquisition permits Clear Channel to demand payment of a $500 million Mergerco Termination Fee.

95. Any party to the Merger Agreement may terminate the Merger Agreement if it is not consummated by June 12, 2008.

96. If defendants fail to comply with their obligations pursuant to the Commitment Letter, it is highly unlikely that Mergerco will be able to close the acquisition of Clear Channel because under current market conditions alternative financing is unavailable on terms similar to those agreed upon in the Commitment Letter and is highly unlikely to be available on any other terms.

97. Plaintiffs have no adequate remedy at law.

98. Plaintiffs are entitled to a decree of specific performance, ordering defendants to perform their obligations pursuant to the terms of the Commitment Letter, including, without limitation, the obligation of defendants to provide the credit facilities to Mergerco described therein, as set forth in the Credit Documents,and to fund in accordance the Credit Documents and the terms of the Commitment Letter.

99. In the alternative, defendants' actions have placed plaintiffs in a position where they are required to seek alternative financing. Such alternative financing is highly unlikely to be available, but if it could be arranged would cost plaintiffs billions of dollars more than the financing that defendants agreed to provide.

100. If defendants' actions prevent Mergerco from consummating the acquisition, Mergerco will become exposed to liability for the Mergerco Termination Fee and incur substantial transaction expenses, and plaintiffs will lose the prospective benefits of the acquisition.

101. Accordingly, in the alternative, plaintiffs are entitled to damages from defendants in amounts to be proved at trial.

102. In the alternative, plaintiffs are entitled to a declaration that defendants must perform their obligations pursuant to the terms of the Commitment Letter, including, without limitation, the obligation of defendants to provide the credit facilities to Mergerco described therein, as set forth in the attached Credit Documents, and that a failure by defendants to provide these facilities constitutes a breach of the Commitment Letter, subjecting them to a decree of specific performance, or, in the alternative, damages in amounts to be proved at trial, totaling billions of dollars.

SECOND CAUSE OF ACTION

Fraud

103. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 86 as if fully set forth herein.

104. Defendants made material false representations regarding their commitment to fund plaintiffs' acquisition of Clear Channel, including but not limited to:

(a) in the Commitment Letter, defendants purported to agree that they would fund the acquisition without regard to changes in general market

conditions, when in fact they had no intention of providing financing in the event of unfavorable market conditions;

(b) in the Commitment Letter, defendants purported to agree that the final credit agreement documentation would include material terms that were consistent with Sponsors Precedent, when in fact they did not intend to negotiate a credit agreement on the basis of Sponsors Precedent if doing so would require them to proceed with a transaction that had become unfavorable to the Banks;

(c) defendants repeatedly represented to the Purchasers that they were proceeding with and "committed to" the transaction, when in fact they desired it to fail and were working toward that end.

(d) defendants, in a series of communications to the plaintiffs in 2006 and 2007 indicated their understanding that the revolving credit facility could be used by Clear Channel to repay its Existing Notes under the terms of the Commitment Letter, when in fact defendants did not intend to allow the revolver to be used for that purpose.

(e) defendants, in a series of communications to the plaintiffs in 2006 and 2007, indicated their understanding that the Clear Channel Outdoor inter-company note could be extended under the terms of the Commitment Letter, when in fact defendants did not intend to permit such an extension.

105. Defendants made these misrepresentations knowingly or recklessly, with an intent to defraud plaintiffs.

106. Plaintiffs reasonably relied on defendants' misrepresentations, including by continuing to proceed with negotiating with the Banks instead of seeking

alternative financing at a time when it might have been available, or available on less costly terms.

107. Plaintiffs suffered actual, consequential, and special damages, including damages separate and apart from those recoverable as contract damages, as a result of their reliance on defendants' misrepresentations.

THIRD CAUSE OF ACTION

Massachusetts General Laws Chapter 93A – Unfair and Deceptive Trade Practices

108. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 87 and paragraphs 104 through 108 as if fully set forth herein.

109. The Purchasers and each of the defendants are engaged in the conduct of trade or commerce within the meaning of Mass. Gen. Laws ch. 93A, § 11.

110. Defendants have engaged in unfair and deceptive acts and practices by a variety of means, including, without limitation, by:

(a) deceptively expressing their intention to proceed with the financing for the Clear Channel merger over a period of months, while negotiating in bad faith in a manner calculated to avoid their obligations under the Commitment Letter with the aim of preventing the merger from taking place;

(b) unfairly delaying negotiations towards a definitive Credit Agreement in an effort to frustrate the Purchasers' efforts to complete the Clear Channel merger;

(c) attempting to coerce financial concessions from one of the private-equity firms involved with the deal by threatening not to fund an unrelated transaction in which that firm was involved;

(d) insisting on financing terms that are inconsistent with the terms of the Commitment Letter;

(e) insisting on financing terms that are inconsistent with Sponsors Precedent;

(f) insisting on provisions that would make the acquisition impracticable;

(g) negotiating in bad faith; and

(h) knowingly interfering with the Merger Agreement by preventing plaintiffs from performing their obligations thereunder.

111. Defendants' unfair and deceptive conduct occurred primarily and substantially in the Commonwealth of Massachusetts. Virtually all of the unfair and deceptive communications by the Banks were made via electronic mail or telephone to the Purchasers (and Sponsors) at offices located in Boston, Massachusetts, where the Plaintiffs and Sponsors have their principal place of business.

112. Defendants' conduct constitutes a willful and knowing violation of its obligations under the Commitment Letter.

113. Plaintiffs have suffered and will continue to suffer injury, including the loss of money and property, as a result of defendants' wrongful conduct.

FOURTH CAUSE OF ACTION

Civil Conspiracy Under Massachusetts Law

114. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 87 and paragraphs 103 through 114 as if fully set forth herein.

115. Defendants agreed with one another or acted in concert or pursuant to a common design to commit the tortious acts described above, or gave substantial assistance and encouragement to each other's tortious conduct.

116. Defendants committed various tortious acts in furtherance of the agreement, concerted action, or common design, including, but not limited to:

(a) in the Commitment Letter, defendants purported to agree that they would fund the acquisition without regard to changes in general market conditions, when in fact they had no intention of providing financing in the event of unfavorable market conditions;

(b) in the Commitment Letter, defendants purported to agree that the final credit agreement documentation would include material terms that were consistent with Sponsors Precedent, when in fact they did not intend to negotiate a credit agreement on the basis of Sponsors Precedent if doing so would require them to proceed with a transaction that had become unfavorable to the Banks;

(c) defendants made the specific misstatements set forth in Paragraphs 105(d) and 105(e);

(d) defendants repeatedly represented to the Purchasers that they were proceeding with and "committed to" the transaction, when in fact they desired it to fail and were working toward that end.

117. Defendants' acts in furtherance of the agreement, concerted action, or common design harmed plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that judgment be awarded in their favor and against defendants as follows:

A. On the First Cause of Action, a decree of specific performance, ordering defendants to perform their obligations to provide the credit facilities to plaintiffs as set forth in the Commitment Letter and, specifically, order the defendants to perform the obligations set forth in the Credit Documents attached as Exhibit 2;

B. On the First Cause of Action, in the alternative, a judgment for damages in amounts to be proved at trial;

C. On the First Cause of Action, in the alternative, a declaration pursuant to CPLR § 3001 that defendants' refusal to provide the credit facilities to plaintiffs constitutes a breach of their obligations under the Commitment Letter, entitling plaintiffs to a decree of specific performance, ordering defendants to perform their obligations to provide the credit facilities to plaintiffs as set forth in the Commitment Letter and the attached Credit Documents, or in the alternative, a judgment for damages in amounts to be proved at trial;

D. On the Second and Fourth Causes of Action, actual, consequential, special, and punitive damages as a result of defendants' malfeasance, fraud, and bad faith;

E. On the Third Cause of Action, actual and consequential damages, including all foreseeable damages, as well as double or treble damages;

F. Pre- and post-judgment interest at the 9% statutory rate;

G. Attorneys' fees and costs of suit; and

H. Such other and further relief as the Court may deem just and proper.

Dated: New York, New York
March 26, 2008

Bruce S. Kaplan
Robert J. Lack
Emily A. Stubbs
Chad M. Leicht
Amy Luria
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
1633 Broadway
New York, NY 10019-6708
(212) 833-1100

Attorneys for Plaintiffs BT Triple Crown Merger Co., Inc., B Triple Crown Finco, LLC and T Triple Crown Finco, LLC

VERIFICATION

STATE OF _____)
) ss:
COUNTY OF _____)

_____, being duly sworn, deposes and says:

I am the _____ of plaintiffs in this action. I have read the foregoing complaint and it is true to my knowledge except as to matters therein alleged on information and belief and as to those, I believe them to be true.

_____

Sworn to before me this
____ day of March, 2008

_____
Notary Public

EXHIBIT D

FINANCIER WORLDWIDE corporatefinanceintelligence

PRIVATE EQUITY & VENTURE CAPITAL | BY IRWIN A KISHNER AND BROOKE E CRESCENTI

US private equity firms forced to re-evaluate strategies

If the fourth quarter of 2007 is any indication of what's in store for private equity firms in 2008, US private equity firms will not be the major players in the M&A market. Large buyout deals have fallen prey to the credit crunch. Private equity firms that had been riding high on cheap financing must now contend with lenders skittish to syndicate or lend on speculative deals. This coupled with high costs and increasingly burdensome covenants in the financing documents for deals that are approved, means there is a much lighter deal flow and increased likelihood that deals in progress will collapse during negotiations.

Lack of attractive credit should not sound a death knell for private equity investments. By some estimates, US private equity firms raised approximately $256bn in 2007 alone. Therefore, many firms presumably control enough capital in order to remain players in the M&A market. However, expensive credit coupled with the weak state of the US dollar, means US private equity buyers face a new hurdle – foreign investors, particularly European, Asian and Middle Eastern, with strong currencies, snapping up attractive 'bargains' in the US. In fact, foreign investments comprised nearly half of US purchases in the fourth quarter of 2007, including two transactions - the takeover of Commerce Bancorp Inc by Canada's Toronto-Dominion Bank and the acquisition of Navteq Corp by Finland's Nokia Oyj - valued at over $8bn each. A large portion of foreign investment can be attributed to sovereign wealth funds. Such investment minded funds are attractive to US targets because of their typically long term strategies and hands off approach to day to day operations following an investment. The reserves in these funds can run into the billions and trillions of dollars, especially in oil producing counties, making bargain shopping in the US an attractive way to invest some of that capital.

Large foreign private equity firms are also increasing their presence in the US, particularly in New York. This allows the firms to be closer to the deals and effectively increase the competition in the US private equity market. The increased presence of foreign private equity firms in the US is reminiscent of the influx of US private equity firms in Europe several years ago – the difference being that US firms helped create a successful buyout market in Europe, while foreign firms coming to the US have the benefit of taking advantage of the weak US dollar in an already thriving M&A landscape. These foreign firms are investing in a wide range of industries, from luxury retail brands and financial institutions to technology companies and real estate. Although the increased foreign presence may be good for the US economy generally, by keeping deals moving, US private equity firms have been, and will likely continue to be, feeling the pinch. The increased competition combined with an already tenuous domestic credit situation means that US private equity firms may have to re-evaluate their investment strategies for the coming year.

Deals completed in this down market for US private equity may actually produce higher returns in the long run, if firms are smart in their investments. Instead of seeking out the mega deal as many firms did in the early part of 2007, private equity investors may consider foregoing purely financial deals in favour of focusing on strategic investments – investments in companies likely to thrive post investment. Private equity firms that contribute management, intellectual and operational resources to target companies in addition to purely capital based investments may have to commit to more hands on, longer term investments than they typically would. In today's M&A world, adaptation is key to firms looking to regain strong positions as players in the M&A market.

Another solution could be increased utilisation of the group bid. Despite today's hurdles in securing major financing, combined private equity firm efforts could alleviate the pressure on each firm individually, allowing for firms to participate in the mega deals they have been accustomed to. As a practical matter, for those firms willing to continue to pursue large acquisitions, they would be smart to protect their interests early on in the negotiation process in the event that deals collapse – not an uncommon occurrence in the fourth quarter of 2007, and a risk that is likely to persist in the current lending market. Target companies have historically been faced with breakup fees in the event that they terminate M&A deals still in progress. However, targets are increasingly negotiating 'reverse' breakup fees into their deals, requiring potential buyers to pay up if they walk away from the table first. Although these fees may be negotiated as seemingly small percentages, such as 2 to 4 percent of the deal's overall value, in larger deals, this could mean a payout of hundreds of millions of dollars with no investment to show for it. As more target companies become savvy to the insurance potential of these reverse breakup fees, it would behove private equity investors to take on deals with a high probability of successful completion, in order to save both time and potentially significant capital.

The future of US private equity firms in 2008 is somewhat unpredictable. Firms could enjoy a generally stable and successful year fuelled primarily by mid-market buyout transactions or strategic financial investments by private equity firms. On the other hand, firms could suffer a dismal year, due to an inability to compete with foreign investors or strategic M&A initiated by US companies and the continued credit crunch. If these firms can find creative ways to utilise the large amounts of capital they have amassed and the Federal Reserve keeps short term interest rates low, US private equity firm deal flow should rebound sooner rather than later. ■

Irwin A Kishner is a partner and Brooke E Crescenti is an associate, at Herrick, Feinstein LLP.
Mr Kishner can be contacted on +1 (212) 592 1435 or by email: ikishner@herrick.com
Ms Crescenti can be contacted on +1 (212) 592 5937 or by email: bcrescenti@herrick.com

EXHIBIT E

The New York Times
nytimes.com

March 29, 2008

TEXT

Treasury's Summary of Regulatory Proposal

Following is the executive summary of the Blueprint for Financial Regulatory Reform, a report from the Treasury Department on ways to improve oversight of the financial services sector:

The mission of the Department of the Treasury ("Treasury") focuses on promoting economic growth and stability in the United States. Critical to this mission is a sound and competitive financial services industry grounded in robust consumer protection and stable and innovative markets.

Financial institutions play an essential role in the U.S. economy by providing a means for consumers and businesses to save for the future, to protect and hedge against risks, and to access funding for consumption or organize capital for new investment opportunities. A number of different types of financial institutions provide financial services in the United States: commercial banks and other insured depository institutions, insurers, companies engaged in securities and futures transactions, finance companies, and specialized companies established by the government. Together, these institutions and the markets in which they act underpin economic activity through the intermediation of funds between providers and users of capital.

This intermediation function is accomplished in a number of ways. For example, insured depository institutions provide a vehicle to allocate the savings of individuals. Similarly, securities companies facilitate the transfer of capital among all types of investors and investment opportunities. Insurers assist in the financial intermediation process by providing a means for individuals, companies, and other financial institutions to protect assets from various types of losses. Overall, financial institutions serve a vitally important function in the U.S. economy by allowing capital to seek out its most productive uses in an efficient matter. Given the economic significance of the U.S. financial services sector, Treasury considers the structure of its regulation worthy of examination and reexamination.

Treasury began this current study of regulatory structure after convening a conference on capital markets competitiveness in March 2007. Conference participants, including current and former policymakers and industry leaders, noted that while functioning well, the U.S. regulatory structure is not optimal for promoting a competitive financial services sector leading the world and

supporting continued economic innovation at home and abroad. Following this conference, Treasury launched a major effort to collect views on how to improve the financial services regulatory structure.

In this report, Treasury presents a series of "short-term" and "intermediate-term" recommendations that could immediately improve and reform the U.S. regulatory structure. The short-term recommendations focus on taking action now to improve regulatory coordination and oversight in the wake of recent events in the credit and mortgage markets. The intermediate recommendations focus on eliminating some of the duplication of the U.S. regulatory system, but more importantly try to modernize the regulatory structure applicable to certain sectors in the financial services industry (banking, insurance, securities, and futures) within the current framework.

Treasury also presents a conceptual model for an "optimal" regulatory framework. This structure, an objectives-based regulatory approach, with a distinct regulator focused on one of three objectives— market stability regulation, safety and soundness regulation associated with government guarantees, and business conduct regulation—can better react to the pace of market developments and encourage innovation and entrepreneurialism within a context of enhanced regulation. This model is intended to begin a discussion about rethinking the current regulatory structure and its goals. It is not intended to be viewed as altering regulatory authorities within the current regulatory framework. Treasury views the presentation of a tangible model for an optimal structure as essential to its mission to promote economic growth and stability and fully recognizes that this is a first step on a long path to reforming financial services regulation.

The current regulatory framework for financial institutions is based on a structure that developed many years ago. The regulatory basis for depository institutions evolved gradually in response to a series of financial crises and other important social, economic, and political events: Congress established the national bank charter in 1863 during the Civil War, the Federal Reserve System in 1913 in response to various episodes of financial instability, and the federal deposit insurance system and specialized insured depository charters (e.g., thrifts and credit unions) during the Great Depression. Changes were made to the regulatory system for insured depository institutions in the intervening years in response to other financial crises (e.g., the thrift crises of the 1980s) or as enhancements (e.g., the Gramm-Leach-Bliley Act of 1999 ("GLB Act")); but, for the most part the underlying structure resembles what existed in the 1930s. Similarly, the bifurcation between securities and futures regulation, was largely established over 70 years ago when the two industries were clearly distinct.

In addition to the federal role for financial institution regulation, the tradition of federalism

preserved a role for state authorities in certain markets. This is especially true in the insurance market, which states have regulated with limited federal involvement for over 135 years. However, state authority over depository institutions and securities companies has diminished over the years. In some cases there is a cooperative arrangement between federal and state officials, while in other cases tensions remain as to the level of state authority. In contrast, futures are regulated solely at the federal level.

Historically, the regulatory structure for financial institutions has served the United States well. Financial markets in the United States have developed into world class centers of capital and have led financial innovation. Due to its sheer dominance in the global capital markets, the U.S. financial services industry for decades has been able to manage the inefficiencies in its regulatory structure and still maintain its leadership position. Now, however, maturing foreign financial markets and their ability to provide alternate sources of capital and financial innovation in a more efficient and modern regulatory system are pressuring the U.S. financial services industry and its regulatory structure. The United States can no longer rely on the strength of its historical position to retain its preeminence in the global markets. Treasury believes it must ensure that the U.S. regulatory structure does not inhibit the continued growth and stability of the U.S. financial services industry and the economy as a whole. Accordingly, Treasury has undertaken an analysis to improve this regulatory structure.

Over the past forty years, a number of Administrations have presented important recommendations for financial services regulatory reforms. Most previous studies have focused almost exclusively on the regulation of depository institutions as opposed to a broader scope of financial institutions. These studies served important functions, helping shape the legislative landscape in the wake of their release. For example, two reports, Blueprint for Reform: The Report of the Task Group on Regulation of Financial Services (1984) and Modernizing the Financial System: Recommendations for Safer, More Competitive Banks (1991), laid the foundation for many of the changes adopted in the GLB Act.

In addition to these prior studies, similar efforts abroad inform this Treasury report. For example, more than a decade ago, the United Kingdom conducted an analysis of its financial services regulatory structure, and as a result made fundamental changes creating a tri-partite system composed of the central bank (i.e., Bank of England), the finance ministry (i.e., H.M. Treasury), and the national financial regulatory agency for all financial services (i.e., Financial Services Authority). Each institution has well-defined, complementary roles, and many have judged this structure as having enhanced the competitiveness of the U.K. economy.

Australia and the Netherlands adopted another regulatory approach, the "Twin Peaks" model,

emphasizing regulation by objective: One financial regulatory agency is responsible for prudential regulation of relevant financial institutions, and a separate and distinct regulatory agency is responsible for business conduct and consumer protection issues. These international efforts reinforce the importance of revisiting the U.S. regulatory structure.

The Need for Review

Market conditions today provide a pertinent backdrop for this report's release, reinforcing the direct relationship between strong consumer protection and market stability on the one hand and capital markets competitiveness on the other and highlighting the need for examining the U.S. regulatory structure.

Prompting this Treasury report is the recognition that the capital markets and the financial services industry have evolved significantly over the past decade. These developments, while providing benefits to both domestic and global economic growth, have also exposed the financial markets to new challenges.

Globalization of the capital markets is a significant development. Foreign economies are maturing into market-based economies, contributing to global economic growth and stability and providing a deep and liquid source of capital outside the United States. Unlike the United States, these markets often benefit from recently created or newly developing regulatory structures, more adaptive to the complexity and increasing pace of innovation. At the same time, the increasing interconnectedness of the global capital markets poses new challenges: an event in one jurisdiction may ripple through to other jurisdictions.

In addition, improvements in information technology and information flows have led to innovative, risk-diversifying, and often sophisticated financial products and trading strategies. However, the complexity intrinsic to some of these innovations may inhibit investors and other market participants from properly evaluating their risks. For instance, securitization allows the holders of the assets being securitized better risk management opportunities and a new source of capital funding; investors can purchase products with reduced transactions costs and at targeted risk levels. Yet, market participants may not fully understand the risks these products pose.

The growing institutionalization of the capital markets has provided markets with liquidity, pricing efficiency, and risk dispersion and encouraged product innovation and complexity. At the same time, these institutions can employ significant degrees of leverage and more correlated trading strategies with the potential for broad market disruptions. Finally, the convergence of financial services providers and financial products has increased over the past decade. Financial intermediaries and trading platforms are converging. Financial products may have insurance,

banking, securities, and futures components.

These developments are pressuring the U.S. regulatory structure, exposing regulatory gaps as well as redundancies, and compelling market participants to do business in other jurisdictions with more efficient regulation. The U.S. regulatory structure reflects a system, much of it created over seventy years ago, grappling to keep pace with market evolutions and, facing increasing difficulties, at times, in preventing and anticipating financial crises.

Largely incompatible with these market developments is the current system of functional regulation, which maintains separate regulatory agencies across segregated functional lines of financial services, such as banking, insurance, securities, and futures. A functional approach to regulation exhibits several inadequacies, the most significant being the fact that no single regulator possesses all of the information and authority necessary to monitor systemic risk, or the potential that events associated with financial institutions may trigger broad dislocation or a series of defaults that affect the financial system so significantly that the real economy is adversely affected. In addition, the inability of any regulator to take coordinated action throughout the financial system makes it more difficult to address problems related to financial market stability.

Second, in the face of increasing convergence of financial services providers and their products, jurisdictional disputes arise between and among the functional regulators, often hindering the introduction of new products, slowing innovation, and compelling migration of financial services and products to more adaptive foreign markets. Examples of recent inter-agency disputes include: the prolonged process surrounding the development of U.S. Basel II capital rules, the characterization of a financial product as a security or a futures contract, and the scope of banks' insurance sales.

Finally, a functional system also results in duplication of certain common activities across regulators. While some degree of specialization might be important for the regulation of financial institutions, many aspects of financial regulation and consumer protection regulation have common themes. For example, although key measures of financial health have different terminology in banking and insurance—capital and surplus respectively—they both serve a similar function of ensuring the financial strength and ability of financial institutions to meet their obligations. Similarly, while there are specific differences across institutions, the goal of most consumer protection regulation is to ensure consumers receive adequate information regarding the terms of financial transactions and industry complies with appropriate sales practices.

Recommendations

Treasury has developed each and every recommendation in this report in the spirit of promoting

market stability and consumer protection. Following is a brief summary of these recommendations.

Short-Term Recommendations

This section describes recommendations designed to be implemented immediately in the wake of recent events in the credit and mortgage markets to strengthen and enhance market stability and business conduct regulation. Treasury views these recommendations as a useful transition to the intermediate-term recommendations and the proposed optimal regulatory structure model. However, each recommendation stands on its own merits.

President's Working Group on Financial Markets

In the aftermath of the 1987 stock market decline an Executive Order established the President's Working Group on Financial Markets ("PWG"). The PWG includes the heads of Treasury, the Federal Reserve, the Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC") and is chaired by the Secretary of Treasury. The PWG was instructed to report on the major issues raised by that stock market decline and on other recommendations that should be implemented to enhance market integrity and maintain investor confidence. Since its creation in 1988, the PWG has remained an effective and useful inter-agency coordinator for financial market regulation and policy issues.

Treasury recommends the modernization of the current PWG Executive Order in four different respects to enhance the PWG's effectiveness as a coordinator of financial regulatory policy.

First, the PWG should continue to serve as an ongoing inter-agency body to promote coordination and communication for financial policy. But the PWG's focus should be broadened to include the entire financial sector, rather than solely financial markets.

Second, the PWG should facilitate better inter-agency coordination and communication in four distinct areas: mitigating systemic risk to the financial system, enhancing financial market integrity, promoting consumer and investor protection, and supporting capital markets efficiency and competitiveness.

Third, the PWG's membership should be expanded to include the heads of the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC"), and the Office of Thrift Supervision ("OTS"). Similarly, the PWG should have the ability to engage in consultation efforts, as might be appropriate, with other domestic or international regulatory and supervisory bodies.

Finally, it should be made clear that the PWG should have the ability to issue reports or other documents to the President and others, as appropriate, through its role as the coordinator for financial regulatory policy.

Mortgage Origination

The high levels of delinquencies, defaults, and foreclosures among subprime borrowers in 2007 and 2008 have highlighted gaps in the U.S. oversight system for mortgage origination. In recent years mortgage brokers and lenders with no federal supervision originated a substantial portion of all mortgages and over 50 percent of subprime mortgages in the United States. These mortgage originators are subject to uneven degrees of state level oversight (and in some cases limited or no oversight).

However, the weaknesses in mortgage origination are not entirely at the state level. Federally insured depository institutions and their affiliates originated, purchased, or distributed some problematic subprime loans. There has also been some debate as to whether the OTS, the Federal Reserve, the Federal Trade Commission ("FTC"), state regulators, or some combination of all four oversees the affiliates of federally insured depository institutions.

To address gaps in mortgage origination oversight, Treasury's recommendation has three components.

First, a new federal commission, the Mortgage Origination Commission ("MOC"), should be created. The President should appoint a Director for the MOC for a four to six-year term. The Director would chair a six-person board comprised of the principals (or their designees) of the Federal Reserve, the OCC, the OTS, the FDIC, the National Credit Union Administration, and the Conference of State Bank Supervisors. Federal legislation should set forth (or provide authority to the MOC to develop) uniform minimum licensing qualification standards for state mortgage market participants. These should include personal conduct and disciplinary history, minimum educational requirements, testing criteria and procedures, and appropriate license revocation standards. The MOC would also evaluate, rate, and report on the adequacy of each state's system for licensing and regulation of participants in the mortgage origination process. These evaluations would grade the overall adequacy of a state system by descriptive categories indicative of a system's strength or weakness. These evaluations could provide further information regarding whether mortgages originated in a state should be viewed cautiously before being securitized. The public nature of these evaluations should provide strong incentives for states to address weaknesses and strengthen their own systems.

Second, the authority to draft regulations for national mortgage lending laws should continue to be

the sole responsibility of the Federal Reserve. Given its existing role, experience, and expertise in implementing the Truth in Lending Act ("TILA") provisions affecting mortgage transactions, the Federal Reserve should retain the sole authority to write regulations implementing TILA in this area.

Finally, enforcement authority for federal laws should be clarified and enhanced. For mortgage originators that are affiliates of depository institutions within a federally regulated holding company, mortgage lending compliance and enforcement must be clarified. Any lingering issues concerning the authority of the Federal Reserve (as bank holding company regulator), the OTS (as thrift holding company regulator), or state supervisory agencies in conjunction with the holding company regulator to examine and enforce federal mortgage laws with respect to those affiliates must be addressed. For independent mortgage originators, the sector of the industry responsible for origination of the majority of subprime loans in recent years, it is essential that states have clear authority to enforce federal mortgage laws including the TILA provisions governing mortgage transactions.

Liquidity Provisioning by the Federal Reserve

The disruptions in credit markets in 2007 and 2008 have required the Federal Reserve to address some of the fundamental issues associated with the discount window and the overall provision of liquidity to the financial system. The Federal Reserve has considered alternative ways to provide liquidity to the financial system, including overall liquidity issues associated with non-depository institutions. The Federal Reserve has used its authority for the first time since the 1930s to provide access to the discount window to non-depository institutions.

The Federal Reserve's recent actions reflect the fundamentally different nature of the market stability function in today's financial markets compared to those of the past. The Federal Reserve has balanced the difficult tradeoffs associated with preserving market stability and considering issues associated with expanding the safety net.

Given the increased importance of non-depository institutions to overall market stability, Treasury is recommending the consideration of two issues. First, the current temporary liquidity provisioning process during those rare circumstances when market stability is threatened should be enhanced to ensure that: the process is calibrated and transparent; appropriate conditions are attached to lending; and information flows to the Federal Reserve through on-site examination or other means as determined by the Federal Reserve are adequate. Key to this information flow is a focus on liquidity and funding issues. Second, the PWG should consider broader regulatory issues associated with providing discount window access to non-depository institutions.

Intermediate-Term Recommendations

This section describes additional recommendations designed to be implemented in the intermediate term to increase the efficiency of financial regulation. Some of these recommendations can be accomplished relatively soon; consensus on others will be difficult to obtain in the near term.

Thrift Charter

In 1933 Congress established the federal savings association charter (often referred to as the federal thrift charter) in response to the Great Depression. The federal thrift charter originally focused on providing a stable source of funding for residential mortgage lending. Over time federal thrift lending authority has expanded beyond residential mortgages. For example, Congress broadened federal thrifts' investment authority in the 1980s and permitted the inclusion of non-mortgage assets to meet the qualified-thrift lender test in 1996.

In addition, the role of federal thrifts as a dominant source of mortgage funding has diminished greatly in recent years. The increased residential mortgage activity of government-sponsored enterprises ("GSEs") and commercial banks, as well as the general development of the mortgage-backed securities market, has driven this shift.

Treasury recommends phasing out and transitioning the federal thrift charter to the national bank charter as the thrift charter is no longer necessary to ensure sufficient residential mortgage loans are made available to U.S. consumers. With the elimination of the federal thrift charter the OTS would be closed and its operations would be assumed by the OCC. This transition should take place over a two-year period.

Federal Supervision of State-Chartered Banks

State-chartered banks with federal deposit insurance are currently subject to both state and federal supervision. If the state-chartered bank is a member of the Federal Reserve System, the Federal Reserve administers federal oversight. Otherwise, the FDIC oversees state-chartered banks.

The direct federal supervision of state-chartered banks should be rationalized. One approach would be to place all such banking examination responsibilities for state-chartered banks with federal deposit insurance with the Federal Reserve.

Another approach would be to place all such bank examination responsibilities for state-chartered banks with federal deposit insurance with the FDIC.

Any such shift of supervisory authority for state-chartered banks with federal deposit insurance from the Federal Reserve to the FDIC or vice versa raises a number of issues regarding the overall structure of the Federal Reserve System. To further consider this issue, Treasury recommends a study, one that examines the evolving role of Federal Reserve Banks, to make a definitive proposal regarding the appropriate federal supervisor of state-chartered banks.

Payment and Settlement Systems Oversight

Payment and settlement systems are the mechanisms used to transfer funds and financial instruments between financial institutions and between financial institutions and their customers. Payment and settlement systems play a fundamental and important role in the economy by providing a range of mechanisms through which financial institutions can easily settle transactions. The United States has various payment and settlement systems, including large-value and retail payment and settlement systems, as well as settlement systems for securities and other financial instruments.

In the United States major payment and settlement systems are generally not subject to any uniform, specifically designed, and overarching regulatory system. Moreover, there is no defined category within financial regulation focused on payment and settlement systems. As a result, regulation of major payment and settlement systems is idiosyncratic, reflecting choices made by payment and settlement systems based on options available at some previous time.

To address the issue of payment and settlement system oversight, a federal charter for systemically important payment and settlement systems should be created and should incorporate federal preemption. The Federal Reserve should have primary oversight responsibilities for such payment and settlement systems, should have discretion to designate a payment and settlement system as systemically important, and should have a full range of authority to establish regulatory standards.

Insurance

For over 135 years, states have primarily regulated insurance with little direct federal involvement. While a state-based regulatory system for insurance may have been appropriate over some portion of U.S. history, changes in the insurance marketplace have increasingly put strains on the system.

Much like other financial services, over time the business of providing insurance has moved to a more national focus even within the state-based regulatory structure. The inherent nature of a state-based regulatory system makes the process of developing national products cumbersome and more costly, directly impacting the competitiveness of U.S. insurers.

There are a number of potential inefficiencies associated with the state-based insurance regulatory system. Even with the efforts of the National Association of Insurance Commissioners ("NAIC") to foster greater uniformity through the development of model laws and other coordination efforts, the ultimate authority still rests with individual states. For insurers operating on a national basis, this means not only being subject to licensing requirements and regulatory examinations in all states where the insurer operates, but also operating under different laws in each state. In addition to a more national focus today, the insurance marketplace operates globally with many significant foreign participants. A state-based regulatory system creates increasing tensions in such a global marketplace, both in the ability of U.S.-based firms to compete abroad and in allowing greater participation of foreign firms in U.S. markets.

To address these issues in the near term, Treasury recommends establishing an optional federal charter ("OFC") for insurers within the current structure. An OFC structure should provide for a system of federal chartering, licensing, regulation, and supervision for insurers, reinsurers, and insurance producers (i.e., agents and brokers). It would also provide that the current state-based regulation of insurance would continue for those not electing to be regulated at the national level. States would not have jurisdiction over those electing to be federally regulated. However, insurers holding an OFC could still be subject to some continued compliance with other state laws, such as state tax laws, compulsory coverage for workers' compensation and individual auto insurance, as well as the requirements to participate in state mandatory residual risk mechanisms and guarantee funds.

An OFC would be issued to specify the lines of insurance that each national insurer would be permitted to sell, solicit, negotiate, and underwrite. For example, an OFC for life insurance could also include annuities, disability income insurance, long-term care insurance, and funding agreements. On the other hand, an OFC for property and casualty insurance could include liability insurance, surety bonds, automobile insurance, homeowners, and other specified lines of business. However, since the nature of the business of life insurers is very different from that of property and casualty insurers, no OFC would authorize an insurer to hold a license as both a life insurer and a property and casualty insurer.

The establishment of an OFC should incorporate a number of fundamental regulatory concepts. For example, the OFC should ensure safety and soundness, enhance competition in national and international markets, increase efficiency in a number of ways, including the elimination of price controls, promote more rapid technological change, encourage product innovation, reduce regulatory costs, and provide consumer protection.

Treasury also recommends the establishment of the Office of National Insurance ("ONI") within

Treasury to regulate those engaged in the business of insurance pursuant to an OFC. The Commissioner of National Insurance would head ONI and would have specified regulatory, supervisory, enforcement, and rehabilitative powers to oversee the organization, incorporation, operation, regulation, and supervision of national insurers and national agencies.

While an OFC offers the best opportunity to develop a modern and comprehensive system of insurance regulation in the short term, Treasury acknowledges that the OFC debate in Congress is difficult and ongoing. At the same time, Treasury believes that some aspects of the insurance segment and its regulatory regime require immediate attention. In particular, Treasury recommends that Congress establish an Office of Insurance Oversight ("OIO") within Treasury. The OIO through its insurance oversight would be able to focus immediately on key areas of federal interest in the insurance sector.

The OIO should be established to accomplish two main purposes. First, the OIO should exercise newly granted statutory authority to address international regulatory issues, such as reinsurance collateral. Therefore, the OIO would become the lead regulatory voice in the promotion of international insurance regulatory policy for the United States (in consultation with the NAIC), and it would be granted the authority to recognize international regulatory bodies for specific insurance purposes. The OIO would also have authority to ensure that the NAIC and state insurance regulators achieved the uniform implementation of the declared U.S. international insurance policy goals. Second, the OIO would serve as an advisor to the Secretary of Treasury on major domestic and international policy issues. Once Congress passes significant insurance regulatory reform, the OIO could be incorporated into the OFC framework.

Futures and Securities

The realities of the current marketplace have significantly diminished, if not entirely eliminated, the original reason for the regulatory bifurcation between the futures and securities markets. These markets were truly distinct in the 1930s at the time of the enactment of the Commodity Exchange Act and the federal securities laws. This bifurcation operated effectively until the 1970s when futures trading soon expanded beyond agricultural commodities to encompass the rise and eventual dominance on non-agricultural commodities.

Product and market participant convergence, market linkages, and globalization have rendered regulatory bifurcation of the futures and securities markets untenable, potentially harmful, and inefficient. To address this issue, the CFTC and the SEC should be merged to provide unified oversight and regulation of the futures and securities industries.

An oft-cited argument against the merger of the CFTC and the SEC is the potential loss of the

CFTC's principles-based regulatory philosophy. Treasury would like to preserve the market benefits achieved in the futures area. Accordingly, Treasury recommends that the SEC undertake a number of specific actions, within its current regulatory structure and under its current authority, to modernize the SEC's regulatory approach to accomplish a more seamless merger of the agencies. These recommendations would reflect rapidly evolving market dynamics. These steps include the following:

• The SEC should use its exemptive authority to adopt core principles to apply to securities clearing agencies and exchanges. These core principles should be modeled after the core principles adopted for futures exchanges and clearing organizations under the Commodity Futures Modernization Act ("CFMA"). By imbuing the SEC with a regulatory regime more conducive to the modern marketplace, a merger between the agencies will proceed more smoothly.

• The SEC should issue a rule to update and streamline the self-regulatory organization ("SRO") rulemaking process to recognize the market and product innovations of the past two decades. The SEC should consider streamlining and expediting the SRO rule approval process, including a firm time limit for the SEC to publish SRO rule filings and more clearly defining and expanding the type of rules deemed effective upon filing, including trading rules and administrative rules. The SEC should also consider streamlining the approval for any securities products common to the marketplace as the agency did in a 1998 rulemaking vis-à-vis certain derivatives securities products. An updated, streamlined, and expedited approval process will allow U.S. securities firms to remain competitive with the over-the-counter markets and international institutions and increase product innovation and investor choice.

• The SEC should undertake a general exemptive rulemaking under the Investment Company Act of 1940 ("Investment Company Act"), consistent with investor protection, to permit the trading of those products already actively trading in the U.S. or foreign jurisdictions. Treasury also recommends that the SEC propose to Congress legislation that would expand the Investment Company Act by permitting registration of a new "global" investment company.

These steps should help modernize the SEC's regulation prior to the merger of the CFTC and the SEC. Legislation merging the CFTC and the SEC should not only call for a structural merger, but also a process to merge regulatory philosophies and to harmonize securities and futures regulations and statutes. The merger plan should also address certain key aspects:

• Concurrent with the merger, the new agency should adopt overarching regulatory principles focusing on investor protection, market integrity, and overall financial system risk reduction. This will help meld the regulatory philosophies of the agencies. Legislation calling for a merger should task the PWG with drafting these principles.

• Consistent with structure of the CFMA, all clearing agency and market SROs should be permitted by statute to self-certify all rulemakings (except those involving corporate listing and market conduct standards), which then become effective upon filing. The SEC would retain its right to abrogate the rulemakings at any time. By limiting self-certified SRO rule changes to non-retail investor related rules, investor protection will be preserved.

• Several differences between futures regulation and federal securities regulation would need to be harmonized. These include rules involving margin, segregation, insider trading, insurance coverage for broker-dealer insolvency, customer suitability, short sales, SRO mergers, implied private rights of action, the SRO rulemaking approval process, and the agency's funding mechanism. Due to the complexities and nuances of the differences in futures and securities regulation, legislation should establish a joint CFTC-SEC staff task force with equal agency representation with the mandate to harmonize these differences. In addition, the task force should be charged with recommending the structure of the merged agency, including its offices and divisions.

Finally, there has also been a continued convergence of the services provided by broker-dealers and investment advisers within the securities industry. These entities operate under a statutory regime reflecting the brokerage and investment advisory industries as they existed decades ago. Accordingly, Treasury recommends statutory changes to harmonize the regulation and oversight of broker-dealers and investment advisers offering similar services to retail investors. In that vein, the establishment of a self-regulatory framework for the investment advisory industry would enhance investor protection and be more cost-effective than direct SEC regulation. Thus, to effectuate this statutory harmonization, Treasury recommends that investment advisers be subject to a self-regulatory regime similar to that of broker-dealers.

Long-Term Optimal Regulatory Structure

While there are many possible options to reform and strengthen the regulation of financial institutions in the United States, Treasury considered four broad conceptual options in this review. First, the United States could maintain the current approach of the GLB Act that is broadly based on functional regulation divided by historical industry segments of banking, insurance, securities, and futures. Second, the United States could move to a more functional-based system regulating the activities of financial services firms as opposed to industry segments. Third, the United States could move to a single regulator for all financial services as adopted in the United Kingdom. Finally, the United States could move to an objectives-based regulatory approach focusing on the goals of regulation as adopted in Australia and the Netherlands.

After evaluating these options, Treasury believes that an objectives-based regulatory approach would represent the optimal regulatory structure for the future. An objectives-based approach is

designed to focus on the goals of regulation in terms of addressing particular market failures. Such an evaluation leads to a regulatory structure focusing on three key goals:

• Market stability regulation to address overall conditions of financial market stability that could impact the real economy;

• Prudential financial regulation to address issues of limited market discipline caused by government guarantees; and

• Business conduct regulation (linked to consumer protection regulation) to address standards for business practices.

More closely linking the regulatory objectives of market stability regulation, prudential financial regulation, and business conduct regulation to regulatory structure greatly improves regulatory efficiency. In particular, a major advantage of objectives-based regulation is that regulatory responsibilities are consolidated in areas where natural synergies take place, as opposed to the current approach of dividing these responsibilities among individual regulators. For example, a dedicated market stability regulator with the appropriate mandate and authority can focus broadly on issues that can impact market stability across all types of financial institutions. Prudential financial regulation housed within one regulatory body can focus on common elements of risk management across financial institutions. A dedicated business conduct regulator leads to greater consistency in the treatment of products, eliminates disputes among regulatory agencies, and reduces gaps in regulation and supervision.

In comparison to other regulatory structures, an objectives-based approach is better able to adjust to changes in the financial landscape than a structure like the current U.S. system focused on industry segments. An objectives-based approach also allows for a clearer focus on particular goals in comparison to a structure that consolidates all types of regulation in one regulatory body. Finally, clear regulatory dividing lines by objective also have the most potential for establishing the greatest levels of market discipline because financial regulation can be more clearly targeted at the types of institutions for which prudential regulation is most appropriate.

In the optimal structure three distinct regulators would focus exclusively on financial institutions: a market stability regulator, a prudential financial regulator, and a business conduct regulator. The optimal structure also describes the roles of two other key authorities, the federal insurance guarantor and the corporate finance regulator.

The optimal structure also sets forth a structure rationalizing the chartering of financial institutions. The optimal structure would establish a federal insured depository institution ("FIDI")

charter for all depository institutions with federal deposit insurance; a federal insurance institution ("FII") charter for insurers offering retail products where some type of government guarantee is present; and a federal financial services provider ("FFSP") charter for all other types of financial services providers. The market stability regulator would have various authorities over all three types of federally chartered institutions. A new prudential regulator, the Prudential Financial Regulatory Agency ("PFRA"), would be responsible for the financial regulation of FIDIs and FIIs. A new business conduct regulator, the Conduct of Business Regulatory Agency ("CBRA"), would be responsible for business conduct regulation, including consumer protection issues, across all types of firms, including the three types of federally chartered institutions. More detail regarding the responsibilities of these regulators follows.

Market Stability Regulator – The Federal Reserve

The market stability regulator should be responsible for overall issues of financial market stability. The Federal Reserve should assume this role in the optimal framework given its traditional central bank role of promoting overall macroeconomic stability. As is the case today, important elements of the Federal Reserve's market stability role would be conducted through the implementation of monetary policy and the provision of liquidity to the financial system. In addition, the Federal Reserve should be provided with a different, yet critically important regulatory role and broad powers focusing on the overall financial system and the three types of federally chartered institutions (i.e., FIIs, FIDIs, or FFSPs). Finally, the Federal Reserve should oversee the payment and settlement system. In terms of its recast regulatory role focusing on systemic risk, the Federal Reserve should have the responsibility and authority to gather appropriate information, disclose information, collaborate with the other regulators on rule writing, and take corrective actions when necessary in the interest of overall financial market stability. This new role would replace its traditional role as a supervisor of certain banks and all bank holding companies.

Treasury recognizes the need for enhanced regulatory authority to deal with systemic risk. The Federal Reserve's responsibilities would be broad, important, and difficult to undertake. In a dynamic market economy it is impossible to fully eliminate instability through regulation. At a fundamental level, the root causes of market instability are difficult to predict, and past history may be a poor predictor of future episodes of instability. However, the Federal Reserve's enhanced regulatory authority along with clear regulatory responsibilities would complement and attempt to focus market discipline to limit systemic risk.

A number of key long-term issues should be considered in establishing this new framework. First, in order to perform this critical role, the Federal Reserve must have detailed information about the business operations of PFRA- and CBRA-regulated financial institutions and their respective

holding companies. Such information will be important in evaluating issues that can have an impact on overall financial market stability.

The other regulators should be required to share all financial reports and examination reports with the Federal Reserve as requested. Working jointly with PFRA, the Federal Reserve should also have the ability to develop additional information-reporting requirements on issues important to overall market stability.

The Federal Reserve should also have the authority to develop information-reporting requirements for FFSPs and for holding companies with federally chartered financial institution affiliates. In terms of holding company reporting requirements, such reporting should include a requirement to consolidate financial institutions onto the balance sheet of the overall holding company and at the segmented level of combined federally chartered financial institutions. Such information-reporting requirements could also include detailed reports on overall risk management practices.

As an additional information-gathering tool, the Federal Reserve should also have the authority to participate in PFRA and CBRA examinations of federally chartered entities, and to initiate such examinations targeted on practices important to market stability. Targeted examinations of a PFRA- or CBRA-supervised entity should occur only if the information the Federal Reserve needs is not available from PFRA or CBRA and should be coordinated with PFRA and CBRA.

Based on the information-gathering tools described above, the Federal Reserve should publish broad aggregates or peer group information about financial exposures that are important to overall market stability. Disseminating such information to the public could highlight areas of risk exposure that market participants should be monitoring. The Federal Reserve should also be able to mandate additional public disclosures for federally chartered financial institutions that are publicly traded or for a publicly traded company controlling such an institution.

Second, the type of information described above will be vitally important in performing the market stability role and in better harnessing market forces. However, the Federal Reserve should also have authority to provide input into the development of regulatory policy and to undertake corrective actions related to enhancing market stability. With respect to regulatory policy, PFRA and CBRA should be required to consult with the Federal Reserve prior to adopting or modifying regulations affecting market stability, including capital requirements for PFRA-regulated institutions and chartering requirements for CBRA-regulated institutions, and supervisory guidance regarding areas important to market stability (e.g., liquidity risk management, contingency funding plans, and counterparty risk management).

With regard to corrective actions, if after analyzing the information described above the Federal

Reserve determines that certain risk exposures pose an overall risk to the financial system or the broader economy, the Federal Reserve should have authority to require corrective actions to address current risks or to constrain future risk-taking. For example, the Federal Reserve could use this corrective action authority to require financial institutions to limit or more carefully monitor risk exposures to certain asset classes or to certain types of counterparties or address liquidity and funding issues.

The Federal Reserve's authority to require corrective actions should be limited to instances where overall financial market stability was threatened. The focus of the market stability regulator's corrective actions should wherever possible be broadly based across particular institutions or across asset classes. Such actions should be coordinated and implemented with the appropriate regulatory agency to the fullest extent possible. But the Federal Reserve would have residual authority to enforce compliance with its requirements under this authority.

Third, the Federal Reserve's current lender of last resort function should continue through the discount window. A primary function of the discount window is to serve as a complementary tool of monetary policy by making short-term credit available to insured depository institutions to address liquidity issues. The historic focus of Federal Reserve discount window lending reflects the relative importance of banks as financial intermediaries and a desire to limit the spread of the federal safety net. However, banks' somewhat diminished role and the increased role of other types of financial institutions in overall financial intermediation may have reduced the effectiveness of this traditional tool in achieving market stability.

To address the limited effectiveness of discount window lending over time, a distinction could be made between "normal" discount window lending and "market stability" discount window lending. Access to normal discount window funding for FIDIs—including borrowing under the primary, secondary, and seasonal credit programs—could continue to operate much as it does today. All FIDIs would have access to normal discount window funding, which would continue to serve as a complementary tool of monetary policy by providing a mechanism to smooth out short-term volatility in reserves, and providing some degree of liquidity to FIDIs. Current Federal Reserve discount window policies regarding collateral, above market pricing, and maturity should remain in place. With such policies in place, normal discount window funding would likely be used infrequently.

In addition, the Federal Reserve should have the ability to undertake market stability discount window lending. Such lending would expand the Federal Reserve's lender of last resort function to include non-FIDIs. A sufficiently high threshold for invoking market stability discount window lending (i.e., overall threat to financial system stability) should be established. Market stability

discount window lending should be focused wherever possible on broad types of institutions as opposed to individual institutions. In addition, market stability discount window lending would have to be supported by Federal Reserve authority to collect information from and conduct examinations of borrowing firms in order to protect the Federal Reserve (and thereby the taxpayer).

Prudential Financial Regulator

The optimal structure should establish a new prudential financial regulator, PFRA. PFRA should focus on financial institutions with some type of explicit government guarantees associated with their business operations. Most prominent examples of this type of government guarantee in the United States would include federal deposit insurance and state-established insurance guarantee funds. Although protecting consumers and helping to maintain confidence in the financial system, explicit government guarantees often erode market discipline, creating the potential for moral hazard and a clear need for prudential regulation. Prudential regulation in this context should be applied to individual firms, and it should operate like the current regulation of insured depository institutions, with capital adequacy requirements, investment limits, activity limits, and direct on-site risk management supervision. PFRA would assume the roles of current federal prudential regulators, such as the OCC and the OTS.

A number of key long-term issues should be considered in establishing the new prudential regulatory framework. First, the optimal structure should establish a new FIDI charter. The FIDI charter would consolidate the national bank, federal savings association, and federal credit union charters and should be available to all corporate forms, including stock, mutual, and cooperative ownership structures. A FIDI charter should provide "field" preemption over state laws to reflect the national nature of financial services. In addition, to obtain federal deposit insurance a financial institution would have to obtain a FIDI charter. PFRA's prudential regulation and oversight should accompany the provision of federal deposit insurance. The goal of establishing a FIDI charter is to create a level playing field among all types of depository institutions where competition can take place on an economic basis rather than on the basis of regulatory differences.

Activity limits should be imposed on FIDIs to serve the traditional prudential function of limiting risk to the deposit insurance fund. A starting place could be the activities that are currently permissible for national banks.

PFRA's regulation regarding affiliates should be based primarily at the individual FIDI level. Extending PFRA's direct oversight authority to the holding company should be limited as long as PFRA has an appropriate set of tools to protect a FIDI from affiliate relationships. At a minimum, PFRA should be provided the same set of tools that exists today at the individual bank level to

protect a FIDI from potential risks associated with affiliate relationships. In addition, consideration should be given to strengthen further PFRA's authority in terms of limiting transactions with affiliates or requiring financial support from affiliates. PFRA should be able to monitor and examine the holding company and the FIDI's affiliates in order to ensure the effective implementation of these protections. With these added protections in place, from the perspective of protecting a FIDI, activity restrictions on affiliate relationships are much less important.

Holding company regulation was designed to protect the assets of the insured depository institution and to prevent the affiliate structure from threatening the assets of the insured institution. However, some view holding company supervision as way to protect against systemic risk. The optimal structure decouples those two regulatory objectives as the blurring of these objectives is ineffective and confusing. Therefore, PFRA will focus on the original intent of holding company supervision, protecting the assets of the insured depository institution; and a new market stability regulator will focus on broader systemic risk issues.

Second, to address the inefficiencies in the state-based insurance regulatory system, the optimal structure should establish a new FII charter. Similar to the FIDI charter, a FII charter should apply to insurers offering retail products where some type of government guarantee is present. In terms of a government guarantee, in the long run a uniform and consistent federally established guarantee structure, the Federal Insurance Guarantee Fund ("FIGF"), could accompany a system of federal oversight, although the existing state-level guarantee system could remain in place. PFRA would be responsible for the financial regulation of FIIs under the same structure as FIDIs.

Finally, some consideration should focus on including GSEs within the traditional prudential regulatory framework. Given the market misperception that the federal government stands behind the GSEs' obligations, one implication of the optimal structure is that PFRA should not regulate the GSEs. Nonetheless, given that the federal government has charged the GSEs with a specific mission, some type of prudential regulation would be necessary to ensure that they can accomplish that mission. To address these challenging issues, in the near term, a separate regulator should conduct prudential oversight of the GSEs and the market stability regulator should have the same ability to evaluate the GSEs as it has for other federally chartered institutions.

Business Conduct Regulator

The optimal structure should establish a new business conduct regulator, CBRA. CBRA should monitor business conduct regulation across all types of financial firms, including FIIs, FIDIs, and FFSPs. Business conduct regulation in this context includes key aspects of consumer protection such as disclosures, business practices, and chartering and licensing of certain types of financial firms. One agency responsible for all financial products should bring greater consistency to areas of

business conduct regulation where overlapping requirements currently exist. The business conduct regulator's chartering and licensing function should be different than the prudential regulator's financial oversight responsibilities. More specifically, the focus of the business conduct regulator should be on providing appropriate standards for firms to be able to enter the financial services industry and sell their products and services to customers.

A number of key long-term issues should be considered in establishing the new business conduct regulatory framework.

First, as part of CBRA's regulatory function, CBRA would be responsible for the chartering and licensing of a wide range of financial firms. To implement the chartering function, the optimal structure should establish a new FFSP charter for all financial services providers that are not FIDIs or FIIs. The FFSP charter should be flexible enough to incorporate a wide range of financial services providers, such as broker-dealers, hedge funds, private equity funds, venture capital funds, and mutual funds. The establishment of a FFSP charter would result in the creation of appropriate national standards, in terms of financial capacity, expertise, and other requirements, that must be satisfied to enter the business of providing financial services. For example, these standards would resemble the net capital requirements for broker-dealers for that type of FFSP charter. In addition to meeting appropriate financial requirements to obtain a FFSP charter, these firms would also have to remain in compliance with appropriate standards and provide regular updates on financial conditions to CBRA, the Federal Reserve, and the public as part of their standard public disclosures. CBRA would also oversee and regulate the business conduct of FIDIs and FIIs.

Second, the optimal structure should clearly specify the types of business conduct issues where CBRA would have oversight authority. In terms of FIDIs' banking and lending, CBRA should have oversight responsibilities in three broad categories: disclosure, sales and marketing practices (including laws and regulations addressing unfair and deceptive practices), and anti-discrimination laws. Similar to banking and lending, CBRA should have the authority to regulate FIIs' insurance business conduct issues associated with disclosures, business practices, and discrimination. CBRA's main areas of authority would include disclosure issues related to policy forms, unfair trade practices, and claims handling procedures.

In term of business conduct issues for FFSPs, such as securities and futures firms and their markets, CBRA's focus would include operational ability, professional conduct, testing and training, fraud and manipulation, and duties to customers (e.g., best execution and investor suitability). Third, CBRA's responsibilities for business conduct regulation in the optimal structure would be very broad. CBRA's responsibilities would take the place of those of the Federal Reserve and other insured depository institution regulators, state insurance regulators, most aspects of the

SEC's and the CFTC's responsibilities, and some aspect of the FTC's role. Given the breadth and scope of CBRA's responsibilities, some aspect of self-regulation should form an important component of implementation. Given its significance and effectiveness in the futures and securities industry, the SRO model should be preserved. That model could be considered for other areas, or the structure could allow for certain modifications, such as maintaining rule writing authority with CRBA, while relying on an SRO model for compliance and enforcement. Finally, the proper role of state authorities should be established in the optimal structure. CBRA would be responsible for setting national standards for a wide range of business conduct laws across all types of financial services providers. CBRA's national standards would apply to all financial services firms, whether federally or state-chartered. In addition, field preemption would be provided to FIDIs, FIIs, and FFSPs, preempting state business conduct laws directly relating to the provision of financial services. In the optimal structure, states would still retain clear authority to enact laws and take enforcement actions against state-chartered financial service providers. In considering the future role of the states vis-à-vis federally chartered institutions, the optimal structure seeks to acknowledge the existing national market for financial products, while at the same time preserving an appropriate role for state authorities to respond to local conditions. Two options should be considered to accomplish that goal. First, state authorities could be given a formalized role in CBRA's rulemaking process as a means of utilizing their extensive local experience. Second, states could also play a role in monitoring compliance and enforcement.

Federal Insurance Guarantee Corporation

The FDIC should be reconstituted as the Federal Insurance Guarantee Corporation ("FIGC") to administer not only deposit insurance, but also the FIGF (if one is created and valid reasons to leave this at the state level exist as discussed in the report). The FIGC should function primarily as an insurer in the optimal structure. Much as the FDIC operates today, the FIGC would have the authority to set risk-based premiums, charge ex-post assessments, act as a receiver for failed FIDIs or FIIs, and maintain some back-up examination authority over those institutions. The FIGC will not possess any additional direct regulatory authority.

Corporate Finance Regulator

The corporate finance regulator should have responsibility for general issues related to corporate oversight in public securities markets. These responsibilities should include the SEC's current responsibilities over corporate disclosures, corporate governance, accounting oversight, and other similar issues. As discussed above, CBRA would assume the SEC's current business conduct regulatory and enforcement authority over financial institutions.

Conclusion

The United States has the strongest and most liquid capital markets in the world. This strength is due in no small part to the U.S. financial services industry regulatory structure, which promotes consumer protection and market stability. However, recent market developments have pressured this regulatory structure, revealing regulatory gaps and redundancies. These regulatory inefficiencies may serve to detract from U.S. capital markets competitiveness.

In order to ensure the United States maintains its preeminence in the global capital markets, Treasury sets forth the aforementioned recommendations to improve the regulatory structure governing financial institutions. Treasury has designed a path to move from the current functional regulatory approach to an objectives-based regulatory regime through a series of specific recommendations. The short-term recommendations focus on immediate reforms responding to the current events in the mortgage and credit markets. The intermediate recommendations focus on modernizing the current regulatory structure within the current functional system.

The short-term and intermediate recommendations will drive the evolution of the U.S. regulatory structure towards the optimal regulatory framework, an objectives-based regime directly linking the regulatory objectives of market stability regulation, prudential financial regulation, and business conduct regulation to the regulatory structure. Such a framework best promotes consumer protection and stable and innovative markets.

EXHIBIT F

Added by Release No. IA-2628, effective September 10, 2007, 72 F.R. 44756.

[¶ 56,383L] **Pooled Investment Vehicles**

Reg. §275.206(4)-8. (a) *Prohibition.* It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser to a pooled investment vehicle to:

(1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or

(2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

(b) *Definition.* For purposes of this section "pooled investment vehicle" means any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)).

[Added by Release No. IA-2628, effective September 10, 2007, 72 F.R. 44756.]

EXHIBIT G

1 of 5 DOCUMENTS

Positive
As of: Apr 10, 2008

JAMES LARUE, PETITIONER v. DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.

No. 06-856

SUPREME COURT OF THE UNITED STATES

128 S. Ct. 1020; 169 L. Ed. 2d 847; 2008 U.S. LEXIS 2014; 76 U.S.L.W. 4083; 42 Employee Benefits Cas. (BNA) 2857; 21 Fla. L. Weekly Fed. S 63

November 26, 2007, Argued
February 20, 2008, Decided

PRIOR HISTORY: [***1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

LaRue v. Dewolff, Boberg & Assocs., 450 F.3d 570, 2006 U.S. App. LEXIS 14938 (4th Cir. S.C., 2006)

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner pension plan participant alleged respondent former employer/plan administrator breached a fiduciary duty under the Employee Retirement Income Security Act of 1974 by failing to follow his investment directions. The United States Court of Appeals for the Fourth Circuit affirmed judgment on the pleadings to the employer, holding *29 U.S.C.S. § 1132(a)(2)* provided remedies only for entire plans. Certiorari was granted.

OVERVIEW: The plan permitted participants to direct the investment of their contributions. One of *§ 1132(a)*'s authorized civil actions allowed participants to bring actions on behalf of a plan to recover for violations of the obligations defined in *29 U.S.C.S. § 1109(a)*. And, *29 U.S.C.S. § 1132(a)(2)* encompassed appropriate claims for "lost profits" as fiduciaries were chargeable with any profit which would have accrued to the plan if there had been no breach of trust, including profits forgone because the fiduciary failed to purchase specific property which it was his duty to purchase. The "entire plan" language from a prior case upon which the Fourth Circuit relied and which appeared nowhere in *29 U.S.C.S. §§ 1109, 1132(a)(2)*, did not apply to defined contribution plans such as the one at issue. Therefore, although *§ 1132(a)(2)* did not provide a remedy for individual injuries distinct from plan injuries, that provision did authorize recovery for fiduciary breaches that impaired the value of plan assets in a participant's individual account. Accordingly, the Fourth Circuit's judgment was vacated.

OUTCOME: The Fourth Circuit's judgment that *29 U.S.C.S. § 1132(a)(2)* provided remedies only for entire plans was vacated and the case was remanded. 5-4 decision; 2 concurrences in part and concurrences in the judgment; 2 concurrences in the judgment.

LexisNexis(R) Headnotes

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Breach of Fiduciary Duty

[HN1] *29 U.S.C.S. § 1132(a)(2)* provides for suits to enforce the liability-creating provisions of § 409 of the Employee Retirement Income Security Act of 1974, concerning breaches of fiduciary duties that harm plans.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Fiduciaries > Fiduciary Responsibilities > General Overview
[HN2] See *29 U.S.C.S. § 1109(a)*.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Breach of Fiduciary Duty
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Fiduciaries > Fiduciary Responsibilities > General Overview
[HN3] *29 U.S.C.S. § 1132(a)* identifies six types of civil actions that may be brought by various parties. The second authorizes the Secretary of Labor as well as plan participants, beneficiaries, and fiduciaries, to bring actions on behalf of a plan to recover for violations of the obligations defined in *29 U.S.C.S. § 1109(a)*. The principal statutory duties imposed on fiduciaries by that section relate to the proper management, administration, and investment of fund assets, with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to participants and beneficiaries.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Breach of Fiduciary Duty
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Fiduciaries > Fiduciary Responsibilities > General Overview
[HN4] *29 U.S.C.S. § 1132(a)(2)* encompasses appropriate claims for "lost profits." Under the common law of trusts, which informs the interpretation of the Employee Retirement Income Security Act of 1974's fiduciary duties, trustees are chargeable with any profit which would have accrued to the trust estate if there had been no breach of trust, including profits forgone because the trustee fails to purchase specific property which it is his duty to purchase.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Breach of Fiduciary Duty
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Fiduciaries > Fiduciary Responsibilities > General Overview
[HN5] For defined contribution plans, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of *29 U.S.C.S. § 1109(a)*.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Civil Claims & Remedies > Causes of Action > Breach of Fiduciary Duty
Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Fiduciaries > Fiduciary Responsibilities > General Overview
[HN6] *29 U.S.C.S. § 1104(c)* exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts. This provision would serve no real purpose if fiduciaries never had any liability for losses in an individual account.

Pensions & Benefits Law > Employee Retirement Income Security Act (ERISA) > Participation & Vesting > Participation
[HN7] A plan "participant," as defined by § 3(7) of the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1002(7)*, may include a former employee with a colorable claim for benefits.

SYLLABUS

Petitioner, a participant in a defined contribution pension plan, alleged that the plan administrator's failure to follow petitioner's investment directions "depleted" his interest in the plan by approximately $ 150,000 and amounted to a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted respondents judgment on the pleadings, and the Fourth Circuit affirmed. Relying on *Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96*, the Circuit held that *ERISA § 502(a)(2)* provides

remedies only for entire plans, not for individuals.

Held: Although *§ 502(a)(2)* does not provide a remedy for individual injuries distinct from plan injuries, it does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. *Section 502(a)(2)* provides for suits to enforce the liability-creating provisions of *§ 409*, concerning breaches of fiduciary duties that harm plans. The principal statutory duties imposed by *§ 409* relate to the proper management, administration, and [***2] investment of plan assets, with an eye toward ensuring that the benefits authorized by the plan are ultimately paid to plan participants. The misconduct that petitioner alleges falls squarely within that category, unlike the misconduct in *Russell.* There, the plaintiff received all of the benefits to which she was contractually entitled, but sought consequential damages arising from a delay in the processing of her claim. *Russell's* emphasis on protecting the "entire plan" reflects the fact that the disability plan in *Russell,* as well as the typical pension plan at that time, promised participants a fixed benefit. Misconduct by such a plan's administrators will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. For defined contribution plans, however, fiduciary misconduct need not threaten the entire plan's solvency to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants or only to particular individuals, it creates the kind of harms that concerned *§ 409*'s draftsmen. Thus, *Russell's* "entire plan" references, [***3] which accurately reflect *§ 409*'s operation in the defined benefit context, are beside the point in the defined contribution context. Pp. 4-8.

450 F.3d 570, vacated and remanded.

COUNSEL: **Peter K. Stris** argued the cause for petitioner.

Matthew D. Roberts argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas P. Gies argued the cause for respondents.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which SOUTER, GINSBURG, BREYER, and ALITO, JJ., joined. ROBERTS, C. J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined.

OPINION BY: STEVENS

OPINION

[*1022] [**850] JUSTICE STEVENS delivered the opinion of the Court.

In *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)*, we held that a participant in a disability plan that paid a fixed level of benefits could not bring suit under § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, *29 U.S.C. § 1132(a)(2)*, to recover consequential [**851] damages arising from delay in the processing of her claim. In this case we consider whether that statutory provision authorizes a participant in a defined contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account. [1] Relying on our decision in *Russell,* the [***4] Court of Appeals for the Fourth Circuit held that *§ 502(a)(2)* "provides remedies only for entire plans, not for individuals . . . . Recovery under this subsection must 'inure[ ] to the benefit of the plan *as a whole,*' not to particular persons with rights under the plan." *450 F.3d 570, 572-573 (2006)* (quoting *Russell, 473 U.S., at 140, 105 S. Ct. 3085, 87 L. Ed. 2d 96*). While language in our *Russell* opinion is consistent with that conclusion, the rationale for *Russell's* holding supports the opposite result in this case.

1 As its names imply, a "defined contribution plan" or "individual account plan" promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions. A "defined benefit plan," by contrast, generally promises the participant a fixed level of retirement income, which is typically based on the employee's years of service and compensation. See §§ 3(34)-(35), *29 U.S.C. §§ 1002(34)-(35)*; P. Schneider & B. Freedman, ERISA: A Comprehensive Guide § 3.02 (2d ed. 2003).

I

Petitioner filed this action in 2004 against his former

employer, DeWolff, Boberg & Associates (DeWolff), and the [***5] ERISA-regulated 401(k) retirement savings plan administered by DeWolff (Plan). The Plan permits participants to direct the investment of their contributions in accordance with specified procedures and requirements. Petitioner alleged that in 2001 and 2002 he directed DeWolff to make certain changes to the investments in his individual account, but DeWolff never carried out these directions. Petitioner [*1023] claimed that this omission "depleted" his interest in the Plan by approximately $ 150,000, and amounted to a breach of fiduciary duty under ERISA. The complaint sought "'make-whole' or other equitable relief as allowed by [*§ 502(a)(3)*]," as well as "such other and further relief as the court deems just and proper." Civil Action No. 2:04-1747-18 (D. S. C.), p. 4, 2 Record, Doc. 1.

Respondents filed a motion for judgment on the pleadings, arguing that the complaint was essentially a claim for monetary relief that is not recoverable under *§ 502(a)(3)*. Petitioner countered that he "d[id] not wish for the court to award him any money, but . . . simply want[ed] the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty." Reply to Defendants [***6] Motion to Dismiss, p. 7, 3 *id.*, Doc. 17. The District Court concluded, however, that since respondents did not possess any disputed funds that rightly belonged to petitioner, he was seeking damages rather than equitable relief available under *§ 502(a)(3)*. Assuming, *arguendo,* that respondents had beached a fiduciary duty, the District Court nonetheless granted their motion.

On appeal petitioner argued that he had a cognizable claim for relief under *§§ 502(a)(2)* and *502(a)(3) of ERISA*. The Court of Appeals stated that petitioner had raised his *§ 502(a)(2)* argument for the first time on appeal, but nevertheless rejected it on the merits.

[**852] [HN1] *Section 502(a)(2)* provides for suits to enforce the liability-creating provisions of *§ 409*, concerning breaches of fiduciary duties that harm plans. [2] The Court of Appeals cited language from our opinion in *Russell* suggesting that that these provisions "protect the entire plan, rather than the rights of an individual beneficiary." *473 U.S., at 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96*. It then characterized the remedy sought by petitioner as "personal" because he "desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit," and concluded:

> "We are [***7] therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as [*§ 502(a)(2)*] requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's plan *account,* which is part of the plan. But such a view finds no license in the statutory text, and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief." *450 F.3d at 574*.

2 *Section 409(a)* provides:

> [HN2] "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act." 88 Stat. 886, *29 U.S.C. § 1109(a)*.

The Court of Appeals [***8] also rejected petitioner's argument that the make-whole relief he sought was "equitable" within the meaning of *§ 502(a)(3)*. Although our grant of certiorari, *551 U.S. , 127 S. Ct. 2971, 168 L. Ed. 2d 702 (2007)*, encompassed the *§ 502(a)(3)* issue, we do not address it because we conclude that the Court of Appeals misread *§ 502(a)(2)*.

[*1024] II

As the case comes to us we must assume that respondents breached fiduciary obligations defined in *§ 409(a)*, and that those breaches had an adverse impact on the value of the plan assets in petitioner's individual account. Whether petitioner can prove those allegations and whether respondents may have valid defenses to the claim are matters not before us. [3] Although the record

does not reveal the relative size of petitioner's account, the legal issue under *§ 502(a)(2)* is the same whether his account includes 1% or 99% of the total assets in the plan.

> 3 For example, we do not decide whether petitioner made the alleged investment directions in accordance with the requirements specified by the Plan, whether he was required to exhaust remedies set forth in the Plan before seeking relief in federal court pursuant to *§ 502(a)(2)*, or whether he asserted his rights in a timely fashion.

As we explained [***9] in *Russell*, and in more detail in our later opinion in *Varity Corp. v. Howe, 516 U.S. 489, 508-512, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)*, [HN3] *§ 502(a) of ERISA* identifies six types of civil actions that may be brought by various parties. The second, which is at issue in this case, authorizes the Secretary of Labor as well as plan participants, beneficiaries, and fiduciaries, to bring actions on behalf of a plan to recover for violations of the obligations defined in *§ 409(a)*. The principal statutory duties [**853] imposed on fiduciaries by that section "relate to the proper management, administration, and investment of fund assets," with an eye toward ensuring that "the benefits authorized by the plan" are ultimately paid to participants and beneficiaries. *Russell, 473 U.S., at 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96*; see also *Varity, 516 U.S., at 511-512, 116 S. Ct. 1065, 134 L. Ed. 2d 130* (noting that *§ 409*'s fiduciary obligations "relat[e] to the plan's financial integrity" and "reflec[t] a special congressional concern about plan asset management"). The misconduct alleged by the petitioner in this case falls squarely within that category. [4]

> 4 The record does not reveal whether the alleged $ 150,000 injury represents a decline in the value of assets that DeWolff should have sold or an increase [***10] in the value of assets that DeWolff should have purchased. Contrary to respondents' argument, however, [HN4] *§ 502(a)(2)* encompasses appropriate claims for "lost profits." See Brief for Respondents 12-13. Under the common law of trusts, which informs our interpretation of ERISA's fiduciary duties, see *Varity, 516 U.S., at 496-497, 116 S. Ct. 1065, 134 L. Ed. 2d 130*, trustees are "chargeable with . . . any profit which would have accrued to the trust estate if there had been no breach of trust," including profits forgone because the trustee "fails to purchase specific property which it is his duty to purchase." 1 *Restatement (Second) Trusts § 205*, and *Comment i, § 211 (1957)*; see also 3 A. Scott, Law on Trusts §§ 205, 211 (3d ed. 1967).

The misconduct alleged in *Russell*, by contrast, fell outside this category. The plaintiff in *Russell* received all of the benefits to which she was contractually entitled, but sought consequential damages arising from a delay in the processing of her claim. *473 U.S., at 136-137, 105 S. Ct. 3085, 87 L. Ed. 2d 96*. In holding that *§ 502(a)(2)* does not provide a remedy for this type of injury, we stressed that the text of *§ 409(a)* characterizes the relevant fiduciary relationship as one "with respect to a plan," and repeatedly identifies [***11] the "plan" as the victim of any fiduciary breach and the recipient of any relief. See *id., at 140, 105 S. Ct. 3085, 87 L. Ed. 2d 96*. The legislative history likewise revealed that "the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators." *Id., at 141, n. 8, 105 S. Ct. 3085, 87 L. Ed. 2d 96*. Finally, our review of ERISA as a whole confirmed that *§§ 502(a)(2)* and *409* protect "the financial integrity of the plan," *id., at 142, n. 9, 105 S. Ct. 3085, 87 L. Ed. 2d 96*, whereas other provisions [*1025] specifically address claims for benefits. See *id., at 143-144, 105 S. Ct. 3085, 87 L. Ed. 2d 96* (discussing *§§ 502(a)(1)(B)* and *503*). We therefore concluded:

> "A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id., at 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96*.

Russell's emphasis on protecting the "entire plan" from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed.

Defined contribution plans dominate the retirement plan scene today. [5] In contrast, when ERISA was enacted, and when *Russell* was decided, "the [defined benefit] plan was the norm of American pension [***12] practice." [**854] J. Langbein, S. Stabile, & B. Wolk, Pension and Employee Benefit Law 58 (4th ed. 2006);

see also Zelinsky, The Defined Contribution Paradigm, *114 Yale L. J. 451, 471 (2004)* (discussing the "significant reversal of historic patterns under which the traditional defined benefit plan was the dominant paradigm for the provision of retirement income"). Unlike the defined contribution plan in this case, the disability plan at issue in *Russell* did not have individual accounts; it paid a fixed benefit based on a percentage of the employee's salary. See *Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482, 486 (CA9 1983).*

> 5 See, *e.g.*, D. Rajnes, An Evolving Pension System: Trends in Defined Benefit and Defined Contribution Plans, Employee Benefit Research Institute (EBRI) Issue Brief No. 249 (Sept. 2002), http://www.ebri.org/pdf/briefspdf/0902ib.pdf (all Internet materials as visited Jan. 28, 2008, and available in Clerk of Court's case file); Facts from EBRI: Retirement Trends in the United States Over the Past Quarter-Century (June 2007), http://www.ebri.org/pdf/publications/facts/0607fact.pdf.

The "entire plan" language in *Russell* speaks to the impact of *§ 409* on plans that [***13] pay defined benefits. Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance. See Zelinsky, *114 Yale L. J., at 475-478.*

[HN5] For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of *§ 409*. Consequently, our references to the "entire plan" in *Russell,* which accurately reflect the operation of *§ 409* in the defined benefit context, are beside the point in the defined contribution context.

Other sections of ERISA confirm that the "entire plan" language [***14] from *Russell,* which appears nowhere in *§ 409* or *§ 502(a)(2)*, does not apply to defined contribution plans. Most significant is [HN6] *§ 404(c)*, which exempts fiduciaries from liability for losses caused by participants' exercise of control over assets in their individual accounts. See also *29 CFR § 2550.404c-1 (2007)*. This provision would serve no real purpose if, as respondents [*1026] argue, fiduciaries never had any liability for losses in an individual account.

We therefore hold that although *§ 502(a)(2)* does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion. [6]

> 6 After our grant of certiorari respondents filed a motion to dismiss the writ, contending that the case is moot because petitioner is no longer a participant in the Plan. While his withdrawal of funds from the Plan may have relevance to the proceedings on remand, we denied their motion because the case is not moot. [HN7] A plan "participant," as [***15] defined by *§ 3(7) of ERISA, 29 U.S.C. § 1002(7)*, may include a former employee with a colorable claim for benefits. See, *e.g., Harzewski v. Guidant Corp., 489 F.3d 799 (CA7 2007).*

It is so ordered.

CONCUR BY: ROBERTS; THOMAS

CONCUR

[**855] CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY joins, concurring in part and concurring in the judgment.

In the decision below, the Fourth Circuit concluded that the loss to LaRue's individual plan account did not permit him to "serve as a legitimate proxy for the plan in its entirety," thus barring him from relief under § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C. § 1132(a)(2). 450 F.3d 570, 574 (2006).* The Court today rejects that reasoning. See *ante, at 4, 7-8.* I agree with the Court that the Fourth Circuit's analysis was flawed, and join the Court's opinion to that extent.

The Court, however, goes on to conclude that *§ 502(a)(2)* does authorize recovery in cases such as the present one. See *ante, at 7-8*. It is not at all clear that this is true. LaRue's right to direct the investment of his contributions was a right granted and governed by the plan. See *ante, at 2*. In this action, he seeks the benefits that would otherwise be due him [***16] if, as alleged, the plan carried out his investment instruction. LaRue's claim, therefore, is a claim for benefits that turns on the application and interpretation of the plan terms, specifically those governing investment options and how to exercise them.

It is at least arguable that a claim of this nature properly lies only under *§ 502(a)(1)(B) of ERISA*. That provision allows a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *29 U.S.C. § 1132(a)(1)(B)*. It is difficult to imagine a more accurate description of LaRue's claim. And in fact claimants have filed suit under *§ 502(a)(1)(B)* alleging similar benefit denials in violation of plan terms. See, *e.g., Hess v. Reg-Ellen Machine Tool Corp., 423 F.3d 653, 657 (CA7 2005)* (allegation made under *§ 502(a)(1)(B)* that a plan administrator wrongfully denied instruction to move retirement funds from employer's stock to a diversified investment account).

If LaRue may bring his claim under *§ 502(a)(1)(B)*, it is not clear that he may do so under *§ 502(a)(2)* as well. *Section 502(a)(2)* [***17] provides for "appropriate" relief. Construing the same term in a parallel ERISA provision, we have held that relief is not "appropriate" under *§ 502(a)(3)* if another provision, such as *§ 502(a)(1)(B)*, offers an adequate remedy. See *Varity Corp. v. Howe, 516 U.S. 489, 515, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)*. Applying the same rationale to an interpretation of "appropriate" in *§ 502(a)(2)* would accord [*1027] with our usual preference for construing the "same terms [to] have the same meaning in different sections of the same statute," *Barnhill v. Johnson, 503 U.S. 393, 406, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992)*, and with the view that ERISA in particular is a "' comprehensive and reticulated statute'" with "carefully integrated civil enforcement provisions," *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)* (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation, 446 U.S. 359, 361, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980))*. In a variety of contexts, some Courts of Appeals have accordingly prevented [**856] plaintiffs from recasting what are in essence plan-derived benefit claims that should be brought under *§ 502(a)(1)(B)* as claims for fiduciary breaches under *§ 502(a)(2)*. See, *e.g., Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc., 102 F.3d 712, 714 (CA4 1996)*. [***18] Other Courts of Appeals have disagreed with this approach. See, *e.g., Graden v. Conexant Systems Inc., 496 F.3d 291, 301 (CA3 2007)*.

The significance of the distinction between a *§ 502(a)(1)(B)* claim and one under *§ 502(a)(2)* is not merely a matter of picking the right provision to cite in the complaint. Allowing a *§ 502(a)(1)(B)* action to be recast as one under *§ 502(a)(2)* might permit plaintiffs to circumvent safeguards for plan administrators that have developed under *§ 502(a)(1)(B)*. Among these safeguards is the requirement, recognized by almost all the Courts of Appeals, see *Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 418, n. 4 (CA6 1998)* (citing cases), that a participant exhaust the administrative remedies mandated by *ERISA § 503, 29 U.S.C. § 1133*, before filing suit under *§ 502(a)(1)(B)*. * Equally significant, this Court has held that ERISA plans may grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of plan terms, decisions that courts may review only for an abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989)*.

> * Sensibly, the Court leaves open the question whether exhaustion may be required [***19] of a claimant who seeks recovery for a breach of fiduciary duty under *§ 502(a)(2)*. See *ante, at 4, n. 3*.

These safeguards encourage employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants, see *Aetna Health Inc. v. Davila, 542 U.S. 200, 215, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)*, and have no doubt engendered substantial reliance interests on the part of plans and fiduciaries. Allowing what is really a claim for benefits under a plan to be brought as a claim for breach of fiduciary duty under *§ 502(a)(2)*, rather than as a claim for benefits due "under the terms of [the] plan," *§ 502(a)(1)(B)*, may result in circumventing such plan terms.

I do not mean to suggest that these are settled

questions. They are not. Nor are we in a position to answer them. LaRue did not rely on *§ 502(a)(1)(B)* as a source of relief, and the courts below had no occasion to address the argument, raised by an *amicus* in this Court, that the availability of relief under *§ 502(a)(1)(B)* precludes LaRue's fiduciary breach claim. See Brief for ERISA Industry Committee as *Amicus Curiae* 13-30. I simply highlight the fact that the Court's determination that the present claim may be brought under [***20] *§ 502(a)(2)* is reached without considering whether the possible availability of relief under *§ 502(a)(1)(B)* alters that conclusion. See, *e.g., United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, n. 2, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981)* (noting general reluctance to consider arguments [*1028] raised only by an *amicus* and not considered by the courts below). In matters of statutory interpretation, where principles of *stare decisis* have their greatest effect, it is important that we not seem to decide more than we do. I see nothing in today's opinion precluding the lower courts on remand, if they determine that the argument is properly before them, from considering the [**857] contention that LaRue's claim may proceed only under *§ 502(a)(1)(B)*. In any event, other courts in other cases remain free to consider what we have not -- what effect the availability of relief under *§ 502(a)(1)(B)* may have on a plan participant's ability to proceed under *§ 502(a)(2)*.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment.

I agree with the Court that petitioner alleges a cognizable claim under § 502(a)(2) of the Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C. § 1132(a)(2)*, but it is ERISA's text and [***21] not "the kind of harms that concerned [ERISA's] draftsmen" that compels my decision. *Ante, at 7.* In *Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)*, the Court held that *§ 409 of ERISA, 29 U.S.C. § 1109*, read together with *§ 502(a)(2)*, authorizes recovery only by "the plan as an entity," *473 U.S., at 140, 105 S. Ct. 3085, 87 L. Ed. 2d 96*, and does not permit individuals to bring suit when they do not seek relief on behalf of the plan, *id., at 139-144, 105 S. Ct. 3085, 87 L. Ed. 2d 96*. The majority accepts *Russell's* fundamental holding, but reins in the Court's further suggestion in *Russell* that suits under *§ 502(a)(2)* are meant to "protect the entire plan," rather than "the rights of an individual beneficiary." *Ante, at 4-8*; see *Russell, supra, at 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96*. The majority states that emphasizing the "entire plan" was a sensible application of *§§ 409* and *502(a)(2)* in the historical context of defined benefit plans, but that the subsequent proliferation of defined contribution plans has rendered *Russell's* dictum inapplicable to most modern cases. *Ante, at 6-7.* In concluding that a loss suffered by a participant's defined contribution plan account because of a fiduciary breach "creates the kind of harms that concerned the draftsmen of *§ 409*," [***22] the majority holds that *§ 502(a)(2)* authorizes recovery for plan participants such as petitioner. *Ante, at 7-8.*

Although I agree with the majority's holding, I write separately because my reading of *§§ 409* and *502(a)(2)* is not contingent on trends in the pension plan market. Nor does it depend on the ostensible "concerns" of ERISA's drafters. Rather, my conclusion that petitioner has stated a cognizable claim flows from the unambiguous text of *§§ 409* and *502(a)(2)* as applied to defined contribution plans. *Section 502(a)(2)* states that "[a] civil action may be brought" by a plan "participant, beneficiary or fiduciary," or by the Secretary of Labor, to obtain "appropriate relief" under *§ 409. 29 U.S.C. § 1132(a)(2). Section 409(a)* provides that "[a]ny person who is a fiduciary with respect to a *plan* . . . shall be personally liable to make good to such *plan* any losses to the *plan* resulting from each [fiduciary] breach, and to restore to such *plan* any profits of such fiduciary which have been made through use of assets of the *plan* by the fiduciary . . . ." *29 U.S.C. § 1109(a)* (emphasis added).

The plain text of *§ 409(a)*, which uses the term "plan" five times, leaves no doubt that *§ 502(a)(2)* [***23] authorizes recovery only for the plan. Likewise, Congress' repeated use of the word "any" in *§ 409(a)* clarifies that the key [**858] factor is whether the alleged losses can be said to be losses "to the plan," not whether they are otherwise of a particular nature or kind. See, *e.g.,* [*1029] *Ali* v. *Federal Bureau of Prisons, ante,* at 4 (noting that the natural reading of "any" is "one or some indiscriminately of whatever kind" (internal quotation marks omitted)). On their face, *§§ 409(a)* and *502(a)(2)* permit recovery of *all* plan losses caused by a fiduciary breach.

The question presented here, then, is whether the losses to petitioner's individual 401(k) account resulting from respondents' alleged breach of their fiduciary duties were losses "to the plan." In my view they were, because the assets allocated to petitioner's individual account were

plan assets. ERISA requires the assets of a defined contribution plan (including "gains and losses" and legal recoveries) to be allocated for bookkeeping purposes to individual accounts within the plan for the beneficial interest of the participants, whose benefits in turn depend on the allocated amounts. See *29 U.S.C. § 1002(34)* (defining a "defined contribution [***24] plan" as a "plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account"). Thus, when a defined contribution plan sustains losses, those losses are reflected in the balances in the plan accounts of the affected participants, and a recovery of those losses would be allocated to one or more individual accounts.

The allocation of a plan's assets to individual accounts for bookkeeping purposes does not change the fact that all the assets in the plan remain plan assets. A defined contribution plan is not merely a collection of unrelated accounts. Rather, ERISA requires a plan's combined assets to be held in trust and legally owned by the plan trustees. See *29 U.S.C. § 1103(a)* (providing that "all assets of an employee benefit plan shall be held in trust by one or more trustees"). In short, the assets of a defined contribution plan under ERISA constitute, at the very least, the sum of all the assets allocated for bookkeeping purposes to the participants' [***25] individual accounts. Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily "losses to the plan" for purposes of *§ 409(a)*. Accordingly, when a participant sustains losses to his individual account as a result of a fiduciary breach, the plan's aggregate assets are likewise diminished by the same amount, and *§ 502(a)(2)* permits that participant to recover such losses on behalf of the plan. *

* Of course, a participant suing to recover benefits on behalf of the plan is not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan.