No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

There is no aiding-and-abetting liability in private actions brought under Section 10(b) of the Securities Exchange Act of 1934. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Thus, a service provider who gives assistance to a company that makes a public misstatement cannot be held liable in a private securities-fraud action. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). In the decision below, however, the Fourth Circuit held that an investment adviser who allegedly "*helped* draft the misleading prospectuses" of a different company, "by *participating* in the writing and dissemination of [those] prospectuses," can be held liable in a private action "even if the statement on its face is *not* directly attributed to the [adviser]." Pet. App. 17a-18a, 24a (emphases added). The questions presented are:

1. Whether the Fourth Circuit erred in concluding that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements.

2. Whether the Fourth Circuit erred in concluding that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Craig Wiggins was a plaintiff in the district court. Mark B. Whiston, Loren M. Starr, and Gregory A. Frost were defendants in the district court.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONERS

Petitioners Janus Capital Group Inc. (JCG) and Janus Capital Management LLC (JCM) respectfully submit that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 566 F.3d 111. The opinion of the district court (Pet. App. 42a-53a) is reported at 487 F. Supp. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2009. A timely petition for rehearing was denied on June 2, 2009. Pet. App. 56a-57a. The Chief Justice extended the time in which to file a petition for a writ of certiorari to October 30, 2009. *See* No. 09A95. The petition was filed on that date and granted on June 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides:

> It shall be 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 Commis-

> sion may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities and Exchange Commission Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b), provides:

> It shall be 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 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[.]

STATEMENT

The operative complaint charges petitioners with securities fraud based on statements in prospectuses that petitioners did not issue, offering securities in which lead plaintiff did not transact. The district court dismissed the complaint for failure to plead an actionable claim. The court of appeals reversed, holding that a service provider that allegedly "helped draft the misleading prospectuses" of a different company can be sued for securities fraud "even if the statement on its face is not directly attributed to the defendant." Pet. App. 17a, 24a.

1. "As a check against abusive litigation" brought by private securities-fraud plaintiffs, "Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). The PSLRA "imposed heightened pleading requirements" on plaintiffs bringing private ac-

tions under Section 10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008); *see also Tellabs*, 551 U.S. at 313 ("Exacting pleading requirements are among the control measures Congress included in the PSLRA").

The PSLRA "requires plaintiffs to state with particularity ... the facts constituting the alleged violation." *Tellabs*, 551 U.S. at 313. The "complaint shall specify each statement alleged to have been misleading" and "the reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1). The statutory consequence for failing to meet this (and other) pleading requirements imposed by Congress for this particular type of lawsuit is mandatory dismissal. *See id.* § 78u-4(b)(3)(A) ("the court shall, on the motion of any defendant, dismiss the complaint if [the statutory pleading] requirements are not met").

Because Section 10(b) actions sound in fraud, the complaint must also "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Of course, even under the "ordinary" pleading requirements of Rule 8(a)(2), the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). That is, the complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

2. JCG is a publicly traded financial services company; JCM is a subsidiary of JCG that provides investment advisory and administrative services to mutual funds, including series of Janus Investment Fund—a separate legal entity that is not owned, gov-

erned, or controlled by JCG or JCM. *See* Pet. App. 5a. The operative second amended complaint contains the following material allegations.[1]

"Lead Plaintiff, First Derivative Traders, purchased [JCG] securities during the class period." Pet. App. 64a ¶ 15. JCG "is an asset management firm that launched mutual funds known as the 'Janus Funds.'" *Id.* at 59a ¶ 2. JCG "manages the Janus Funds through its wholly-owned subsidiary [JCM, which] serves as investment adviser to the Janus Funds, and, in that capacity is responsible for the funds' day-to-day operations." *Ibid.* "Defendants [JCG] and [JCM] are referred to herein collectively as 'Janus.'" *Ibid.*

"Janus represented that its mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." Pet. App. 60a ¶ 5. "Certain investors, however, have attempted to use mutual funds to generate quick profits by rapidly trading in and out of certain mutual funds." *Ibid.* "[T]hese so-called 'market timers' … take advantage of price inequities, but do so at the expense and to the detriment of long-term shareholders." *Ibid.* "Janus wrote and represented its policy against market timers." *Id.* at 69a ¶ 31.

"Defendants caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public." Pet. App. 60a ¶ 6.

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[1] Given the procedural posture, the non-conclusory factual allegations of the complaint are taken as true (*Iqbal*, 129 S. Ct. at 1949-50), and judicial review is limited to the well-pleaded allegations and a limited set of other documents. *Tellabs*, 551 U.S. at 322-23.

"These prospectuses, which are given to prospective shareholders, included language that said Janus' funds were 'not intended for market timing or excessive trading' and said 'Janus had measures in place to stop the trading.'" *Id.* at 72a ¶ 38. "These statements were materially false and misleading" because "Janus and its subsidiaries had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions in various Janus Funds." *Ibid.*

"On September 3, 2003, New York Attorney General Eliot Spitzer" charged a hedge fund "with secretly paying several mutual fund managers (including Janus) to allow [it] to engage in, *inter alia*, market timing trades in those mutual funds." Pet. App. 96a ¶ 86. "It was ... entirely foreseeable that the revelations concerning the secret market timing arrangements would have [a] material impact on [JCG's] common stock price." *Id.* at 106a ¶ 111.

Based on these allegations, lead plaintiff charged that both JCG and JCM violated Section 10(b) and Rule 10b-5 (Pet. App. 111a-114a ¶¶ 126-135), and further charged that JCG was liable for JCM's actions as a "control person" under Section 20(a) of the Exchange Act (*id.* at 115a-116a ¶¶ 136-140).

3. The district court dismissed the second amended complaint for failure to plead an actionable claim against either JCG or JCM. Pet. App. 43a-53a.

The district court emphasized that the operative complaint "contains no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it." Pet. App. 46a. Indeed, lead plaintiff "concede[d] as much, arguing that '[t]he fact that the prospectus statements were not specifically at-

tributed to defendants does not warrant dismissal.'" *Ibid.* (quoting opposition to motion to dismiss) (second alteration in original). The district court therefore concluded that "plaintiffs have not alleged facts sufficient to support their conclusory averment that JCG made a material misstatement or omission," as required by Rule 10b-5(b). *Id.* at 48a.

The district court found it unnecessary to "decide whether JCM made the alleged misstatements" because even "a mutual fund investment adviser that allegedly made representations to mutual fund shareholders cannot be liable under section 10(b) to its parent's shareholders who purchased no mutual fund shares." Pet. App. 50a n.5, 53a. That is so, the district court explained, because an investment adviser "owe[s] no duty to its parent's shareholders because the latter never purchased or sold … mutual funds." *Id.* at 50a; *see also id.* at 53a n.7 (noting "the dispositive legal issue that JCM owed no duty to JCG shareholders under the circumstances of this case").

4. The court of appeals reversed, ruling that JCM could be held liable for "helping" to draft allegedly misleading statements in the prospectuses of another company even though the statements were not attributed to JCM. Pet. App. 17a-31a.

The Fourth Circuit first held that, "although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM *helped* draft the misleading prospectuses." Pet. App. 17a (emphasis added). The court concluded that four passages in the operative complaint, "taken together, allege that JCG and JCM, by *participating* in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 17a-18a

(citing *id.* at 60a ¶¶ 5-6, 69a ¶ 31, 109a ¶ 122) (first emphasis added).

The Fourth Circuit next considered "whether these statements were sufficiently attributable to JCG and JCM." Pet. App. 18a-19a. Declining to follow the decisions of other circuits, the Fourth Circuit concluded that "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly *infer* that interested investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant*." *Id.* at 23a-24a (emphases added; citations omitted). The court held that this newly created standard was satisfied as to JCM because "interested investors would have *inferred* that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements." *Id.* at 31a (emphasis added).[2]

SUMMARY OF ARGUMENT

In the PSLRA, Congress both "ratified" prior decisions implying a private right of action to enforce Section 10(b) and Rule 10b-5 and precluded further judicial expansion of that right. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S.

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[2] The Fourth Circuit concluded that "plaintiffs' allegations of attribution … are insufficient to reach JCG" (Pet. App. 32a) and therefore that JCG could be held liable only as a "control person" of JCM under Section 20(a) of the Exchange Act. Pet. App. 38a-40a. Because such liability may be imposed only when the controlled person has itself violated the Exchange Act (*id.* at 36a), JCG's liability is dependent on JCM's. Accordingly, the remainder of this brief focuses on JCM.

148, 165-66 (2008). The decision below, which expands the private right to sweep in contractual service providers to an issuer in whose prospectuses the alleged misstatements appear, transgresses this limitation.

I. JCM, which provides investment advisory services to mutual funds pursuant to contract, is a secondary actor with respect to statements in the mutual funds' prospectuses.

A. Because there is no aiding-and-abetting liability in private actions under Section 10(b) and Rule 10b-5, "secondary actors" cannot be held liable in such suits unless "*all* of the requirements for primary liability … are met." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). Where liability is premised on alleged misstatements in a prospectus, the primary actors are the issuer of the securities and certain of its employees. All other persons or entities "who provide services" to the issuer in connection with the offering, regardless of the nature and extent of those services, are secondary actors. *Id.* at 188.

B. Both lead plaintiff and the government have suggested that investment advisers should be treated differently from other service providers, arguing that investment advisers are "essentially … corporate insider[s]" of the mutual funds they advise. U.S. Cert. Br. 9. Congress has said otherwise: The relationship between mutual funds and their investment advisers is governed by a comprehensive statutory scheme that includes numerous provisions to ensure that the adviser and funds—which are related only by contract—remain independent. *See Burks* v. *Lasker*, 441 U.S. 471, 482-83 (1979); *Jones*

v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422-23 (2010).

The obligation to register mutual fund securities is imposed on the issuing mutual funds, not the separate investment adviser. The mutual fund prospectuses at issue in this case were all approved by the Board of Trustees of the Janus Funds. The offering documents expressly recite that they are filed on behalf of the Funds, not the adviser, and make clear that all expenses incurred in complying with the securities laws—including prospectus preparation—remain the responsibility of the Janus Funds.

An "investment adviser exception" is, moreover, unnecessary to the effective operation of the securities laws. Congress expressly provided for the liability of investment advisers in a different statute. And the Exchange Act deals with the liability of secondary actors, including those who "control" a primary actor who violates the securities laws. Although the government intimates (incorrectly) that JCM controlled the Janus Funds, no such allegation appears in the operative complaint, and the district court has already precluded additional amendments.

II. JCM, as a secondary actor, cannot be held primarily liable for unattributed statements made by another company in that company's prospectuses. The complaint was properly dismissed because it does not adequately allege either that JCM *made* the alleged misstatements or that the statements were directly attributed to it, which is a necessary predicate for presumed *reliance*.

A. The statements in the Janus Funds' prospectuses were made by the Funds, not by JCM.

1. The complaint does not contain factual allegations from which a reasonable factfinder could conclude that JCM made the statements in the prospectuses of the Janus Funds. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). The complaint identifies just two "representations" that JCM is alleged to have been responsible for, but there is no allegation that JCM made these representations *in the mutual fund prospectuses*. Those documents describe JCM, in the third person, as a service provider to the Funds, and contain no indication that JCM made any of the statements therein. Indeed, lead plaintiff has all but conceded the inadequacy of its own complaint—its *third* effort to plead PSLRA-compliant claims against JCM.

The Fourth Circuit held only that the "essence" of the complaint was that JCM "helped draft the misleading prospectuses" and, "by participating in the writing and dissemination of the prospectuses, made the misleading statements contained in the documents." Pet. App. 17a-18a (emphasis omitted). This holding is flatly inconsistent with *Central Bank* and *Stoneridge*: There is no private liability for "helping" (*i.e.*, aiding) another company. Nor is there private liability for "participating" in another company's activities; to the contrary, this is a form of secondary liability that Congress has authorized only the SEC—and not private plaintiffs—to pursue. 15 U.S.C. § 78t(e).

2. Rather than try to defend the Fourth Circuit's decision on its own terms, both the government and lead plaintiff have proffered expansive definitions of "making" in an effort to salvage the result below.

This effort should be rejected as inconsistent with *Stoneridge*.

The government argues that a service provider "makes" a statement if it "creates" the statement or "causes it to be made." This construction is supported by no authority and has been roundly rejected by the lower courts. It is inconsistent with the text of Section 10(b) and the structure of the Exchange Act—indeed, in other provisions Congress has expressly distinguished between "make" and "cause to be made." 15 U.S.C. § 78r. Moreover, Rule 10b-5(b)—the only provision at issue here—is narrower than Section 10(b) and reaches only those who "make any untrue statement." Just as the President rather than his speechwriters "makes" a speech, an issuer rather than its service providers "makes" the statements in the prospectus.

Lead plaintiff argues that a service provider "makes" a statement by "participating in its preparation, filing, and dissemination." This alternative construction—in addition to being unsupported by the allegations of the complaint—suffers from the same flaws as the government's. "Participation" is a signifier of secondary action, and a service provider cannot be held primarily liable for assisting another company with its public statements. The challenged statements were made by the Janus Funds, on whom the statutory obligation was imposed, not JCM.

B. Even if JCM could be said to have made the challenged statements in the Janus Funds' prospectuses, the complaint does not adequately plead reliance because the statements were not directly attributed to JCM.

1. This Court has held that reliance on "public material misrepresentations" may be presumed. *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988). To invoke this fraud-on-the-market presumption, a private plaintiff must plead and prove that *the defendant* made a public misrepresentation, as this Court confirmed in both *Central Bank* and *Stoneridge*. Thus, the Court has applied the presumption only to express speakers while declining to extend it to reach unidentified sources of information. Under that framework, cases against secondary actors cannot proceed on a fraud-on-the-market theory.

2. If the *Basic* presumption could be invoked in cases against secondary actors, it would only be where the secondary actor's role was contemporaneously disclosed to the market—as where a statement is directly attributed to someone other than the issuer. The majority of the courts of appeals have recognized that direct attribution is a prerequisite to presuming reliance in cases against secondary actors. "Absent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud." *PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 148 (2d Cir. 2010). The understanding of market participants that a secondary actor may be at work "behind the scenes" is insufficient to support a presumption of reliance. *Id.* at 155.

The Fourth Circuit recognized that attribution is necessary, but concluded that market participants would "infer" that an investment adviser is the source of statements in mutual fund prospectuses. This inferential reasoning is at odds with the structure of the mutual fund industry. More fundamen-

tally, Congress has authorized the use of inferences to plead only one element of a private Rule 10b-5 action—scienter—and thus the factual predicates of all other elements, including reliance, must be pleaded with particularity. Permitting an attenuated inference of presumed reliance usurps "the federal lawmaker's prerogative … to allow, disallow, or shape the contours of—including the pleading and proof requirements for—[Section] 10(b) private actions." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 (2007).

Stoneridge held in no uncertain terms that the private right of action under Rule 10b-5 may not be expanded by courts, because adjustments to the liability regime under the federal securities laws are committed to Congress. The decision below is incompatible with *Stoneridge* and should be reversed.

ARGUMENT

The Securities Exchange Act of 1934 does not expressly provide a private right of action for alleged violations of Section 10(b). This Court, however, "has found a right of action implied in the words of the statute and its implementing regulation," the SEC's Rule 10b-5. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (citing *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)). This case involves only subsection (b) of that Rule, under which it is unlawful to "make any untrue statement" in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5(b); *see also* note 8, *infra*.

The implied right previously recognized under Section 10(b) and Rule 10b-5 incorporates two distinctions that were misapplied by the court below: *first*, the Court and Congress have distinguished

primary from secondary *actors*; and *second*, the Court and Congress have distinguished primary from secondary *violators*. These distinctions are critically important because the private right of action under Section 10(b) does not reach *any* secondary violations, and thus reaches secondary actors only when "*all* of the requirements for primary liability under Rule 10b-5 are met." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994); *see also Stoneridge*, 552 U.S. at 158 ("The conduct of a secondary actor must satisfy each of the elements or preconditions for liability").

JCM is neither a primary actor nor a primary violator with respect to the statements challenged by lead plaintiff, which appear in prospectuses of a separate company offering securities that lead plaintiff did not purchase or sell. JCM is not a primary actor because it did not issue the securities offered by those prospectuses; rather, JCM provided investment advisory services to the issuer pursuant to contract. It is therefore a secondary actor. And as such, JCM cannot be held primarily liable under Rule 10b-5(b) because the operative complaint does not competently allege either that JCM "made" the statements in question or that the statements were directly and contemporaneously "attributed" to JCM. A "material misrepresentation ... by the defendant" and "reliance upon [that] misrepresentation" are essential elements of lead plaintiff's claim (*Stoneridge*, 552 U.S. at 157), and its inability to plead these elements is therefore fatal. *Central Bank*, 511 U.S. at 191-92; *see also Stoneridge*, 552 U.S. at 157-58.

The Fourth Circuit's contrary decision expands the implied right of action to a new class of defendants—contractual service providers to issuers—and

gives unprecedented breadth to both the "making" and "reliance" elements of the private right of action. In the PSLRA, however, "Congress … ratified the implied right of action [under Section 10(b)] after the Court moved away from a broad willingness to imply private rights of action." *Stoneridge*, 552 U.S. at 165. "It is appropriate," *Stoneridge* held, "to assume that when [the PSLRA] was enacted, Congress accepted the [Section] 10(b) private cause of action as *then defined* but chose to extend it *no further*." *Id.* at 166 (emphases added). The decision below is irreconcilable with that adjudicative approach.

The court of appeals' judgment should be reversed and the district court's judgment of dismissal with prejudice reinstated.

I. INVESTMENT ADVISERS ARE SECONDARY ACTORS WITH RESPECT TO STATEMENTS IN PROSPECTUSES ISSUED BY THEIR MUTUAL FUND CLIENTS

The alleged misstatements in this case were contained in prospectuses that lead plaintiff did not read, issued by a company that lead plaintiff did not sue, offering securities that lead plaintiff did not purchase or sell. JCM, a contractual service provider to the issuer, is in every sense a secondary actor with respect to the challenged statements.

A. SERVICE PROVIDERS ARE SECONDARY ACTORS

In a prospectus-liability case—that is, where as here a Rule 10b-5 fraud claim is premised on alleged misstatements (or omissions) in a prospectus, registration statement, or other offering document—the universe of primary actors is limited to the issuer and certain of its employees. All others involved in

the offering, including the range of contractual advisers who assist issuers—financial advisers, legal advisers, and so forth—are secondary actors. *See*, *e.g.*, *PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 148 n.1 (2d Cir. 2010).

1. In *Central Bank*, this Court held that "a private plaintiff may not maintain an aiding and abetting suit" under Section 10(b) and Rule 10b-5. 511 U.S. at 191. The Court emphasized that "the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act." *Id.* at 177. "The proscription does not include," however, "giving aid to a person who commits a manipulative or deceptive act." *Ibid.* Accordingly, "secondary actors," including "lawyer[s], accountant[s], [and] bank[s]," cannot be held liable in a private Rule 10b-5 action unless "*all* of the requirements for primary liability … are met." *Id.* at 191.

The SEC and the plaintiffs' bar responded to *Central Bank* by urging Congress to permit private aiding-and-abetting suits, but Congress declined those entreaties. *See Stoneridge*, 552 U.S. at 158; *see also*, *e.g.*, S. Rep. No. 104-98, at 19 (1995) ("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 [the PSLRA's] goal of reducing meritless litigation"); H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (discussing "the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability").

While it chose not to allow private suits against aiders and abettors, Congress *did* authorize the SEC to bring enforcement actions against such persons.

Yet it did so not by amending Section 10(b), but rather by amending Section 20—a provision that also imposes secondary liability on "controlling person[s]" of primary violators. *Central Bank*, 511 U.S. at 184. Section 20(e), added by the PSLRA, provides that, in SEC enforcement actions, "any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter … shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." 15 U.S.C. § 78t(e). It is therefore clear that Congress knows how to impose liability on secondary actors when it so chooses. *Central Bank*, 511 U.S. at 184 ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere").

Having failed before Congress, private plaintiffs tried to "sidestep *Central Bank* by re-casting aiding and abetting claims as primary violations." Edward Brodsky, *Aiding and Abetting*, N.Y.L.J., June 8, 1994, at 3. That effort culminated in *Stoneridge*, where this Court reaffirmed *Central Bank*'s holding that "[t]he [Section] 10(b) implied private right of action does not extend to aiders and abettors." 552 U.S. at 158. Instead, the Court reiterated, "[t]he conduct of a secondary actor must satisfy each of the elements or preconditions for liability." *Ibid.*

Stoneridge observed that Congress's decision to amend the Exchange Act to "authoriz[e] [aiding-and-abetting liability] in actions brought by the SEC but not by private parties" further "supports the conclusion that there is no liability." 552 U.S. at 162-63. Although the plaintiffs' "view of primary liability makes any aider and abettor liable under [Section]

10(b) if he or she committed a deceptive act in the process of providing assistance," the Court noted that this "construction of [Section] 10(b) … 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." 552 U.S. at 162-63. Such an approach "would undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants." *Id.* at 163.

Congress has turned aside periodic attempts to undo *Central Bank* and *Stoneridge* and give private plaintiffs authority to sue aiders and abettors. *See*, *e.g.*, 155 Cong. Rec. S8501, S8557, S8564 (July 30, 2009). Indeed, the most recent Congress considered an amendment to Section 20(e) that would have authorized a private right of action against "any person that knowingly provides substantial assistance to another person in violation of this title." 156 Cong. Rec. S3569, S3618 (May 12, 2010) (introducing amendment); *see also* 156 Cong. Rec. S3385, S3399-S3400 (May 7, 2010) (statement of Sen. Specter); 156 Cong. Rec. S3663, S3670 (May 13, 2010) (statement of Sen. Specter). That amendment did not pass; instead, Congress directed the Comptroller General to "conduct a study on the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws," including "a review of the role of secondary actors in companies['] issuance of securities." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010).

2. In *Central Bank*, this Court held that "those who provide services to participants in the securities

business"—including "lawyer[s], accountant[s], and bank[ers]"—are "secondary actors." 511 U.S. at 188, 189, 191. And *Stoneridge* made clear that the non-issuer defendants before the Court—customers and suppliers of an issuer—were "secondary actors." 552 U.S. at 166. Relying on *Central Bank* and *Stoneridge*, the lower courts have correctly applied the prohibition on aiding-and-abetting liability to *all* persons and entities other than the issuer and certain of its employees. *See PIMCO*, 603 F.3d at 148 n.1 ("We use the term 'secondary actor' to refer to lawyers … , accountants, or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud").

The Dodd-Frank Act—Congress's most recent action in this area—expressly distinguishes between "secondary actors" and "companies" that "issu[e] … securities." Dodd-Frank Act § 929Z; *see also* 155 Cong. Rec. S8501, S8564 (July 30, 2009) (statement of Sen. Specter) (distinguishing between "stock issuer[s]" and "'secondary actors'" such as an issuer's "auditors, bankers, business affiliates, and lawyers"). "[T]he [academic] literature," similarly, "uses the term 'secondary actor' to refer to all entities or individuals who are not direct issuers of securities." The Supreme Court 2007 Term, Leading Cases, *Scope of Secondary Actor Liability*, 122 Harv. L. Rev. 485, 485 n.3 (2008); *see also*, *e.g.*, Thomas Wardell, *The Current State of Play Under the Sarbanes-Oxley Act of 2002*, 28 N.C. J. Int'l L. & Com. Reg. 935, 950 (2003) (referring to "the auditors, the investment banks, the lawyers, the investment advisors, the financial advisors, and others" as secondary actors); Taavi Annus, Note, *Scheme Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 72 Mo. L. Rev. 855, 858 n.25 (2007) ("[t]he term 'secondary actor' … usu-

ally denotes any actor who did not issue the security in question").

This distinction between issuers and non-issuers reflects the fact that the Securities Act of 1933 and the Securities Exchange Act of 1934 impose disclosure and other obligations primarily on issuers, not service providers. *See* Louis Loss *et al.*, *Securities Regulation* 152, 281-82, 357-60 (4th ed. 2009); *see also*, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195 (1976). Service providers, by contrast, are subject to a variety of *other* liability regimes under both federal and state law. *See*, *e.g.*, *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 156 (2d Cir. 2007) ("Congress knows how to impose duties on accountants, and expose them to liability, when it wants to do so"); *cf. Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 478 (1977).

The bright-line distinction between issuers and non-issuers also serves the critical goal of fostering "'certainty and predictability'" in an area of law that cannot tolerate "decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Central Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). For this reason, the nature and extent of duties contracted out to a service provider is irrelevant to the Rule 10b-5 analysis. As this Court warned in *Central Bank*, "'a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" 511 U.S. at 188 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975)).

B. INVESTMENT ADVISERS ARE SERVICE PROVIDERS

Lead plaintiff does not take issue with "the existing body of authority that holds that in most ordinary situations, outside professionals and service providers are not responsible to investors for misleading statements in an issuer's public filings." BIO 22. Lead plaintiff has asserted, however, that an exception should be made for investment advisers because they "handl[e]" certain "operations" of their mutual fund clients. *Id.* at 2, 21. The government has likewise suggested that "investment advisers are materially unlike outside service providers such as law firms and accounting firms" and are instead "essentially … corporate insiders." U.S. Cert. Br. 9, 22 n.10.

Any suggestion that the Court should endorse an "investment adviser exception" to the distinction between primary and secondary actors has a number of fatal flaws. Most fundamentally, since no such exception had been recognized when the PSLRA was enacted in 1995, the interpretive methodology of *Stoneridge* precludes judicial creation of such an exception now. Adjustments to the private liability regime are for Congress, not the courts. *Stoneridge*, 552 U.S. at 165.

In contrast to the government's litigating position that investment advisers are indistinguishable from their mutual fund clients, the SEC in its regulatory capacity has recognized that "the investment adviser is separate and distinct from the fund it advises, with primary responsibility and loyalty to its own shareholders." *Role of Independent Directors of Investment Companies*, SEC Release No. 33-7932, 66 Fed. Reg. 3734, 3735 (Jan. 16, 2001). Indeed, in-

vestment advisers are identical to all other recognized secondary actors in the only respect that matters under this Court's cases: They are not issuers or employees of issuers. *See PIMCO*, 603 F.3d at 148 n.1.[3]

1. The Investment Company Act of 1940 (ICA) and the Investment Advisers Act of 1940 (IAA) comprehensively regulate the fund-adviser relationship and contain numerous provisions to ensure that the adviser and funds remain independent. *See Burks* v. *Lasker*, 441 U.S. 471, 482-83 (1979). The relationship between these separate companies is governed by a written contract that must, by law, be approved by the independent directors of the funds and their shareholders. 15 U.S.C. § 80a-15(a), (c). This Court has heretofore emphasized the statutorily required *independence* between funds and their adviser. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422-23, 1427 (2010).

The 1940 Acts reflect Congress's deliberate decision not to require "compulsory internalization of the management function." *Burks*, 441 U.S. at 483. Congress could have required mutual funds to be internally managed, in which case the adviser would indeed be an "insider" of the funds. Congress elected

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[3] Of course, an investment adviser could issue its own securities, and it would be a primary actor with respect to statements in the offering materials for those securities. Lead plaintiff, however, does not challenge any statements made in connection with securities issued by JCM's parent, JCG—the only securities that lead plaintiff purchased or sold. *See* Pet. App. 44a-45a n.2. Rather, lead plaintiff challenges statements in the prospectuses for securities issued by the Janus Funds—securities that JCM did not issue, and that lead plaintiff did not purchase or sell. *Ibid.*

not to do so, however, instead allowing separate companies to advise mutual funds pursuant to contract. *See Jones*, 130 S. Ct. at 1422 (investment adviser is "separate entity" from mutual fund). This congressionally authorized structure, which has been adopted by the overwhelming majority of mutual fund complexes with the SEC's knowledge and approval, cannot be disregarded without dismantling the regulatory structure established by the 1940 Acts.[4]

a. The obligation to prepare and file the registration statement and other offering materials is imposed by the ICA on the entity that issues shares for sale to the public—the registered investment company—not the separate investment adviser. *See* 15 U.S.C. § 80a-8(b); *see also id.* § 80a-3(a)(1) (defining "investment company" as "any issuer" that (among other things) is "engaged primarily … in the business of investing, reinvesting, or trading in securities").

To discharge their registration obligation, mutual funds file Form N-1A with the SEC, which includes the prospectus and statement of additional information (SAI) for a given period. *See Registra-*

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[4] The government's suggestion that JCM (a Delaware limited liability company) should be considered a "corporate inside[r]" of Janus Investment Fund (a Massachusetts business trust) also contravenes this Court's admonition to respect the corporate form. *See United States* v. *Bestfoods*, 524 U.S. 51, 63-64 (1998). Such state-law distinctions are applicable in federal securities cases (*see Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)), and lead plaintiff expressly represented to the district court that "[w]e don't have to pierce the corporate veil here." J.A. 492a; *see also* Pet. App. 71a ¶ 34 ("each mutual fund is … its own company"). There is no basis for any attempt to disregard the legal separateness of the Janus Funds and JCM.

tion Form Used by Open-End Management Investment Companies, SEC Release No. 33-7512, 63 Fed. Reg. 13,916 (Mar. 13, 1998). These documents are typically prepared by legal counsel to the funds, who may be compensated by the adviser. *See Implementation of Standards of Professional Conduct for Attorneys*, SEC Release No. 33-8186, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003) ("such an attorney, though employed by the investment adviser rather than the investment company, is providing legal services for the investment company," and "the logical implication of that fact" is "that the attorney employed by the investment adviser is accordingly representing the investment company"). The offering documents must be approved by the funds' boards of trustees, which have ultimate governance responsibility for the funds. *See* Laurin Blumenthal Kleiman & Carla G. Teodoro, *Forming, Organizing and Operating a Mutual Fund—Legal and Practical Considerations*, in *The ABCs of Mutual Funds 2009*, at 18, 22 (PLI).

The SEC has recognized in various contexts that the responsibility for mutual funds' offering documents rests with the funds, not investment advisers. *See Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings*, SEC Release No. 33-8408, 69 Fed. Reg. 22,300 (Apr. 23, 2004) ("requir[ing] open-end management investment companies [*i.e.*, mutual funds] to disclose [a variety of information about market timing] in *their* prospectuses" (emphasis added)). Commentators, likewise, recognize that disclosure obligations rest with the registrant—the trust comprising mutual fund series—and not with the investment adviser. *See* 3 Tamar Frankel & Ann Taylor Schwing, *The Regulation of Money Managers: Mutual Funds and Advisers* § 24.02[A], at 24-34 (2d ed. 2010). This is consistent

with the Securities Act of 1933, which imposes filing and disclosure obligations on the registrant of securities, not contractual service providers. *See* 15 U.S.C. § 78*l*(b).

b. The mutual fund prospectuses at issue in this case were all reviewed and approved by the Board of Trustees of the Janus Funds. *In re Lammert*, Initial Decision Release No. 348, 93 SEC Docket 422, 430 (Apr. 28, 2008), *available at* http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf. There is "no question that six of seven of the Janus fund trustees are not 'interested' within the meaning of the ICA." *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 873, 879 (D. Md. 2005). This exceeds the statutory requirements for independence from the adviser (*see* 15 U.S.C. § 80a-10(a)), and both the Janus Funds and the Independent Trustees at all relevant times had separate outside legal counsel. Lead plaintiff has never disputed that the Board of Trustees is legally and factually independent from JCM. Indeed, while the complaint alleges that JCM is "responsible for the funds' *day-to-day management*" (Pet. App. 59a ¶ 2 (emphasis added)), the Board of Trustees remains responsible for establishing the strategic direction of the Janus Funds and all matters related to corporate governance, including registering the Funds' securities for sale. *See* 15 U.S.C. § 80a-24(a).

The registration statements in this case expressly recite that they are filed "[o]n behalf of" the Janus Funds—not JCM. J.A. 166a. The stated purpose of the filing is to "update the financial information of the Trust [*i.e.*, the Funds]" (*ibid.*), and the prospectuses contained in the filing refer to the "*Funds*' Statement of Additional Information." *Id.* at 403a (emphasis added). These materials also make

clear that the Janus Funds—not JCM—bear the "costs of preparing, printing and mailing the *Funds*' Prospectuses and SAI to current shareholders and other costs of complying with applicable laws regulating the sale of Funds shares." *Id.* at 225a (emphasis added).

Although the Janus Funds have retained JCM by contract to perform certain management functions, those functions do *not* include preparing or filing the prospectus and other offering documents, for which the Funds expressly remain responsible. *See* J.A. 225a; *see also*, *e.g.*, 15 U.S.C. § 80a-24(a). Indeed, the investment advisory agreements in place during the class period (which are incorporated by reference in the complaint, Pet. App. 59a-60a ¶ 3) explain in detail the services to be performed by JCM, which do not include preparing registration statements. Add., *infra*, 1a-3a. The Janus Funds, by contrast, remain responsible for "all expenses incurred in complying" with the securities laws, including "the registration or qualification of shares of the Fund for sale" and "preparing, printing and mailing prospectuses and statements of additional information to Fund shareholders." *Id.* at 5a. The Funds are also obliged to "furnish JCM with ... copies of any financial statements or reports *made* to [the Funds'] shareholders or to any governmental body or securities exchange." *Id.* at 3a (emphasis added). The Janus Funds, not JCM, are thus responsible for the making of prospectus disclosures.

2. The "investment adviser exception" suggested by lead plaintiff and the government is not just unprecedented and unworkable, but also entirely unnecessary to the effective operation of the securities laws, which create a calibrated and interlocking ma-

trix of liability provisions, of which private class actions under Rule 10b-5 represent just one small part. *Cf. Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261-63 (1993).

The 1940 Acts contain broad provisions—including Section 206 of the IAA—prohibiting fraud and other misconduct by investment advisers. 15 U.S.C. § 80b-6; *see generally SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963). Indeed, the recent Dodd-Frank Act amended several of the ICA's and IAA's liability provisions. *See*, *e.g.*, Dodd-Frank Act §§ 929M, 929N. That Congress has directly and specifically addressed the liability of investment advisers makes it unnecessary to distort primary liability under Section 10(b) to reach them. *See Lattanzio*, 476 F.3d at 156; *cf. Pinter*, 486 U.S. at 650 ("When Congress wished to create such liability, it had little trouble doing so"). And that the 1940 Acts' liability provisions are, with an exception not relevant here, enforceable only by the SEC is further reason not to expand the private action under Rule 10b-5. *See Stoneridge*, 552 U.S. at 163.[5]

In addition to the adviser-specific liability provisions in the 1940 Acts, Congress dealt with the liability of secondary actors in the Exchange Act itself. The PSLRA added Section 20(e), which provides the

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[5] This enforcement authority is not "toothless." *Stoneridge*, 552 U.S. at 166. Indeed, the SEC has exercised its authority under the 1940 Acts to redress the allegations in this very case, requiring JCM to pay $100 million to investors (and funds) affected by discretionary frequent trading in the Janus Funds—investors who, unlike lead plaintiff, actually purchased or sold the securities offered by the challenged prospectuses. *See* J.A. 429a. The SEC did not proceed against JCM under Section 10(b).

SEC, but not private plaintiffs, authority to pursue those who provide substantial assistance to primary actors, and the Dodd-Frank Act recently broadened this authority to include secondary actors who "recklessly" provide such assistance. *See* Dodd-Frank Act § 929*O*. Such legislative adjustments to the Exchange Act's liability provisions preclude any need for judicial policymaking in this area. *Stoneridge*, 552 U.S. at 165-166.

Moreover, Section 20(a) imposes liability, including in private actions, on those who "control" a primary actor who violates the securities laws. 15 U.S.C. § 78t(a). In an appropriate case, an investment adviser (or any other contractual service provider) could be held liable as such a "control person." *Cf.* 17 C.F.R. § 240.12b-2 (noting that control can be exercised "by contract"). The potential availability of such congressionally authorized liability provides ample reason not to stretch Section 10(b) to reach the same class of defendants. *Central Bank*, 511 U.S. at 184.

The government repeatedly asserts that JCM "control[led]" the Janus Funds. U.S. Cert. Br. 12 ("respondent's complaint adequately alleged that JCM *controlled* the drafting and dissemination of the misleading prospectuses as one aspect of its general *control* over the Funds' affairs" (emphases added)); *see also id.* at 9, 10 & n.4, 13, 16; *cf.* BIO 23 (arguing that the investment adviser "control[s] all of the operations of the issuer"). The operative complaint, however, does not contain any such allegations. Indeed, lead plaintiff conceded in the court below that "replead[ing]" would be required "to add section 20(a) 'Control Person' claims against JCG and JCM for their role in controlling the activities of the funds."

Resp. C.A. Reply Br. 22 n.10. Lead plaintiff could not plead such a claim consistent with Rule 11—the Janus Funds are governed by an independent Board of Trustees, not "controlled" by JCM—but in any event the district court has squarely ruled that "there are not going to be any more amendments" in this case. J.A. 469a. Lead plaintiff "cannot switch horses mid-stream, changing its theory of liability at a later stage of the litigation in hopes of securing a swifter steed." *SEC* v. *Tambone*, 597 F.3d 436, 450 (1st Cir. 2010) (en banc).

* * *

The reticulated remedial scheme that Congress has enacted and revised over the years cannot be sidestepped by characterizing a secondary actor as a primary one. *See Stoneridge*, 552 U.S. at 166; *Central Bank*, 511 U.S. at 191. JCM did not issue the securities offered by the prospectuses in which the challenged statements appear, and therefore it is a secondary actor.

II. AS A SECONDARY ACTOR, JCM CANNOT BE HELD PRIMARILY LIABLE FOR UNATTRIBUTED STATEMENTS MADE BY ANOTHER COMPANY IN ITS PROSPECTUSES

A secondary actor may be held to answer in a private securities-fraud suit only if "*all* of the requirements for primary liability under Rule 10b-5 are met" based on the secondary actor's *own* actions (and not those of some other person). *Central Bank*, 511 U.S. at 191. The elements of a private Rule 10b-5 claim are "(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." *Stoneridge*, 552 U.S. at 157 (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-42 (2005)).

The operative complaint was properly dismissed in this case because lead plaintiff did not adequately allege either that JCM *made* the challenged statements in the Janus Funds' prospectuses or that the putative class of JCG investors *relied* on any statements attributed to JCM.

Although *Stoneridge* precludes liability theories that do not fit within the pre-1995 framework for private Rule 10b-5 actions, the Fourth Circuit was unable to cite a single decision from this Court (or, indeed, any court of appeals) supporting its holding on either of the two questions presented. *See* Pet. App. 18a (citing a single district court decision in support of its "making" holding); *id.* at 24a-25a (citing two district court decisions in support of its "attribution" holding). Likewise, in attempting to defend the Fourth Circuit's decision, neither lead plaintiff nor the government could cite a single appellate decision supporting their positions. *See* BIO 23 (citing the same two district court decisions for the proposition that "other courts had found the potential for liability on the part of professionals or service providers"); U.S. Cert. Br. 11 (citing no authority whatsoever for government's preferred construction of the "making" element); *id.* at 15 (same for government's proposed elimination of the "attribution" requirement).

It is therefore apparent that the Fourth Circuit made new law, but the federal courts no longer have license to extend the private right of action previously implied under Rule 10b-5 "beyond its present boundaries." *Stoneridge*, 552 U.S. at 165; *see also*

Morrison v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2881 & n.5 (2010). The Fourth Circuit's decision cannot be affirmed consistent with *Stoneridge*. *Cf.* J.K. Rowling, *Harry Potter and the Order of the Phoenix* 841 (2003) ("neither can live while the other survives").

A. THE CHALLENGED STATEMENTS WERE NOT MADE BY JCM

Lead plaintiff's contention that "the statements in the prospectuses regarding market timing were misleading" (Pet. App. 8a) requires it to plead (and prove) that JCM *made* the challenged statements. 17 C.F.R. § 240.10b-5(b). Lead plaintiff cannot meet its pleading (or proof) burden, however, because the statements in the Janus Funds' prospectuses were made by the Trust comprising the Janus Funds—a separate legal entity, with its own Board of Trustees and legal counsel—not by JCM.

1. THE COMPLAINT DOES NOT ADEQUATELY ALLEGE "MAKING"

The complaint does not plead facts that, if proved, could lead a reasonable trier of fact to conclude that JCM "made" the challenged statements in the Janus Funds' prospectuses. To be sure, the complaint asserts that "defendants … publicly issu[ed] false and misleading statements" (Pet. App. 109a ¶ 122), but this Court has held that such a "formulaic recitation" of an element of a cause of action, without factual support, "will not do." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). The remainder of the complaint does not provide the requisite factual support. *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). It does not satisfy Rule 8, much less the heightened requirements of Rule 9(b) and the PSLRA.

a. The operative complaint *nowhere* alleges that JCM made the challenged statements in the Janus Funds' prospectuses. It identifies just *two* "represent[ations]" that petitioners are alleged to have been responsible for: "Janus wrote and represented its policy against market timers" (Pet. App. 69a ¶ 31), and "Janus represented that its mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans" (*id.* at 60a ¶ 5). But there is no allegation that JCM made these "represent[ations]" *in the mutual fund prospectuses*, which are the only documents at issue.

Even accepting as true that JCM "represented" both "its policy against market timers" and that "its mutual funds were designed to be long-term investments," the complaint does not allege *where* (or *to whom*) such representations were made. It is entirely consistent with the contractual relationship between JCM and the Janus Funds for such representations to have been made by the investment adviser to the mutual funds. Any such representations, if reproduced or summarized by the Funds in *their* prospectuses, were "made" by the registrant, not JCM as service provider. *See* 15 U.S.C. § 80a-8(b) (requiring "[e]very registered investment company" to file a "registration statement … containing [specified] information and documents" about fund policies). The preceding communications between the service provider and the issuer will not support a

private securities-fraud case. *See Stoneridge*, 552 U.S. at 161.[6]

Nothing in the Janus Funds' registration statements suggests that JCM was the source of any of the policies or other information contained in those documents. To the contrary, the offering documents describe JCM, in the third person, as a contractual service provider to the Funds, and summarize JCM's duties in that capacity—which do *not* include prospectus preparation. *See*, *e.g.*, J.A. 143a, 224a-225a; *see also* Part I.B.1.b., *supra*. As the documents themselves attest, the statements therein were made "[o]n behalf of the Trust [*i.e.*, the Funds]," not JCM. J.A. 166a.

Indeed, lead plaintiff has all but conceded that the operative complaint does not adequately allege that JCM made the challenged statements, resorting instead to materials not referenced in the complaint. *See*, *e.g.*, BIO 2; Resp. C.A. Br. 38. But the *pleading* requirements imposed by the PSLRA (15 U.S.C. § 78u-4(b)(1)-(2); *see also id.* § 78u-4(c)(1)) would be neutered by allowing a private Rule 10b-5 plaintiff to

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[6] Consider an automobile parts supplier that promulgates a written policy concerning quality control; if an automobile manufacturer (a separate company with which the supplier has a contractual relationship) reproduces the supplier's policy verbatim in a prospectus, the "maker" of the statement *in the prospectus* is the manufacturer, not the supplier. This is one of the reasons that the PSLRA requires private plaintiffs to "distinguish among those they sue and enlighten *each defendant* as to his or her particular part in the alleged fraud." *Southland Sec. Corp.* v. *INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 365 (5th Cir. 2004); *see also*, *e.g.*, *Harrison* v. *Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (Rule 9(b) requires that plaintiff plead with particularity "the identity of the person making the misrepresentation").

avoid dismissal by reference to things outside the complaint. *See Teachers' Ret. Sys. of La.* v. *Hunter*, 477 F.3d 162, 172 (4th Cir. 2007) (the PSLRA "authoriz[es] the court to assume that the plaintiff has indeed stated *all* of the facts upon which he bases his allegation of a misrepresentation or omission").

The deficiency of the operative complaint is particularly glaring in light of the multiple opportunities the district court afforded lead plaintiff to amend its complaint. In fact, when the district court dismissed the first amended complaint for failure to plead loss causation in conformance with *Dura*, it specifically noted (but did not resolve) the "difficult issu[e]" whether JCM had "made" the statements in the Fund prospectuses. J.A. 159a & n.1. Lead plaintiff then sought and received leave to file yet another amended complaint (*id.* at 162a)—its *third* attempt to plead PSLRA-compliant claims—and the district court put no limitations on the scope of amendment. The second amended complaint, filed years after the events in question and after substantial discovery in related actions, includes 140 numbered paragraphs and incorporates by reference more than 70 documents. But despite being given three chances, lead plaintiff was unable to plead that JCM made the challenged statements.

b. The Fourth Circuit did not hold that the operative complaint adequately pleads that JCM *actually made* any of the prospectus statements at issue. Rather, the Fourth Circuit held that the "clear *essence* of [the] complaint is that JCG and JCM *helped* draft the misleading prospectuses," and that the complaint "allege[s] that JCG and JCM, by *participating* in the writing and dissemination of the prospectuses, *made* the misleading statements con-

tained in the documents." Pet. App. 17a-18a (emphases added). Merely quoting this holding should suffice to establish its inconsistency with *Central Bank* and *Stoneridge*.

There is no private liability for "helping" another company write its prospectuses. *Central Bank* held that "[a]ny person or entity … who ... *makes* a material misstatement (or omission)" may be liable as a primary violator. 511 U.S. at 191 (emphasis added). The Court did not include those who "help" others to make a statement. Indeed, the term "help" is a classic signifier of *secondary* liability: "Help" is synonymous with "ai[d]" and "assist[ance]," words used by this Court to describe the conduct of secondary actors that is beyond the reach of the Rule 10b-5 private right of action. *See Central Bank*, 511 U.S. at 168, 191; *Stoneridge*, 552 U.S. at 162.

Nor is there private liability for "participating" in the writing of another company's statement. In *Stoneridge*, the Court granted certiorari to decide whether "an injured investor may rely upon [Section] 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 [Section] 10(b)." 552 U.S. at 156 (emphasis added). The Court's "no" answer to that question cannot be reconciled with the Fourth Circuit's "yes" answer in this case. *See Regents* v. *CSFB*, 482 F.3d 372, 390 (5th Cir. 2007) ("The banks' participation in the transactions … did not give rise to primary liability under [Section] 10(b)"); *see also Fidel* v. *Farley*, 392 F.3d 220, 235 (6th Cir. 2004).

If "participating" in writing another company's prospectus were sufficient for liability under Section 10(b), then the congressional response to *Central*

Bank—which conferred on the SEC but not private plaintiffs the authority to pursue those who provide "substantial assistance" to primary violators (15 U.S.C. § 78t(e))—would be rendered nugatory. *See Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 176 (2d Cir. 1998) (rejecting a "substantial participation" test for Rule 10b-5 liability). Instead, "[a]llegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms … all fall within the prohibitive bar of *Central Bank*." *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997).

The en banc First Circuit recently and correctly observed that "[i]f *Central Bank*'s carefully drawn circumscription of the private right of action is not to be hollowed … courts must be vigilant to ensure that secondary violations are not shoehorned into the category reserved for primary violations." *Tambone*, 597 F.3d at 446. The court below did not exercise such vigilance; to the contrary, by holding that JCM could be held liable for "help[ing] draft" or "participating in writing" another company's statements, the Fourth Circuit impermissibly authorized the very kind of secondary liability squarely precluded by *Central Bank* and *Stoneridge*.

2. "MAKING" CANNOT BE REDEFINED TO REACH THE ACTIVITIES OF SECONDARY ACTORS

At the certiorari stage, neither lead plaintiff nor the government was willing to defend the Fourth Circuit's holding that a service provider can be held primarily liable for securities fraud if it "helps" another company make a statement. Instead, their defenses of the decision below rest on expansive constructions of "making." Not only does this tactic run afoul of *Stoneridge*'s prohibition against extending

the private right of action, but the proposed definitions are also inconsistent with the text and structure of the statute and rule.

a. The government argues that a person "makes" a statement "when [that] person, acting alone or with others, *creates* a misrepresentation or *causes* it to be made." U.S. Cert. Br. 11 (emphases added). It is telling that the government cites *no* authority for its alternative definition of "make"—no statute or rule, no court decision, no dictionary, not even a snippet of legislative history. *See id.* at 11-12. That is because lower courts have refused to accept the government's *ipse dixit*, adhering instead to the text and structure of Section 10(b) and its implementing regulation. *See PIMCO*, 603 F.3d at 155 ("reject[ing] the creator standard" proposed by the SEC); *Tambone*, 597 F.3d at 438 ("reject[ing] the SEC's expansive interpretation" of "make"). This is also, of course, how this Court has approached similar questions. *Ernst & Ernst*, 425 U.S. at 199 (rejecting SEC's proposed construction that would "add a gloss to the operative language of the statute quite different from its commonly accepted meaning").

Section 10(b) makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security … , any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j. Just as "the language of Section 10(b) does not in terms mention aiding and abetting" (*Central Bank*, 511 U.S. at 175), it likewise does not reach "creating" or "causing." In a prospectus-liability case, the only one "us[ing] or employ[ing]" *anything* is the issuer—the company that, through the prospectus, is offering its securities for

sale—and thus the issuer is the only one covered by Section 10(b).[7]

In other sections of the Exchange Act, Congress demonstrated that it knew perfectly well how to reach persons who "cause" a statement to be made. Section 18, for instance, "creates a private cause of action against persons, such as accountants, who '*make or cause to be made*' materially misleading statements in reports or other documents filed with the Commission." *Ernst & Ernst*, 425 U.S. at 212

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[7] The government might argue that its novel definition of "making" finds support in Section 10(b)'s phrase "directly or indirectly." *But see Central Bank*, 511 U.S. at 176 (rejecting a similar argument). As an initial matter, the placement of that phrase immediately before the jurisdictional nexus—rather than in the substantive portion of the statute—strongly suggests that it was included to reach "'indirect' use of the instrumentality of interstate commerce." *Harrison* v. *Equitable Life Assur. Soc.*, 435 F. Supp. 281, 284 (W.D. Mich. 1977). Thus, for instance, a defendant can be held liable for using a telephone to arrange a meeting at which it "use[s] or employ[s]" a misrepresentation, even though the misrepresentation was communicated in person rather than over the wires. *See Aquionics Acceptance Corp.* v. *Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974). Even assuming that "use or employ[ment]" could be indirect, however, an issuer often speaks to the market both directly and indirectly. It may speak to the market directly, as through SEC filings, and indirectly, such as by providing information to analysts "with the intent that the analysts communicate those statements to the market." *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002). But in the latter example, even though the analyst is the one speaking, it remains the issuer that is indirectly "us[ing] or employ[ing]" the information "in connection with the purchase or sale of any security." 15 U.S.C. § 78j. Not so with respect to service providers: If an issuer adopts language from a service provider in its public filings, it remains the issuer—and not the service provider—that is "making" the statement.

n.31 (quoting 15 U.S.C. § 78r) (emphasis added); *cf.* Pet. App. 60a ¶ 6 ("Defendants caused mutual fund prospectuses to be issued for Janus mutual funds"). Section 18 is stated in the disjunctive—"make *or* cause to be made"—which destroys the government's suggestion that one "makes" a statement merely by "causing" it to be made. *See Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings"). And thus if *Central Bank*'s focus on the statutory language "is to have any real meaning, a defendant must *actually make* a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting." *Wright*, 152 F.3d at 175 (emphasis added); *see also Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

In any event, even if the text of Section 10(b) could be stretched far enough to encompass the government's proposed "creator" standard, *Rule 10b-5(b)*—the only provision at issue here—cannot. Although "[t]he scope of Rule 10b-5 is coextensive with the coverage of [Section] 10(b)" (*SEC* v. *Zandford*, 535 U.S. 813, 816 n.1 (2002)), Rule 10b-5(b) is narrower than Rule 10b-5(a) and (c), and encompasses less than the full sweep of Section 10(b). *See Affili-*

ated Ute Citizens of Utah v. *United States*, 406 U.S. 128, 152-53 (1972).[8]

Rule 10b-5(b) reaches only those who "make any untrue statement." 17 C.F.R. § 240.10b-5(b). The SEC had the entire English language at its disposal in crafting this provision; its decision to limit the proscription to one very specific activity—"mak[ing] any untrue statement"—must be given effect. The accepted meaning of "make" in the context of "making a statement" is today, as it was when Rule 10b-5 was promulgated, "to put forth; give out; deliver; as to make a speech." *Reass* v. *United States*, 99 F.2d 752, 755 n.4 (4th Cir. 1938). That definition describes only the Janus Funds' issuance of the prospectuses—not any role that other actors, including JCM, might have had in the drafting process.

To be sure, "make" can sometimes mean "create"—as when one makes a sandwich. *See Tambone*, 597 F.3d at 443. But the government's attempt to graft that meaning onto Rule 10b-5(b) simply ignores the relevant context: "make *any untrue statement*." 17 C.F.R. § 240.10b-5(b) (emphasis added); *see Holloway* v. *United States*, 526 U.S. 1, 7 (1999) ("the

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[8] The district court dismissed lead plaintiff's claims under Rule 10b-5(a) and (c). *See* Pet. App. 48a ("although [an] alleged fraudulent scheme is mentioned as a background fact" in the operative complaint, lead plaintiff "do[es] not assert scheme liability on the part of defendants," "[n]or could [it] do so"). The Fourth Circuit left that ruling undisturbed. *Id.* at 35a-36a. Lead plaintiff did not challenge that dismissal at the certiorari stage and therefore may not do so now. S. Ct. R. 15.2; *see also*, *e.g.*, *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 815-16 (1985). In any event, lead plaintiff's claims implicate Rule 10b-5(b) rather than Rule 10b-5(a) or (c) because they are founded on "specific … written statement[s]." *Stoneridge*, 552 U.S. at 158.

meaning of statutory language, plain or not, depends on context"). When "make [is] followed by a noun with the indefinite article," it is "often nearly equivalent to the verb intransitive corresponding to that noun; as, 'make a splash,' to splash, 'make a move,' to move, 'make a complaint,' to complain." *Webster's New International Dictionary* 1485 (2d ed. 1934). Similarly here, to "make [a] statement" is "to state."

Thus, when the President delivers a speech, we say that he *made* the speech—but it would stretch ordinary usage too far to say that the President's *speechwriters* made the speech. So, too, a registered issuer of securities "makes" the statements in the registration documents for those securities; a contractual service provider—even one that may have assisted or participated in the drafting process, as lawyers (for example) frequently do—is not a maker.

The government's proposed "creator" standard—which is designed to reach persons other than the "maker" of a statement—is thus nothing other than aiding-and-abetting liability with a new name. *See PIMCO*, 603 F.3d at 157 (government's "creator standard … establishes no clear boundary between primary violators and aiders and abettors"). The Court closed the front door to such liability in *Central Bank*, and the back door in *Stoneridge*; the government's effort to sneak in the side door should meet with no more success.

b. Lead plaintiff contends that a service provider "make[s]" a statement "by participating in its preparation, filing and dissemination." BIO 1. In so doing, lead plaintiff rests its entire argument on the Court's observation that the suppliers in *Stoneridge* "had no role in preparing or disseminating" the allegedly false statements at issue in that case. 552

U.S. at 155. But the Court, in describing the *facts* of that case, did not purport to announce a legal rule that any role in preparing or disseminating false statements is sufficient to transform a service provider into a "maker" of those statements within the meaning of Rule 10b-5(b).

Preparation. The complaint does not allege that JCM prepared the challenged statements. In any event, for the same reason that the government is mistaken to argue that Section 10(b) and Rule 10b-5(b) reach "creating" or "causing" a statement, lead plaintiff is wrong that "prepar[ing]" a statement suffices for liability. A law clerk may "prepare" a draft judicial opinion, but only the judge "makes" the decision. *See also* Part II.A.2.a., *supra*.

Filing. Contrary to lead plaintiff's assertion in briefing, the operative complaint does not allege that JCM "filed" the Janus Funds' prospectuses—nor could it, since the filing obligation is imposed by statute on the registrant. *See* 15 U.S.C. § 80a-24(a); J.A. 278a. Congress has distinguished "filing" from "making," providing in the ICA that "[i]t shall be unlawful for any person to *make* any untrue statement … filed or transmitted pursuant to th[e] [ICA]." 15 U.S.C. § 80a-33(b) (emphasis added). Service providers routinely handle the physical steps necessary for filing—in this Court, for instance, printers often arrange for delivery of briefs they print—but they do not "make" the statements in the filed documents. And it doubtless would come as a surprise to the courier who delivered this particular brief to the Court that he had thereby "made" this sentence.

Dissemination. As is common in the mutual fund industry (*see Tambone*, 597 F.3d at 439), distribution of the Janus Funds' securities and prospectuses was

handled by a registered broker-dealer, Janus Distributors LLC, which was not sued by lead plaintiff. *See* J.A. 371a. When lead plaintiff speaks of "dissemination," therefore, it means only that the prospectuses were made available on www.janus.com. *See* Pet. App. 72a ¶ 38. Both courts below correctly concluded that this is an insufficient basis to impose liability. *Id.* at 32a, 46a. As the en banc First Circuit has explained, "[a]llowing courts to imply that 'X' has made a false statement with only a factual allegation that he passed along what someone else wrote would flout a core principle that underpins the *Central Bank* decision." *Tambone*, 597 F.3d at 446. That irrefutable point disposes of lead plaintiff's dissemination theory.

* * *

The proponents of civil liability have offered a series of words—"helping," "participating," "creating," "causing," "preparing," "filing," and "disseminating"—to describe JCM's supposed role with respect to the challenged statements in the Janus Funds' prospectuses. What these words have in common is that none of them is found in the Rule that lead plaintiff seeks to enforce. Rule 10b-5(b) very specifically outlaws the "mak[ing]" of any false statement, but the complaint does not (and could not) allege that JCM made the statements at issue. Rather, the challenged statements in the Janus Funds' prospectuses were *made* by the Janus Funds—on whom the statutory obligation to register the securities offered by those documents was imposed, and on whose behalf they were filed.

B. THE CHALLENGED STATEMENTS WERE NOT ATTRIBUTED TO JCM

Even if the Court were to conclude that the operative complaint adequately alleges that JCM "made" the challenged statements, this case was properly dismissed by the district court because lead plaintiff failed to plead a legally sufficient theory of reliance. The challenged statements were not expressly attributed to JCM at the time they were made in the Janus Funds' prospectuses and, therefore, the reliance element is not satisfied.[9]

1. THE *BASIC* PRESUMPTION DOES NOT REACH THE ACTIVITIES OF SECONDARY ACTORS

In private securities-fraud suits, the plaintiff must plead *both* "a material misrepresentation or omission by the defendant" *and* "reliance upon the misrepresentation or omission." *Stoneridge*, 552 U.S. at 157 (citing *Dura*, 544 U.S. at 341-42).

The reliance requirement serves a critical function in separating primary liability from aiding-and-abetting liability. "Allowing plaintiffs to circumvent the reliance requirement" thus "would disregard the careful limits on [Rule] 10b-5 recovery mandated by [this Court's] cases." *Central Bank*, 511 U.S. at 180;

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[9] The government maintains that reliance is not an element in an SEC enforcement action. U.S. Cert. Br. 13. If the government is right, that is another reason why the SEC's views on the reliance element of private actions (including the attribution requirement) are entitled to no deference. *See Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 n.27 (1977). In addition, the government has identified no rule or other formal agency action to which deference could be given. *See United States* v. *Mead Corp.*, 533 U.S. 218, 229-31 (2001).

see also, *e.g.*, *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996) ("The critical element separating primary from aiding and abetting violations is the existence of a representation … made by the defendant, that is relied upon by the plaintiff").

Lead plaintiff does not allege that it *actually relied* on any statements made by JCM or JCG. It purchased and sold JCG equity stock, not shares of the Janus Funds, and does not claim to have reviewed the Funds' prospectuses before choosing to purchase or sell shares of another company's stock.[10]

In the absence of actual reliance, reliance may be (rebuttably) *presumed* in only two circumstances: where the defendant made a public misstatement regarding a security that trades in an efficient market, or where the defendant failed to disclose information

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[10] The fact that lead plaintiff did not transact in the securities offered by the prospectuses at issue also means it cannot establish that any misrepresentations in those prospectuses were "in connection with" its purchase or sale of JCG stock. *See* Pet. App. 49a n.4 (reserving judgment on this issue). A plaintiff may not "base its action on Rule 10b-5 … without having either bought or sold the securities described in the allegedly misleading prospectus." *Blue Chip Stamps*, 421 U.S. at 727; *see also Morrison*, 130 S. Ct. at 2884. The reliance and "in connection with" requirements are directly linked: "Congress when it used the phrase 'in connection with the purchase or sale of any security' intended only that the device employed, whatever it might be, *be of a sort that would cause reasonable investors to rely thereon*, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc) (quoting 15 U.S.C. § 78j) (emphasis added). This Court has previously recognized the interrelated nature of the elements of a private Rule 10b-5 action. *See Stoneridge*, 552 U.S. at 160-61.

to the plaintiff despite a duty to speak. *Stoneridge*, 552 U.S. at 159 (citing, respectively, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988), and *Affiliated Ute*, 406 U.S. at 153-54). *Stoneridge* held that where neither of these presumptions applies, a private Rule 10b-5 class action must be dismissed for failure to satisfy the reliance element. 552 U.S. at 159. So, too, here.

Lead plaintiff has never sought to invoke the *Affiliated Ute* presumption, and for good reason: JCM owes no duty to JCG's shareholders to correct statements in the Janus Funds' prospectuses. Pet. App. 52-53 & n.7. In the absence of a duty to speak, there can be no presumed reliance under *Affiliated Ute*. *Stoneridge*, 552 U.S. at 159; *see also Chiarella* v. *United States*, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak").

The reliance element in this case, therefore, stands or falls on the *Basic* presumption. In *Basic*, a 4-2 decision in which no current Justice participated, this Court held that "an investor's reliance on any public material misrepresentations … may be presumed for purposes of a Rule 10b-5 action." 485 U.S. at 247. Invoking the "hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company," the Court concluded that "[m]isleading statements will … defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." *Id.* at 241-42 (internal quotation marks omitted). Because "the market … transmits information to the investor in the processed form of a market price," an investor who buys or sells stock at the market price is presumed to

"d[o] so in reliance on the integrity of that price." *Id.* at 244, 247.

"[T]o invoke the [*Basic*] presumption," however, "a plaintiff must allege and prove" (among other things) "that *the defendant* made public misrepresentations." 485 U.S. at 248 n.27 (emphasis added); *see also id.* at 226 (presumption applicable to "the issuance of a materially misleading statement *by the corporation*" (emphasis added)). This focus on "the defendant" rather than some other person or entity is no accident: The entire presumption is based on "the incentive for investors to 'pay attention' to *issuers' disclosures*." *Id.* at 246 n.23 (emphasis added). Absent a misstatement made by the defendant to the public, a plaintiff cannot use the *Basic* presumption to show "reliance on *the defendant's* misstatement or omission." *Central Bank*, 511 U.S. at 180 (emphasis added); *see also Stoneridge*, 552 U.S. at 159 ("Reliance by the plaintiff upon *the defendant's* deceptive acts is an essential element of the [Section] 10(b) private cause of action" (emphasis added)).

In *Central Bank*, this Court's conclusion that the Rule 10b-5 private right of action does not extend to aiding and abetting was "confirmed by the fact that [a contrary holding] would impose … liability when at least one critical element for recovery under [the implied right of action] is absent: reliance." 511 U.S. at 180. In an aiding-and-abetting suit, the Court noted, "the defendant could be liable without any showing that the plaintiff relied upon *the aider and abettor's* statements or actions." *Ibid.* (emphasis added).

Similarly in *Stoneridge*, this Court rejected primary liability because, even though the alleged misstatements were public, the defendants' role in those

misstatements was not. Scientific-Atlanta and Motorola "drafted [false] documents" that permitted Charter Communications to issue misleading financial statements. 552 U.S. at 154. But even though Scientific-Atlanta and Motorola had both engaged in "deceptive acts," this Court concluded that those acts were "too remote to satisfy the requirement of reliance" since they "were not disclosed to the investing public." *Id.* at 161. Charter's financial statements were indisputably public, but the plaintiffs could not "show reliance *upon any of respondents'* [*i.e.*, Scientific-Atlanta's and Motorola's] *actions*" because "[n]o member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times." *Id.* at 159 (emphasis added); *see also id.* at 166-67 ("the investors cannot be said to have relied upon any of *respondents'* deceptive acts in the decision to purchase or sell securities" (emphasis added)).

According to the Fourth Circuit, *Stoneridge* "has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." Pet. App. 32a. But the statements in *Stoneridge*—the issuer's financial results—*were* publicly disclosed; the question was whether the service provider whose involvement was not disclosed could be held liable for those statements. 552 U.S. at 154-55. As *Stoneridge* recognized, the issue under *Basic* is whether *the defendant* made public misstatements, not whether the statements were made in the public sphere. *See Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 369 (4th Cir. 2004).

This Court has never suggested that the fraud-on-the-market presumption can be applied in cases against defendants who did not themselves speak to the market. To the contrary, the Court has applied the presumption only to express speakers (*Basic*) while declining to extend it to reach sources of information who were not disclosed to the market (*Stoneridge*). Because this Court is no longer in the business of adjusting the contours of the Rule 10b-5 private right of action, it should simply confirm that the *Basic* presumption is limited to those who speak to the market, and that cases against secondary actors cannot proceed on a fraud-on-the-market theory. That alone would resolve this case.

2. RELIANCE CANNOT BE PRESUMED IN THE ABSENCE OF DIRECT ATTRIBUTION

Even if the fraud-on-the-market presumption were not categorically inapplicable to cases against secondary actors, the reliance requirement ordinarily would not be satisfied in such cases precisely because the role (if any) of such actors in the alleged fraud is not known to the market and, therefore, incapable of being incorporated into the stock price. Only if the secondary actor's role were expressly (and contemporaneously) disclosed—such as where a statement is directly attributed to someone other than the issuer—could the fraud-on-the-market presumption apply.

a. The majority of the courts of appeals to address the issue have recognized that "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement not attributed to that actor at the time of its dissemination." *Wright*, 152 F.3d at 175. That is because, "[a]bsent attribution, plaintiffs can-

not show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud." *PIMCO*, 603 F.3d at 148 (holding that a law firm cannot be held liable for drafting alleged misstatements in its client's offering documents); *see also*, *e.g.*, *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) (holding that an accounting firm cannot be held liable for drafting its client's allegedly fraudulent letters and press releases).

The attribution requirement "stems directly from the need for private litigants to prove reliance on an alleged fraud to succeed on a private cause of action." *SEC* v. *Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008) (emphases omitted). Imposing liability on a secondary actor for unattributed statements "would circumvent the reliance requirements" of Rule 10b-5 because "'[r]eliance only on representations made by others cannot itself form the basis of liability.'" *Wright*, 152 F.3d at 175 (quoting *Anixter*, 77 F.3d at 1225). That is, the plaintiff must demonstrate that it "rel[ied] on a secondary actor's *own* deceptive statements—and not on statements conveyed to the public through another source and not attributed to the defendant—to state a claim under Rule 10b-5(b)." *PIMCO*, 603 F.3d at 155-56.

Under the *Basic* presumption, the market absorbs the information in the prospectus and identifies it as coming from the registrant, which gives the information a particular value that is assumed to be incorporated into that company's stock price. *See PIMCO*, 603 F.3d at 156. If the prospectus contains misrepresentations, it is the company itself, and no one else, that can be held primarily liable, because

only the company's statement was considered by the market in valuing the stock's price. *See*, *e.g.*, *Ziemba*, 256 F.3d at 1207 ("no statements attributable to [the accounting firm] were ever made to Plaintiffs; therefore, Plaintiffs could not have relied on [the accounting firm] in making their investment decisions"). Attribution thus ensures that a necessary premise of the *Basic* presumption is satisfied—namely, that the market price for the relevant stock reflects *the defendant's* misstatement. 485 U.S. at 248 n.27.

The government's lawyers speculate that "[t]here is no reason to suppose that the investing public's willingness to rely on those statements would have depended on whether the public attributed those statements to JCM or solely to the Funds' own employees." U.S. Cert. Br. 16. But the market necessarily places a value on the *source* of information, and an issuer's statements about its own operations—the sort of misstatements at issue in *Basic*—have more value to analysts than a service provider's statements. The SEC's Regulation FD acknowledges as much. 17 C.F.R. § 243.100(a) ("Whenever an issuer … discloses any material nonpublic information regarding that issuer or its securities to [(among others) a broker or dealer], the issuer shall make public disclosure of that information").

If an offering document expressly attributes a statement to a non-issuer, then the market can price it accordingly—*i.e.*, by applying an appropriate discount or premium. *See PIMCO*, 603 F.3d at 156 ("Where statements are publicly attributed to a well-known national law or accounting firm, buyers and sellers of securities (and the market generally) are more likely to credit the accuracy of those state-

ments"); *see generally* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549, 563-64 (1984). But without such contemporaneous attribution, market professionals could do no more than guess about what role any number of secondary actors—accountants, lawyers, investment banks, investment advisers, and so forth—might have played in preparing the final product.

Efficiency is not omniscience. "The market" is not a living and breathing entity; it operates through professionals, such as analysts, who consider publicly available statements about companies, and whose analyses and reports affect stock prices. *Basic*, 485 U.S. at 247 n.24 ("market professionals generally consider most publicly announced material statements about companies, thereby affecting stock prices"). Even if such professionals could surmise that a secondary actor may have played a role in helping the issuer prepare its offering materials, they have no way to determine (let alone value) the precise contribution of that secondary actor—and thus "reliance on that [actor]'s participation can only be shown through 'an indirect chain … too remote for liability.'" *PIMCO*, 603 F.3d at 156 (quoting *Stoneridge*, 552 U.S. at 159).

When a public company includes unaudited financial statements in its quarterly SEC filings, for instance, there is every reason for "interested investors [to] attribute" to the company's auditor a "substantial role in … approving" those statements. Pet. App. 24a. Indeed, federal law expressly provides that "interim financial statements included in quarterly reports on Form 10-Q … must be reviewed by an independent public accountant using professional

standards and procedures for conducting such reviews." 17 C.F.R. § 210.10-01(d). Yet the auditor nonetheless cannot be held liable because "[t]he mere identification of a secondary actor as being involved in a transaction, or the public's understanding that a secondary actor 'is at work behind the scenes' are alone insufficient." *PIMCO*, 603 F.3d at 155 (quoting *Lattanzio*, 476 F.3d at 155).

b. The Fourth Circuit agreed that, "[t]o satisfy the fraud-on-the-market theory, the defendant must make a 'public misrepresentation,'" which means "the defendant must make a representation that is public and is attributable to the defendant." Pet. App. 18a (quoting *Basic*, 485 U.S. at 248 n.27). The attribution requirement is "necessary," the court noted, "to ensure that the misleading information 'is reflected in the market price of the security.'" *Ibid.* (quoting *Stoneridge*, 552 U.S. at 159).

The Fourth Circuit acknowledged that the Janus Funds' prospectuses were not attributed to JCM (Pet. App. 17a), as lead plaintiff conceded in the district court (*id.* at 46a). The court of appeals nonetheless held that "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly *infer* that interested investors would have known that the defendant was responsible for the statement at the time it was made, even if the statement on its face is not directly attributable to the defendant." *Id.* at 23a-24a (emphasis added). This test was satisfied, the Fourth Circuit concluded, because "interested investors would *infer* that JCM played a role in preparing or approving the content of the Janus fund prospectuses" based on "the organizational structure of mutual funds." *Id.* at 29a, 31a (emphasis added).

The Fourth Circuit's inferential reasoning is premised on an unpleaded—and incorrect—impression of the organizational structure of the mutual fund industry. The investment adviser and its mutual fund client are separate legal entities, with separate ownership and separate governance structures. *Jones*, 130 S. Ct. at 1422. JCM and the Janus Funds are related only by a contract (*see* 15 U.S.C. § 80a-15), under which JCM is not "responsible" for "preparing or approving" the Janus Funds' prospectuses. Instead, the advisory agreement makes clear that compliance with the securities laws is the responsibility of the Janus Funds. Add., *infra*, 3a, 5a; *see also* Part I.B.1.b., *supra*. The Fourth Circuit acknowledged that JCM's "duties are detailed in [the offering] documents" (Pet. App. 28a); since prospectus disclosure is indisputably *not* among those duties, there is no basis to "infer" otherwise.

Moreover, by permitting plaintiffs to "infer" attribution (and thus reliance), the Fourth Circuit's decision stretches the *Basic* presumption past its breaking point. In *Basic*, this Court explained that presumptions "typically serve to assist courts in managing circumstances in which direct proof … is rendered difficult." 485 U.S. at 245. The Court concluded that reliance on a defendant's public misrepresentations could be presumed because "[r]equiring a plaintiff to show a speculative state of facts, *i.e.*, how he would have acted if … the misrepresentation had not been made, would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market." *Ibid.* On top of that presumption, the Fourth Circuit has layered an additional *inference* to ease a plaintiff's burden in showing that the defendant made misrepresentations to the public.

Inferences, like presumptions, are used for elements that are typically incapable of direct proof, because they allow conclusions to be drawn from circumstantial evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 390 n.30 (1983) (acknowledging that "proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence"). But an inference on top of a presumption constructs an evidentiary tower with no factual allegations to hold it up. Its structure is formed by facts presumed and inferred, *but not pleaded*.

Congress has authorized the use of inferences to plead only one element of a private Rule 10b-5 case: scienter. In the PSLRA, Congress provided that, to plead scienter, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2); *see also Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323-24 (2007). Mental state is rarely susceptible to direct proof, which explains Congress's decision to allow a plaintiff to rely on inferences. *See Huddleston*, 459 U.S. at 390 n.30; *see also* Fed. R. Civ. P. 9(b) ("conditions of a person's mind may be alleged generally"). But the other elements of the Rule 10b-5 action, including the factual predicates of the fraud-on-the-market presumption (*see Basic*, 485 U.S. at 248 n.27), *can* be proved directly, and thus must be pleaded "with particularity"—not inferred. Fed. R. Civ. P. 9(b); *see also* 15 U.S.C. § 78u-4(b)(1).

Permitting a new, judge-made inference to substitute for competent allegations of attribution (and hence reliance) would thus contravene Congress's judgment, in enacting the PSLRA, that the implied private right of action under Rule 10b-5 should not

"be extended beyond its present boundaries." *Stoneridge*, 552 U.S. at 165. This reasoning leaves no room for courts to invent new presumptions (or inferences) of reliance. *See Malack* v. *BDO Seidman, LLP*, No. 09-4475, 2010 WL 3211088, at *10 (3d Cir. Aug. 16, 2010) (invoking *Stoneridge* to "rejec[t] … new presumptions of reliance").

The prospectuses containing the alleged misstatements were issued by a separate company, whose securities lead plaintiff did not purchase or sell, and the statements are not attributed to JCM. In these circumstances, JCM—a contractual service provider to the issuer—cannot be held to answer in a private securities-fraud suit for the statements of which lead plaintiff complains.

* * *

This Court has repeatedly acknowledged the danger of recognizing an entirely new class of Rule 10b-5 defendants by judicial fiat. *Central Bank*, 511 U.S. at 180; *Stoneridge*, 552 U.S. at 163-64; *see also Tambone*, 597 F.3d at 452-53 (Boudin, J., concurring); *Malack*, 2010 WL 3211088, at *10-*11. Affirming the decision below would subject contractual service providers to unprecedented private liability, and "the increased costs incurred by professionals because of the litigation and settlement costs under [Rule] 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors." *Central Bank*, 511 U.S. at 189; *see also*, *e.g.*, Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) ("Overbreadth and uncertainty deter beneficial conduct and breed costly litigation").

The Fourth Circuit's expansive view of the private right under Rule 10b-5 is at odds with the "narrow dimensions [courts] 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." *Stoneridge*, 552 U.S. at 167; *see also Tellabs*, 551 U.S. at 327. Because the court below transgressed the bounds imposed by Congress and enforced by this Court in every post-PSLRA Rule 10b-5 decision, its decision cannot stand. The complaint was properly dismissed with prejudice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 3, 2010.

ADDENDUM

JANUS INVESTMENT FUND
INVESTMENT ADVISORY AGREEMENT
JANUS BALANCED FUND

THIS INVESTMENT ADVISORY AGREEMENT (the "Agreement") is made this 3rd day of April, 2002, between JANUS INVESTMENT FUND, a Massachusetts business trust (the "Trust"), and JANUS CAPITAL MANAGEMENT LLC, a Delaware limited liability company ("JCM").

W I T N E S S E T H:

WHEREAS, the Trust is registered as an open-end management investment company under the Investment Company Act of 1940, as amended (the "1940 Act"), and has registered its shares for public offering under the Securities Act of 1933, as amended (the "1933 Act"); and

WHEREAS, the Trust is authorized to create separate funds, each with its own separate investment portfolio of which the beneficial interests are represented by a separate series of shares; one of such funds created by the Trust being designated as the Janus Balanced Fund (the "Fund"); and

WHEREAS, the Trust and JCM deem it mutually advantageous that JCM should assist the Trustees and officers of the Trust in the management of the securities portfolio of the Fund.

NOW, THEREFORE, the parties agree as follows:

1. Investment Advisory Services. JCM shall furnish continuous advice and recommendations to the Fund as to the acquisition, holding, or disposition of any or all of the securities or other assets which the

Fund may own or contemplate acquiring from time to time. JCM shall give due consideration to the investment policies and restrictions and the other statements concerning the Fund in the Trust Instrument, bylaws, and registration statements under the 1940 Act and the 1933 Act, and to the provisions of the Internal Revenue Code, as amended from time to time, applicable to the Fund as a regulated investment company. In addition, JCM shall cause its officers to attend meetings and furnish oral or written reports, as the Trust may reasonably require, in order to keep the Trustees and appropriate officers of the Trust fully informed as to the condition of the investment portfolio of the Fund, the investment recommendations of JCM, and the investment considerations which have given rise to those recommendations. JCM shall supervise the purchase and sale of securities as directed by the appropriate officers of the Trust.

2. Other Services. JCM is hereby authorized (to the extent the Trust has not otherwise contracted) but not obligated (to the extent it so notifies the Trustees at least 60 days in advance), to perform (or arrange for the performance by affiliates of) the management and administrative services necessary for the operation of the Fund. JCM is specifically authorized, on behalf of the Trust, to conduct relations with custodians, depositories, transfer and pricing agents, accountants, attorneys, underwriters, brokers and dealers, corporate fiduciaries, insurance company separate accounts, insurers, banks and such other persons in any such other capacity deemed by JCM to be necessary or desirable. JCM shall generally monitor and report to the Fund's officers the Fund's compliance with investment policies and restrictions as set forth in the currently effective

prospectus and statement of additional information relating to the shares of the Fund under the Securities Act of 1933, as amended. JCM shall make reports to the Trustees of its performance of services hereunder upon request therefor and furnish advice and recommendations with respect to such other aspects of the business and affairs of the Fund as it shall determine to be desirable. JCM is also authorized, subject to review by the Trustees, to furnish such other services as JCM shall from time to time determine to be necessary or useful to perform the services contemplated by this Agreement.

3. Obligations of Trust. The Trust shall have the following obligations under this Agreement:

(a) to keep JCM continuously and fully informed as to the composition of its investment portfolio and the nature of all of its assets and liabilities from time to time;

(b) to furnish JCM with a certified copy of any financial statement or report prepared for it by certified or independent public accountants and with copies of any financial statements or reports made to its shareholders or to any governmental body or securities exchange;

(c) to furnish JCM with any further materials or information which JCM may reasonably request to enable it to perform its function under this Agreement; and

(d) to compensate JCM for its services and reimburse JCM for its expenses incurred hereunder in accordance with the provisions hereof.

4. Compensation. The Trust shall pay to JCM for its investment advisory services a fee, calculated and payable for each day that this Agreement is in effect, of 1/365 of 0.65% of the daily closing net asset value of the Fund (1/366 of 0.65% of the daily closing net asset value of the Fund in a leap year). The fee shall be paid monthly.

5. Expenses Borne by JCM. In addition to the expenses which JCM may incur in the performance of its investment advisory functions under this Agreement, and the expenses which it may expressly undertake to incur and pay under other agreements with the Trust or otherwise, JCM shall incur and pay the following expenses relating to the Fund's operations without reimbursement from the Fund:

(a) Reasonable compensation, fees and related expenses of the Trust's officers and its Trustees, except for such Trustees who are not interested persons of JCM; and

(b) Rental of offices of the Trust.

6. Expenses Borne by the Trust. The Trust assumes and shall pay all expenses incidental to its organization, operations and business not specifically assumed or agreed to be paid by JCM pursuant to Sections 2 and 5 hereof, including, but not limited to, investment adviser fees; any compensation, fees, or reimbursements which the Trust pays to its Trustees who are not interested persons of JCM; compensation of the Fund's custodian, transfer agent, registrar and dividend disbursing agent; legal, accounting, audit and printing expenses; administrative, clerical, recordkeeping and bookkeeping expenses; brokerage commissions and all other expenses in connection with execution of portfolio transactions (including any appropriate commissions paid to JCM or its af-

filiates for effecting exchange listed, over-the-counter or other securities transactions); interest; all federal, state and local taxes (including stamp, excise, income and franchise taxes); costs of stock certificates and expenses of delivering such certificates to purchasers thereof; expenses of local representation in Massachusetts; expenses of shareholders' meetings and of preparing, printing and distributing proxy statements, notices, and reports to shareholders; expenses of preparing and filing reports and tax returns with federal and state regulatory authorities; all expenses incurred in complying with all federal and state laws and the laws of any foreign country applicable to the issue, offer, or sale of shares of the Fund, including, but not limited to, all costs involved in the registration or qualification of shares of the Fund for sale in any jurisdiction, the costs of portfolio pricing services and compliance systems, and all costs involved in preparing, printing and mailing prospectuses and statements of additional information to fund shareholders; and all fees, dues and other expenses incurred by the Trust in connection with the membership of the Trust in any trade association or other investment company organization.

7. Treatment of Investment Advice. The Trust shall treat the investment advice and recommendations of JCM as being advisory only, and shall retain full control over its own investment policies. However, the Trustees may delegate to the appropriate officers of the Trust, or to a committee of the Trustees, the power to authorize purchases, sales or other actions affecting the portfolio of the Fund in the interim between meetings of the Trustees.

8. Termination. This Agreement may be terminated at any time, without penalty, by the Trustees

of the Trust, or by the shareholders of the Fund acting by vote of at least a majority of its outstanding voting securities, provided in either case that sixty (60) days advance written notice of termination be given to JCM at its principal place of business. This Agreement may be terminated by JCM at any time, without penalty, by giving sixty (60) days advance written notice of termination to the Trust, addressed to its principal place of business. The Trust agrees that, consistent with the terms of the Trust Instrument, the Trust shall cease to use the name "Janus" in connection with the Fund as soon as reasonably practicable following any termination of this Agreement if JCM does not continue to provide investment advice to the Fund after such termination.

9. Assignment. This Agreement shall terminate automatically in the event of any assignment of this Agreement.

10. Term. This Agreement shall continue in effect until July 1, 2002, unless sooner terminated in accordance with its terms, and shall continue in effect from year to year thereafter only so long as such continuance is specifically approved at least annually by the vote of a majority of the Trustees of the Trust who are not parties hereto or interested persons of any such party, cast in person at a meeting called for the purpose of voting on the approval of such terms of such renewal, and by either the Trustees of the Trust or the affirmative vote of a majority of the outstanding voting securities of the Fund. The annual approvals provided for herein shall be effective to continue this Agreement from year to year if given within a period beginning not more than ninety (90) days prior to July 1 of each applicable year, notwithstanding the fact that more than three hundred

sixty-five (365) days may have elapsed since the date on which such approval was last given.

11. Amendments. This Agreement may be amended by the parties only if such amendment is specifically approved (i) by a majority of the Trustees, including a majority of the Trustees who are not interested persons (as that phrase is defined in Section 2(a)(19) of the 1940 Act) of JCM and, if required by applicable law, (ii) by the affirmative vote of a majority of the outstanding voting securities of the Fund (as that phrase is defined in Section 2(a)(42) of the 1940 Act).

12. Other Series. The Trustees shall determine the basis for making an appropriate allocation of the Trust's expenses (other than those directly attributable to the Fund) between the Fund and the other series of the Trust.

13. Limitation of Personal Liability. All the parties hereto acknowledge and agree that all liabilities of the Trust arising, directly or indirectly, under this Agreement, of any and every nature whatsoever, shall be satisfied solely out of the assets of the Fund and that no Trustee, officer or holder of shares of beneficial interest of the Trust shall be personally liable for any of the foregoing liabilities. The Trust Instrument describes in detail the respective responsibilities and limitations on liability of the Trustees, officers and holders of shares of beneficial interest of the Trust.

14. Limitation of Liability of JCM. JCM shall not be liable for any error of judgment or mistake of law or for any loss arising out of any investment or for any act or omission taken with respect to the Trust, except for willful misfeasance, bad faith or gross negligence in the performance of its duties, or

by reason of reckless disregard of its obligations and duties hereunder and except to the extent otherwise provided by law. As used in this Section 14, "JCM" shall include any affiliate of JCM performing services for the Trust contemplated hereunder and directors, officers and employees of JCM and such affiliates.

15. Activities of JCM. The services of JCM to the Trust hereunder are not to be deemed to be exclusive, and JCM and its affiliates are free to render services to other parties. It is understood that trustees, officers and shareholders of the Trust are or may become interested in JCM as directors, officers and shareholders of JCM, that directors, officers, employees and shareholders of JCM are or may become similarly interested in the Trust, and that JCM may become interested in the Trust as a shareholder or otherwise.

16. Certain Definitions. The terms "vote of a majority of the outstanding voting securities," "assignment" and "interested persons" when used herein, shall have the respective meanings specified in the 1940 Act, as now in effect or hereafter amended, and the rules and regulations thereunder, subject to such orders, exemptions and interpretations as may be issued by the Securities and Exchange Commission under said Act and as may be then in effect.

IN WITNESS WHEREOF, the parties have caused their duly authorized officers to execute this Investment Advisory Agreement as of the date and year first above written.

JANUS CAPITAL MANAGEMENT LLC

By: /s/_____

Thomas A. Early, Vice President

JANUS INVESTMENT FUND

By: /s/_____

Kelley Abbott Howes, Vice President