1 LOHIER, Circuit Judge, concurring in part and dissenting in part:

2 The majority opinion today denies a petition for rehearing that I would
3 have granted in part. I nevertheless commend my panel colleagues for clarifying
4 that the initial majority opinion in this case did not hold that the Supreme Court's
5 decisions in Stoneridge and Janus[1] require a plaintiff claiming market
6 manipulation to allege that a defendant directly communicated false information
7 to a victim. Majority Op. at 10–11. Because that opinion initially appeared to
8 foreclose the plaintiffs' market manipulation claim against Israel Dweck, even
9 though plaintiffs alleged that he had engaged directly in a manipulation of
10 securities, I dissented on the ground that the opinion conflated the elements of a
11 misrepresentation claim and those of a manipulation claim. In particular, it
12 appeared to ignore the well-established theory of reliance based on the
13 fraud-on-the-market doctrine. See Fezzani v. Bear, Stearns & Co. Inc., 716 F.3d
14 18, 29 (2d Cir. 2013) (Lohier, J., dissenting). As the Supreme Court recently
15 reaffirmed, that doctrine remains alive and well. See Halliburton Co. v. Erica P.
16 John Fund, Inc., 134 S. Ct. 2398, 2409, 2413–15 (2014).

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[1] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008); Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011).

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1 Prompted in part by the compelling arguments advanced by the Securities
2 and Exchange Commission as amicus curiae in support of the appellants' petition
3 for rehearing, the majority's denial of the petition helpfully corrects the
4 misimpressions left by the original majority opinion. For example, it recognizes
5 that we have never required "that reliance by a victim on direct oral or written
6 communications by a defendant must be shown in every manipulation case."[2]
7 Majority Op. at 10–11. It also clarifies that "in a manipulation claim, a showing of
8 reliance may be based on 'market activity' intended to mislead investors by
9 sending 'a false pricing signal to the market,' upon which victims of the
10 manipulation rely." Id. at 11. Of course, I agree; as I explained in my prior
11 dissent, to read our jurisprudence otherwise would be a mistake. See Fezzani,
12 716 F.3d at 28–29 (Lohier, J., dissenting).
13 Nevertheless, I continue to dissent from the majority's ongoing refusal to
14 let the plaintiffs' claims against Dweck proceed. We should grant the petition for
15 rehearing and vacate the District Court's dismissal of those claims. The majority
16 opinion's denial of the petition is wrong because, in the process of correcting one

[2] Here, I would replace the phrase "every manipulation case" with "any manipulation case."

1 apparent error in the original opinion, it falls prey to two others.

2 The opinion's first error is to suggest that the claims against Dweck
3 founder because they "lump together sales of [manipulated] securities that
4 Dweck did not park with those of securities he did park," even though the
5 plaintiffs also allege that Dweck is responsible for losses in both categories of
6 securities. Majority Op. at 13. This is not a reason to dismiss these claims. As an
7 initial matter, the plaintiffs' treatment of the parked and unparked securities
8 together does not justify dismissing the complaint as to those securities that
9 Dweck is alleged to have parked. More importantly, the opinion ignores the fact
10 that the alleged manipulative scheme here, like most "pump and dump" stock
11 manipulation schemes, involves a cluster of interdependent securities that the
12 defendants—Dweck included—manipulated in tandem by parking certain shares
13 of those securities with knowing nominees while selling other shares to
14 unwitting victims. As the complaint describes it, "[i]f one security propped up
15 by the misconduct of defendants failed, all would fail." J.A., Vol. II, at 255. In
16 other words, Dweck's parking of certain securities helped to sustain the
17 defendants' manipulation of all of the securities, and the allegations in the
18 complaint as to Dweck's role in the manipulation support a claim for losses

1 associated with the overall market manipulation scheme.

2 The opinion makes a second, more serious set of errors. It misunderstands
3 the relationship between parking transactions and the fraud-on-the-market
4 doctrine, and it confuses the "signals" theory relating to parking transactions—a
5 theory the opinion purports to embrace, see Majority Op. at 13—with the direct
6 misrepresentation theory. In unraveling these errors, I think it useful to define
7 "parking," which, in the context of market manipulation, is no mere infraction;
8 people go to prison for it. See, e.g., United States v. Russo, 74 F.3d 1383, 1386,
9 1393 (2d Cir. 1996); United States v. Regan, 937 F.2d 823, 829–30 (2d Cir.),
10 amended by 946 F.2d 188 (2d Cir. 1991). We have described "parking" as
11 follows: "[A]n artificial device to avoid depressing the market price [that] . . .
12 occurs when a broker, unable to keep securities in his trading account, ostensibly
13 sells the same to another broker, with the understanding that the same securities
14 will be purchased back by the ostensible seller before the settlement date. In this
15 manner the shares are not sold into the [open] market." United States v. Corr,
16 543 F.2d 1042, 1045 n.5 (2d Cir. 1976); see also United States v. Bilzerian, 926 F.2d
17 1285, 1290 (2d Cir. 1991) ("'Parking' refers to a transaction in which a
18 broker-dealer buys stock from a customer with the understanding that the

customer will buy the stock back at a later date for the purchase price plus interest and commissions . . . [with] no market risk to the broker-dealer who is the owner of the shares in name only."). An illegal parking transaction keeps a significant number of shares in the hands of a "friendly" nominee who agrees not to sell the security and thereby avoids placing downward pressure on the share price, as might occur if the security were sold legitimately on the open market. In turn, keeping the parked shares out of the market supply enables the defendant to maintain better control over the tradeable shares and to manipulate the share price more easily.

So defined, parking indisputably reflects an illegal sham transaction, an artificial device designed to avoid depressing the market price of a security. We previously have recognized the tie between parking transactions and a fraud on the market. See Russo, 74 F.3d at 1393 (endorsing a theory pursuant to which a broker-dealer for whom defendants worked engaged in stock parking and thereby "perpetrated a fraud on the market by divorcing the financial risk of owning [the parked stock] from legal ownership of the stock"). Commentators have confirmed the connection. See, e.g., Lewis D. Lowenfels & Alan R. Bromberg, Securities Market Manipulations: An Examination and Analysis of

1 Domination and Control, Frontrunning, and Parking, 55 Alb. L. Rev. 293, 339–41
2 (1991).
3 The majority opinion does not quibble with the fact that the complaint
4 alleges a parking transaction more or less as defined above. Instead, it derides
5 the complaint for not alleging that the specific prices used in Dweck's parking
6 transactions "were ever reported in a market" or that the "'prices' used in the
7 parking transactions . . . were ever made known to the buyers of the securities in
8 question or that the securities were sold to appellants at prices 'signaled' by the
9 prices used in the parking . . . transactions." Majority Op. at 12. But this
10 misunderstands one of the primary functions of parking schemes such as the one
11 alleged here: to conceal rather than transmit real price information. Here, the
12 relevant "signals" are not false pricing signals about the specific "prices used in
13 the parking transactions," but rather include: (1) creating the false appearance of
14 trading volume or activity in the parked security, (2) making it appear that
15 Dweck (and others) rather than the broker-dealer was the beneficial owner of the
16 security who bore the financial risk of ownership, when, in fact, Dweck's
17 financial risk as a nominal holder of the securities was divorced from his legal
18 ownership, (3) masking the number of shares of the manipulated securities that

the broker-dealer actually controlled, and (4) creating the illusion that the parked securities were trading on the open, liquid market, when in fact they were not. In my view, several paragraphs in the complaint plausibly allege that these signals, among others, were transmitted to the market. For example:

> 10. Defendant[] Isaac R. Dweck . . . also engaged in parking transactions with the purpose and effect of creating a false appearance of an active trading market with the intent of inflating the trading price of the Manipulated Securities and causing investors, such as plaintiffs to purchase the Manipulated Securities.
>
> 131. Parking misl[ed] regulators and customers about the amount of Baron Stocks in Baron's own inventory, and fictitiously improved Baron's net capital . . . . The placement of such stock also artificially maintained the price of the Manipulated Stocks. The "parking" was done with the purpose and had the effect of creating a false impression in the minds of Baron customers of the value and liquidity of the "parked" securities and induced Baron customers, including plaintiffs, to make investments based on Baron's illusion of trading activity.
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> 221. . . . [Plaintiffs] were unaware that the market for Baron stocks was entirely a fictional mirage. Month after month, they had received confirmations and monthly statements from Bear Stearns which indicated that the Baron stocks were trading in a bona fide market. Publicly available information on these stocks further confirmed an active market where large numbers of shares traded freely. . . . [None of the]

> plaintiffs[] knew that Bear Stearns, the Dweck Defendants, . . . and all other defendants knew that Baron simply cr[e]ated the illusion of an active market through parking, wash sales, unauthorized purchases and fraud.
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> 319. . . . Defendants' fraudulent and manipulative activities as described herein created the appearance that the price at which the Manipulated Securities traded reflected bona fide supply and demand in a freely functioning market. The increasing prices of the Manipulated Securities appeared to indicate increasing value, placed by the market, on the businesses underlying the securities. Thus, . . . the appearance of an active, rising market induced plaintiffs to purchase those securities in reliance upon the "wisdom of the marketplace." Instead, the values placed by the market on the Manipulated Securities were fictitious and solely a result of defendants' manipulative practices.

J.A., Vol. II, at 243, 281, 310, 340.

The majority opinion summarizes its reasons for denying the petition by suggesting that the plaintiffs did not rely on the signals conveyed by Dweck's parking transactions, but relied instead on "misrepresentations by Baron sales people as to how the price they were charging for particular securities was arrived at." Majority Op. at 14. The opinion concludes that "Dweck's role in parking certain securities was unknown to and not relied upon by those who purchased" the securities. Id. On the one hand, to the extent that the majority

1 opinion can be understood to conclude that the plaintiffs failed to allege reliance
2 on Dweck's role, it misses the point of the manipulative scheme, which was to
3 conceal rather than disclose Dweck's role as a confederate who parked securities.
4 On the other hand, to the extent that the opinion suggests that the plaintiffs
5 inadequately alleged reliance on the effect of Dweck's parking, as well as other
6 components of the manipulative scheme, that suggestion is contradicted by the
7 allegations quoted above.

8 I can't help but to end by noting that the majority opinion trots out
9 Stoneridge yet again to reject the claims against Dweck, this time on the ground
10 that the plaintiffs did not allege "reliance upon the parking transactions."
11 Majority Op. at 15. I have previously explained and will not repeat why
12 Stoneridge does not apply to claims of market manipulation such as the one
13 alleged here, or why plaintiffs were not obliged to allege reliance on the parking
14 transactions themselves.

1 I respectfully dissent from the denial of the petition for rehearing as to the

2 claims against Dweck.[3]

[3] The appellants' arguments in their petition for rehearing relating to Bear Stearns and the summary order in this case are not without force. Nevertheless, I agree with my panel colleagues that the appellants' nearly exclusive reliance on Levitt v. J.P. Morgan Securities, Inc., 710 F.3d 454 (2d Cir. 2013), is misplaced. Levitt is not necessarily inconsistent with the summary order and, as a technical matter, fails to provide a basis for rehearing under Rule 40(a) of the Federal Rules of Appellate Procedure. I therefore concur in the result as to Bear Stearns. I do not necessarily join the majority's other reasons for rejecting the petition for rehearing as to Bear Stearns. See, e.g., Majority Op. at 8 ("There is a real danger of harm to the financial industry in allowing such allegations to suffice to subject clearing brokers to the cost of discovery and perhaps a trial even though there is no evidence of participation by the brokers in the fraud or manipulation.").