

No. 09-525

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IN THE  
**Supreme Court of the United States**

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JANUS CAPITAL GROUP INC. AND  
JANUS CAPITAL MANAGEMENT LLC,  
*Petitioners,*

v.

FIRST DERIVATIVE TRADERS,  
*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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October 26, 2010

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## QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly concluded that a mutual-fund investment adviser “ma[d]e” misrepresentations within the meaning of Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, when it wrote those misrepresentations, caused prospectuses for mutual funds that it created and managed to be issued containing those misrepresentations, and disseminated those prospectuses.

2. Whether a mutual-fund investment adviser that made misrepresentations in the prospectuses of mutual funds that it created and managed can avoid liability under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 on the ground that the prospectuses containing those misrepresentations were directly and contemporaneously attributed to the funds, rather than the adviser.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29.6 of the Rules of this Court, respondent First Derivative Traders states the following:

First Derivative Traders is not a publicly held corporation, has no parent corporation, and has no stock held by any publicly held corporation.

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## INTRODUCTION

Petitioner Janus Capital Group Inc. (“JCG”) created and manages the Janus family of mutual funds (“Janus Funds” or “Funds”) through its wholly owned operating subsidiary, petitioner Janus Capital Management LLC (“JCM”). The Janus Funds are pools of assets; they have no employees of their own; and JCM manages their operations. For years, unbeknownst to JCG’s shareholders and investors in the Funds, JCM permitted a select number of hedge funds to engage in “market timing” in the Funds. “Market timing” refers to trading through which arbitrageurs exploit inefficiencies in the pricing of a mutual fund’s shares to the detriment of other fund investors. Petitioners recognized that mutual funds that allow market timing are not attractive investments for ordinary investors, so, in the Funds’ prospectuses, JCM represented that its policies and practices prevented market timing. Those representations were false.

In September 2003, an investigation by the New York Attorney General publicly revealed JCM’s secret market-timing arrangements. Following that revelation, JCG’s common stock price plummeted, and investors in the Janus Funds redeemed their shares at a dramatic rate. JCG’s revenues derived primarily from passed-through profits from JCM, whose fees for managing the Funds were calculated based on a percentage of assets under management in the Funds. When the Funds’ assets decreased and confidence in JCM declined, JCG’s financial performance suffered. In this action, JCG’s shareholders seek compensation from JCG and JCM for their investment losses caused by JCM’s material misstatements regarding its market-timing policy.

Petitioners contend that they are not liable for securities fraud on the theory that the Janus Funds – not JCM – “made” the misrepresentations regarding market timing in the prospectuses. The Fourth Circuit correctly held, however, that JCM, which operates the Funds and which created and disseminated the misrepresentations in the prospectuses, made the misstatements regarding its own market-timing policy.

Petitioners also argue that, even if JCM made the misstatements, it should not be responsible for them because the prospectuses were issued in the Janus Funds’ names, rather than JCM’s. To evade liability, petitioners request that this Court impose a “direct attribution” requirement for JCM’s misrepresentations. This Court, however, has never recognized such a requirement, and to do so would contravene congressional policy that promotes honesty and transparency in the Nation’s securities markets. In any event, the Fourth Circuit correctly concluded that, given the publicly disclosed facts confirming JCM’s day-to-day control of the Funds, a reasonable investor would attribute the misstatements in the prospectuses to JCM.

If adopted by this Court, petitioners’ theory would provide a roadmap for unscrupulous companies to commit securities fraud. Such a firm could form a shell corporation and create and disseminate misrepresentations about its activities in the shell corporation’s name. On petitioners’ view, such a scheme could enable the wrongdoer to avoid liability in both private suits and government enforcement proceedings, because the government also must establish that a defendant “made” a misrepresentation.

## STATEMENT

1. JCG is a publicly traded holding company that, through its subsidiaries, sponsors and markets mutual funds and provides investment advisory and administrative services to those funds. App.<sup>1</sup> 5a, 59a (¶ 2).<sup>2</sup> JCM is the wholly owned subsidiary and primary operating company of JCG. App. 5a, 59a (¶ 2). JCM acts as the investment adviser and manager of the various Janus mutual funds at issue here. App. 5a, 59a (¶ 2).

A mutual fund, such as the Janus Funds, is a pool of assets that typically is created, operated, and controlled by an entity known as an investment adviser, such as JCM. *See Jones v. Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010); *see also Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 731 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing en banc) (“mutual funds are ‘captives’ of investment advisers”) (internal quotations omitted). Securities and Exchange Commission (“SEC” or “Commission”) filings by the various Janus entities during the time period involved in this action (July 2000 to September 2003), including the Funds’ prospectuses, informed the investing public that JCM controlled

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<sup>1</sup> “App.” refers to the appendix accompanying the certiorari petition, and “JA” refers to the Joint Appendix accompanying petitioners’ opening merits brief.

<sup>2</sup> At this stage of the litigation, the Court accepts as true the factual allegations in the Second Amended Complaint, *see Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), which is considered “in its entirety,” along with “documents incorporated into the complaint by reference” and “matters of which a court may take judicial notice,” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).



the Funds.<sup>3</sup> Under the heading “Management of the Funds,” the prospectuses explained that JCM “is responsible for the day-to-day management of the investment portfolios of” the Funds; that it “furnishes certain administrative, compliance and accounting services for the Funds”; and that it “provides office space for the Funds.” JA359a-360a.

Every one of the Janus Funds’ 17 officers was a Vice President at JCM. JA250a-258a; *see also* JA360a (“[JCM] employees serve as officers of the [Funds] and [JCM] . . . pays the salaries, fees and expenses of all Fund officers and those [Funds] Trustees who are interested persons of [JCM]”). The Funds’ General Counsel, Thomas Early, also was General Counsel and Vice President of JCM and General Counsel, Corporate Affairs Officer, Vice President, and Secretary of JCG. JA254a. The Janus Funds’ Board of Trustees was chaired by the founder and former CEO of JCG, Thomas Bailey. JA249a. The same filings also disclosed that the Janus entities engaged in a coordinated marketing strategy that blurred the distinction between the entities that constituted JCG’s business, so that investors perceived a unified Janus brand. *See* JCG Form 10-K at 3-4 (Mar. 28, 2003).

More than 90% of JCG’s revenue came from fees generated by JCM’s management of mutual funds, with JCM’s fee calculated as a percentage of assets in the Janus Funds. App. 60a (¶ 4), 64a (¶ 17), 107a (¶ 115). When investors in the Janus Funds redeemed

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<sup>3</sup> A prospectus is a communication offering to sell a security. *See* 15 U.S.C. §§ 77b(a)(10), 80a-2(a)(31). The SEC has promulgated regulations describing the information that must be contained in mutual-fund prospectuses. *See* 17 C.F.R. §§ 270.8b-1, 270.8b-10, 274.11A.

their shares, the amount of assets under management in the Funds decreased, resulting in a corresponding reduction in JCM's – and, in turn, JCG's – revenue. App. 69a (¶ 30). In pertinent SEC filings, JCG identified as the number one risk to its business that “[a]ny decrease in the value of Janus’ assets under management would adversely affect revenues and profits.” JCG Form 10-K at 7 (Mar. 28, 2003) (incorporated by reference in the complaint at App. 94a (¶ 80)). It explained that, because “the majority of [JCG’s] revenues are related directly to the value of the assets under management, any decline in the value or amount of those assets would have an adverse effect on revenues.” *Id.*

**2.a.** The underlying misconduct alleged in this case involves a practice known as “market timing,” which refers to trading in mutual-fund shares to exploit stale prices for stocks listed on foreign exchanges. Most mutual funds calculate the net asset (i.e., market) value, or “NAV,” of their entire portfolio only once per day, typically at the 4:00 p.m. Eastern Time close of trading on New York exchanges. Some fund assets are listed on foreign exchanges, which may have closed as many as 15 hours before the close of the New York market. Market timers purchase mutual-fund shares on days when the foreign securities in a fund’s portfolio are undervalued and redeem shares on days when the foreign securities are overvalued. App. 5a-6a, 68a (¶ 26); *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633, 637 n.4 (2006).

Market timers’ profits are supplied dollar-for-dollar by long-term holders of mutual-fund shares, which are continually devalued by ongoing market timing. *See generally* App. 68a-69a (¶¶ 27-28). Market-timing trades also increase costs for the fund’s long-term investors, as the prospectuses here explained.

App. 69a (¶ 28); JA357a (“Frequent trades into or out of a Fund can disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders, including long-term shareholders who do not generate these costs.”).

Because market timing is harmful to long-term holders of mutual-fund shares, most ordinary investors view mutual funds that permit market timing as unattractive investments. App. 69a (¶ 29).

**b.** To induce investors to purchase shares in the Janus Funds, JCM “wrote and represented [a] policy against market timers.” App. 69a (¶ 31). It “caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCM] would implement measures to curb market timing in the Janus Funds.” App. 60a (¶ 6). Those prospectuses stated that the Funds were “not intended for market timing or excessive trading.” JA357a; *see also* App. 99a (¶ 88) (describing internal JCM e-mail acknowledging that “[o]ur stated policy is that we do not tolerate timers”). The prospectuses detailed measures employed to deter suspected market timing in the Funds, including closing accounts and imposing redemption fees for Fund shares held less than three months. App. 72a-80a (¶¶ 40-52). JCM disseminated the prospectuses to the investing public through JCG’s website. App. 72a (¶ 38), 107a (¶ 114); *see also* App. 71a (¶ 36).

Despite announcing a policy prohibiting market timing in the Janus Funds, JCM secretly allowed such transactions. App. 80a (¶ 52), 96a (¶ 85). Petitioners’ motive in pursuing those market-timing arrangements was to collect more in management and advisory fees by allowing market timing in the

Funds in return for the timer's agreement to place a certain amount of "sticky" or "static" assets – long-term investments – in other investment vehicles managed by JCM. App. 97a-100a (¶¶ 87-88), 102a-104a (¶¶ 95-104).

JCG's CEO, Mark Whiston, knew about the market timing done under these arrangements. App. 108a (¶¶ 118-119). JCM's operations group closely tracked the market timing, and JCM's senior management received reports about those arrangements. App. 97a-100a (¶¶ 87-88), 108a-109a (¶¶ 116-120).

c. On September 3, 2003, the New York Attorney General filed a complaint against a hedge fund engaged in market timing the Janus Funds. App. 96a (¶ 86). The complaint revealed JCM's secret market-timing arrangements. App. 96a-100a (¶¶ 86-88). Multiple senior executives resigned in the wake of the scandal. App. 62a (¶ 9), 103a-104a (¶¶ 97, 103), 108a (¶ 117).

Following the revelations of the secret market-timing arrangements, investors withdrew at least \$14 billion from the Janus Funds. App. 62a (¶ 10), 105a (¶ 107). The post-scandal withdrawal rate was triple the pre-scandal rate. App. 62a (¶ 10). The expectation of such a decrease in JCM's assets under management precipitated a decline in JCG's stock price. JCG's stock price fell nearly 13% in the day following the September 3 announcement of the Attorney General's complaint, and by nearly 24% by September 26. App. 106a (¶ 112).

3. In 2003 and 2004, purchasers of JCG's common stock filed actions alleging violations of § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. App. 4a. The actions were coor-

dinated in the District of Maryland with numerous other actions arising from the market-timing scandal, and the district court appointed respondent lead plaintiff. *Id.*; see 15 U.S.C. § 78u-4(a)(3). In September 2004, respondent filed an amended complaint, respondent’s first pleading in the coordinated action. App. 4a. That complaint alleged violations of § 10(b) and Rule 10b-5 by petitioners, and it alleged that JCG also is liable under § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), as a “controlling person” of JCM. JA61a-118a.

In February 2005, petitioners moved to dismiss respondent’s complaint. App. 4a. In February 2006, the district court granted that motion on the narrow ground that the proposed class definition included investors who could not satisfy the standard for loss causation prescribed in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). JA159a-161a. The court subsequently granted respondent three days in which to file a second amended complaint (“the complaint”) for the sole purpose of curing the defect in the class definition. JA162a-163a.

In May 2007, following the filing of another motion to dismiss by petitioners, the district court entered an order dismissing the complaint. App. 42a-55a. It held that JCG did not make the misstatements in the prospectuses and therefore did not violate § 10(b). App. 44a-49a. The court concluded that JCM had “no duty” to JCG shareholders. App. 50a. It did not reach the question “whether JCM made the alleged misstatements upon which plaintiffs rely.” App. 50a n.5.

4. The Fourth Circuit reversed the district court’s judgment and remanded the case for further proceedings. App. 1a-41a.

Petitioners defended the district court’s judgment on the ground that the complaint did not plead reliance. App. 13a-14a. They argued that the presumption of reliance this Court recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and reaffirmed in *Stoneridge Investment Partners, LLC v. ScientificAtlanta*, 552 U.S. 148 (2008), did not apply here because petitioners did not “make” the misstatements in question and because those misstatements were not expressly and contemporaneously attributed to petitioners. App. 16a-17a. The Fourth Circuit rejected both contentions, holding that the complaint alleged that JCM and JCG had made the misstatements in the Funds’ prospectuses regarding market timing and that those statements were attributable to JCM.

On the first issue, the Fourth Circuit explained that “the complaint alleges that [petitioners] ‘wrote and represented [their] policy against market timers,’ and ‘publicly issued false and misleading statements’” regarding that policy. App. 17a (quoting complaint; citation omitted; second alteration in original). “According to the complaint, [petitioners] made th[o]se representations by ‘caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public,’ through filings with the SEC and dissemination on a joint Janus website.” App. 17a-18a (quoting complaint; citation omitted; third and fourth alterations in original). The court concluded that the complaint’s allegations, “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.” App. 18a.

On the attribution issue, the Fourth Circuit stated 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.” App. 23a-24a. In applying that standard, the court emphasized the complaint’s allegations that “JCM in its role as investment advisor to the Janus Funds ‘is responsible for the day-to-day management of [the] . . . business affairs of the funds’ and ‘furnishes . . . administrative, compliance and accounting services for the funds’” and that the prospectuses and statements of additional information for the Funds identify JCM as the investment adviser and describe its duties. App. 27a-28a (brackets in original). It also noted the allegations that “JCG and JCM and the Janus Funds held themselves out to the investing public as a single entity: ‘Janus’” and that JCM disseminated the prospectuses and marketed shares in the Funds to the investing public. App. 30a (quoting complaint). Considering the complaint in its entirety, the court held that, “given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds’ policies affecting the purchase or sale of shares.” App. 31a.

Although the Fourth Circuit concluded that the complaint’s allegations of attribution “are insufficient to reach JCG,” App. 32a, it held that the complaint adequately pleaded a claim of controlling-person liability against JCG under § 20(a), App. 36a-40a.<sup>4</sup>

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<sup>4</sup> Petitioners do not challenge that holding in this Court. Pet. Br. 7 n.2.

## SUMMARY OF ARGUMENT

I. SEC Rule 10b-5 construes it a violation of Exchange Act § 10(b) “[t]o make any untrue statement of a material fact.” 17 C.F.R. § 240.10b-5(b). Under Rule 10b-5’s plain language, an entity that creates or causes to exist a statement about its own conduct “make[s]” that statement. That interpretation follows from the ordinary meaning of the word “make,” and comports with the SEC’s construction of that term in Rule 10b-5. That well-settled meaning of “make,” which the Commission has articulated and applied in multiple and varied proceedings for more than a decade, is entitled to deference. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997). Petitioners cannot show that the SEC’s reasonable construction of its rule is plainly erroneous or inconsistent with the regulation.

Respondent pleaded that JCM made misstatements regarding its market-timing policy in the Janus Funds’ prospectuses. The complaint alleges that JCM “wrote and represented [a] policy against market timers”; that it “represented that [the Funds] were designed to be long-term investments for ‘buy and hold’ investors”; that it “publicly issu[ed] false and misleading statements” regarding its market-timing policy; and that it “caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCM] would implement measures to curb market timing in the Janus Funds.” App. 60a (¶¶ 5-6), 69a (¶ 31), 109a (¶ 122). Related materials appropriate for consideration in ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) confirm JCM’s responsibility for the misstatements in the prospec-



tuses. Petitioners' criticisms of the complaint and their caricature of the Fourth Circuit's decision cannot defeat the complaint's well-pleaded allegations at this stage of the litigation.

Petitioners also contend that investment advisers such as JCM are secondary actors with respect to their captive mutual funds. Regardless of the accuracy of that proposition, it is irrelevant in this case. Respondent filed this action against the issuer of the securities in which it transacted (JCG) and the issuer's wholly owned operating subsidiary (JCM) to recover for investment losses caused by material misrepresentations made by JCM to the investing public. Respondent is not a shareholder in a mutual fund seeking to hold an investment adviser liable for providing services to the fund. Moreover, respondent pursues no theory of secondary or aiding-and-abetting liability against JCM.

In any event, petitioners' attempt to paint JCM as a mere "service provider" is inconsistent with the complaint, which alleges that JCM "is responsible for the . . . day-to-day management" of and "as a practical matter . . . runs" the Funds. App. 59a (¶ 2), 71a (¶ 34). Those allegations are consistent with the federal regime regulating mutual-fund investment advisers for the protection of mutual-fund shareholders. The SEC, which administers that regime, recognizes that "investment advisers typically dominate the funds they advise." *Role of Independent Directors of Investment Companies*, 66 Fed. Reg. 3734, 3735 n.3 (Jan. 16, 2001).

**II.** The complaint alleges reliance on JCM's misrepresentations regarding its market-timing policy. Under this Court's cases, "reliance is presumed" when material misstatements "become public," because

it can then “be assumed that an investor who buys or sells stock at the market price relies upon the statement.” *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247). Petitioners do not contest the materiality of the misstatements to investors in JCG. Nor could they: the price of JCG’s shares dropped precipitously following disclosure of the truth about JCM’s market-timing practices that directly affected JCG’s revenue.

Petitioners contend that reliance on a public misrepresentation cannot be presumed unless that misrepresentation was, on its face, attributed to the defendant. That rule conflicts with this Court’s cases, which establish that whether the presumption of reliance applies in cases involving public misstatements about publicly traded companies turns on the materiality of the information, not the speaker’s identity. Imposing a new direct-attribution requirement in § 10(b) actions would frustrate Congress’s purposes of promoting honest securities markets and investor confidence. As applied in this case, it would allow JCM “to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows.” U.S. Cert. Br. 16.

In any event, the Fourth Circuit correctly concluded that a reasonable investor would have attributed the misrepresentations regarding market timing in the Janus Funds’ prospectuses to JCM, given the publicly disclosed facts regarding JCM’s role in creating and managing the Funds.

## ARGUMENT

Section 10(b) of the Exchange Act makes it “unlawful” for “any person, directly or indirectly,” to “use or employ . . . any manipulative or deceptive device or contrivance in contravention of” Commission rules. 15 U.S.C. § 78j(b). Rule 10b-5, which implements § 10(b), makes it “unlawful” for “any person, directly or indirectly” — “(a) [t]o employ any device, scheme, or artifice to defraud”; “(b) [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”; or “(c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” 17 C.F.R. § 240.10b-5.

As this Court has recognized, Congress’s primary purposes in enacting the Exchange Act were to establish “honest securities markets and thereby promote investor confidence after the market crash of 1929” and “to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.” *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotations omitted). The “statute should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes.” *Id.* (internal quotations omitted).

This Court has recognized a private right of action under § 10(b) and Rule 10b-5. *See Stoneridge*, 552 U.S. at 157. The elements of a private § 10(b) action 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 misrepre-

sentation or omission; (5) economic loss; and (6) loss causation.” *Id.* The Court “has long recognized that meritorious private actions to enforce federal anti-fraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions.” *Tellabs*, 551 U.S. at 313; *see also Dura*, 544 U.S. at 345 (“The securities statutes seek to maintain public confidence in the marketplace . . . by deterring fraud, in part, through the availability of private securities fraud actions.”).

This case concerns the conduct element of § 10(b) and Rule 10b-5 and the reliance element of a private § 10(b) action.

## **I. JCM MADE MISSTATEMENTS**

### **A. An Entity That Creates Or Causes To Exist A Statement Describing Its Own Conduct “Makes” A Statement Actionable Under Rule 10b-5**

1. Under the plain language of Rule 10b-5, an entity that creates a statement about its own conduct “make[s]” that statement. Rule 10b-5 makes it “unlawful” “[t]o make any untrue statement of a material fact.” 17 C.F.R. § 240.10b-5(b). The term “make” is not defined in the rule and therefore should be given its ordinary meaning. *See Smith v. United States*, 508 U.S. 223, 228 (1993). “[M]ake” means “[t]o cause to exist, appear, or occur,” *Webster’s New International Dictionary* 1485 (2d ed. 1934) (“*Webster’s Second*”) – that is, “to create” or “to compose,” *Webster’s Third New International Dictionary* 1363 (2002) (“*Webster’s Third*”). *See Black’s Law Dictionary* 1145 (3d ed. 1933) (“To cause to exist”); *Black’s Law Dictionary* 1041 (9th ed. 2009) (“To cause (something) to exist”); *see also SEC v. Tambone*, 597 F.3d 436, 443 (1st Cir. 2010) (en banc) (defining “make” to

include “create or cause”); *id.* at 450-51 (“The word ‘make,’ in reference to a statement, ordinarily refers to one authoring the statement or repeating it as his own”) (Boudin, J., concurring); *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668 (2007) (referring to dictionary definition in determining the meaning of a regulation). Moreover, interpreting the term “make” in Rule 10b-5 to include causing a statement to exist or creating it is especially appropriate in cases where, as here, the misstatements in question concern the defendant’s own conduct. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212 n.32 (1976) (explaining that SEC adopted Rule 10b-5 in response to corporate officer’s misstatements regarding the operations of his company).

2. Giving the term “make” in Rule 10b-5 its ordinary meaning comports with the interpretation of the SEC, whose construction of its own regulation is entitled to deference.

a. The SEC interprets the term “make” in Rule 10b-5(b) to include creating a statement or causing a statement to exist. *See* U.S. Cert. Br. 11 (“when a person, acting alone or with others, creates a misrepresentation or causes it to be made, that person can be liable as a primary violator”). The Commission has held that view for more than a decade,<sup>5</sup> and it has applied that interpretation in a formal adjudication. *See In re Armstrong*, Release No. 51920, 85 S.E.C. Docket 2321, 2005 WL 1498425, at \*7 (June 24, 2005) (“A person can be primarily liable under Section 10(b) and Rule 10b-5 for directly or indirectly making an untrue statement of fact if that person,

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<sup>5</sup> *See* SEC Amicus Brief at 17-19, *Klein v. Boyd*, Nos. 97-1143 & 97-1261 (3d Cir. filed Apr. 30, 1998) (“SEC *Klein* Br.”), available at <http://www.sec.gov/pdf/klein.pdf>.

acting alone or with others, creates a false statement that reaches investors.”)<sup>6</sup>

**b.** The SEC’s interpretation of the term “make” in its Rule 10b-5 is entitled to deference. *See Auer*, 519 U.S. at 461; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In *Auer*, this Court held that an agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation.” 519 U.S. at 461 (internal quotations omitted). The Court has reaffirmed and applied that rule on multiple occasions in recent years. *See, e.g., Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2470 (2009) (agency’s interpretation of its regulations “is not plainly erroneous or inconsistent with the regulation[s], and so we accept it as correct”) (internal quotations omitted; alteration in original); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (“Just as we defer to an agency’s reasonable interpretations of the statute when it issues regulations in the first instance, the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force.”) (citation

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<sup>6</sup> After *Armstrong*, the Commission consistently has confirmed its interpretation in legal briefs submitted in the federal courts of appeals. *See, e.g.,* Brief of Respondent at 30, *McConville v. SEC*, 465 F.3d 780 (7th Cir. 2006) (No. 05-3510), 2005 WL 3749754 (“The Commission concluded, after *Central Bank [of Denver, N.A. v. First Interstate Bank of Denver, N.A.]*, 511 U.S. 164 (1994)], that the creation of a misstatement by an individual that reaches investors is sufficient to find that the individual ‘made’ the misstatement, thereby establishing primary liability.”); SEC Amicus Brief at 7, *Pacific Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010) (“SEC PIMCO Br.”) (“In the Commission’s view, a person makes a false or misleading statement and thus can be liable as a primary violator of Rule 10b-5 when that person *creates* the statement.”).

omitted); *National Ass'n of Home Builders*, 551 U.S. at 672.

Deference is particularly appropriate here, for multiple reasons. Although the Court deferred to a regulatory interpretation contained in an *amicus* brief in *Auer*, here the SEC has articulated its interpretation not only in briefs but also in a formal adjudication in *Armstrong*. This Court has treated agency interpretations articulated in formal adjudications as on par with interpretations announced in rulemakings; both are accorded the highest degree of deference. *See, e.g., Zandford*, 535 U.S. at 819-20. Moreover, the case for deference here is especially strong. The SEC's interpretation reflects the agency's exercise of specifically delegated discretion to enforce a complex regulatory scheme. *See Heckler v. Chaney*, 470 U.S. 821, 835 (1985). And the agency has "rendered binding, consistent, official interpretations" of the regulation "over a long period of time." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 41 n.27 (1977).<sup>7</sup> Moreover, courts have approved of the SEC's interpretation of the term "make" in Rule 10b-5. *See McConville v. SEC*, 465 F.3d 780, 787-88 (7th Cir. 2006); *see also SEC v. Wolfson*, 539 F.3d 1249, 1260-61 (10th Cir. 2008) (following *McConville*).

**B. JCM Created And Caused To Exist The Misstatements About Its Practices With Respect To Market Timing**

1. Respondent alleges that JCM both wrote (i.e., created) its policy regarding market timing in the Janus Funds and caused the Funds' prospectuses to

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<sup>7</sup> This Court consistently has applied the normal principles of administrative deference to the SEC's interpretations of § 10(b) and Rule 10b-5. *See, e.g., Zandford*, 535 U.S. at 819-20.

be issued and disseminated containing that policy. That suffices to plead that JCM made the misrepresentations in the Funds' prospectuses regarding its market-timing policy.

Specifically, the complaint alleges that JCM "wrote and represented [a] policy against market timers," App. 69a (¶ 31), and that it "represented that [the Janus Funds] were designed to be long-term investments for 'buy and hold' investors," App. 60a (¶ 5). It further alleges that JCM "publicly issu[ed] false and misleading statements" regarding the market-timing policy, App. 109a (¶ 122); "made . . . a series of materially false or misleading statements about" that policy, App. 110a (¶ 123); "made untrue statements of material fact," App. 112a (¶ 128); *see id.* (¶ 130); and "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [JCM] would implement measures to curb market timing in the Janus Funds," *id.* (¶ 6). JCM also disseminated the Funds' prospectuses. App. 72a (¶ 38) (JCM "makes the most recent prospectus for each Janus Fund available on its website").

The complaint describes the relationship between JCM and the Janus Funds, which provides context for the allegation that JCM "caused" the issuance of the prospectuses. It alleges that JCM "is responsible for the day-to-day management of its investment portfolio and other business affairs of the funds." App. 65a (¶ 18); *see also* App. 59a (¶ 2). The complaint further explains that JCM "furnishes advice and recommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds." App. 65a (¶ 18);



*see also* App. 71a (¶ 34) (“as a practical matter the [investment adviser] runs [the mutual fund]”).

The prospectuses, which are incorporated by reference in the complaint (*e.g.*, App. 72a (¶ 38)), confirm that JCM was charged with control over the “day-to-day management” of the “business affairs” of the Janus Funds as well as their “administrative” and “compliance” services. JA359a-360a. Every one of the Funds’ 17 officers was a JCM Vice President. JA250a-258a. And JCM “provides office space for the Funds,” JA360a, which the district court found in a related case “have no assets separate and apart from those they hold for shareholders,” *In re Mutual Funds Inv. Litig.*, 384 F. Supp. 2d 845, 853 n.3 (D. Md. 2005). Moreover, the address under the signature line in the prospectuses – 100 Fillmore Street, Denver, Colorado 80206-4928 – was the address for the headquarters of both JCM and JCG. JA359a, 403a, 431a. And the prospectuses are signed by “Janus,” a name to which JCM reserved the right. JA275a.

Once the market-timing scandal became public, JCG accepted responsibility for the false statements in the prospectuses. JCG’s CEO Mark Whiston announced in a JCG press release that “It’s our hope that the measures we’re announcing today will help resolve this situation in a way that recognizes the importance of the matter. Most of all, we hope this action demonstrates that Janus is committed to living up to the high ethical standards that our shareholders expect of us.” App. 101a (¶ 92). That public statement confirms respondent’s allegations: JCM – JCG’s wholly owned operating subsidiary – made false statements regarding its own policy on market

timing, which brought substantial harm to JCG's shareholders.

2. The well-recognized and uniquely close relationship between a mutual fund and its investment adviser reinforces the plausibility of the complaint's allegations. As this Court has recognized, mutual funds are "typically created and managed by a pre-existing external organization known as an investment adviser." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (citing *Burks v. Lasker*, 441 U.S. 471, 481 (1979)); see *Jones*, 130 S. Ct. at 1422 (observing that it is "typical" for an investment adviser to "create[] the mutual fund"); S. Rep. No. 91-184, at 5 (1969). The adviser "selects the fund's directors," *Jones*, 130 S. Ct. at 1422, who "often" are "affiliated" with the adviser, *Daily Income Fund*, 464 U.S. at 536 (citing *Burks*, 441 U.S. at 481). "[T]he relationship between a mutual fund and its investment adviser" is so symbiotic that the fund often "'cannot, as a practical matter sever its relationship with the advisor.'" *Jones*, 130 S. Ct. at 1422 (quoting *Burks*, 441 U.S. at 481 (quoting S. Rep. No. 91-184, at 5)).

The adviser "generally supervises the daily operation of the fund." *Daily Income Fund*, 464 U.S. at 536 (citing *Burks*, 441 U.S. at 481). Indeed, the mutual fund "may have no employees of its own." *Jones*, 130 S. Ct. at 1422. The investment adviser thus "manages the fund's investments, and provides other services." *Id.* The "other services" that investment advisers provide often include preparing prospectuses. See Investment Co. Inst. Amicus Brief at 18, *Jones v. Harris Assocs. L.P.*, *supra* ("Mutual fund advisers . . . prepare prospectuses, shareholder reports and other disclosures for which they have liability under the securities laws.") (emphasis added).

Given those well-known facts about the relationship between many mutual funds and the investment advisers that create them, the complaint's allegations that JCM made the misstatements regarding JCM's policy with respect to market timing in the prospectuses plainly are plausible.

3. As this case has proceeded, orders issued in other regulatory and judicial proceedings – matters “of which [this Court] may take judicial notice,” *Tel-labs*, 551 U.S. at 322 – have confirmed the allegations in the complaint and the documents referenced therein.

In a 2004 cease-and-desist order, the SEC found that “*JCM filed* several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds.” *In re Janus Capital Mgmt., LLC*, Release No. 2277, 83 S.E.C. Docket 1766, ¶ 26 (Aug. 18, 2004) (emphasis added), *reproduced at* JA415a. The Commission further found that, “[b]etween November 2001 and September 2003, JCM provided [the Funds’] prospectuses to shareholders . . . and filed registration statements containing these prospectuses with the Commission.” *Id.* ¶¶ 20-21 (JA413a). In addition, in a 2008 order, an SEC Administrative Law Judge found that JCM’s legal department “had the responsibility for drafting” the Funds’ prospectuses.<sup>8</sup>

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<sup>8</sup> Initial Decision at 15, 21, *In re Lammert*, Release No. 348, Admin. Proc. File No. 3-12386 (SEC Apr. 28, 2008), *available at* <http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf>. That initial decision became final on May 29, 2008. *See* Final Decision, *In re Lammert*, Release No. 8921, Admin. Proc. File No. 3-12386

In 2005, in a related action arising out of the events at issue here, the district court dismissed private § 10(b) claims against the Janus Funds because the Funds themselves had no assets “separate and apart from those they hold for shareholders” that could have engaged in securities fraud. *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3. In a 2008 order, the same court found “ample evidence of substantial involvement by employees of the Janus . . . investment advisers [JCM], including members of their legal department, in the drafting and review of fund prospectuses.” *In re Mutual Funds Inv. Litig.*, 590 F. Supp. 2d 741, 747 (D. Md. 2008). Indeed, petitioners there “admit[ted] that ‘it is undisputed that the Janus legal department drafted and edited certain prospectus language, which was then circulated among JCM and JCG employees for review.’” *Id.*

4. Although the complaint and related materials that the Court may consider under *Tellabs* make clear that respondent’s complaint adequately alleged that JCM made the misstatements in question, petitioners’ own discovery responses in the district court further confirm that fact.<sup>9</sup> In an interrogatory

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(SEC May 29, 2008), available at <http://www.sec.gov/litigation/aljdec/2008/33-8921.pdf>.

<sup>9</sup> Petitioners suggest (at 33-34) that the Court must ignore their own admissions in sworn discovery responses. Regardless of whether discovery material is generally appropriate for consideration in ruling on a motion to dismiss under Rule 12(b)(6), however, these discovery responses eliminate any uncertainty that, if given leave to amend the complaint, respondent could plead actionable misstatements by JCM. Cf. *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 195 (4th Cir. 2009) (appellate court considers plaintiffs’ proffered additional allegations in deciding whether district court abused its discretion in denying opportunity to amend complaint).

response, JCM admitted that its in-house attorneys, “Kelley Howes, Bonnie Howe, and other members of JCM’s legal department,” drafted the prospectuses. JA507a. In addition to the individuals in JCM’s legal department who drafted the prospectuses, Thomas Early, a JCM in-house attorney (*see id.*) and General Counsel to the Janus Funds, was one of two individuals “ultimately responsible” for changes made to the prospectuses. JA508a.<sup>10</sup> At least 70 JCM-affiliated personnel may have reviewed and commented upon the prospectus language concerning JCM’s “excessive trading policy.” JA508a-518a. Those admissions, which are consistent with JCM’s public statements about its relationship to the Funds (*see supra* Part I.B.1), reinforce the plausibility of the complaint’s allegations.<sup>11</sup>

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Although the district court stated at a hearing that it would not grant leave to amend, JA469a, that issue would be subject to an appropriate order from this Court.

<sup>10</sup> Mr. Early, the *Janus Funds*’ General Counsel, signed the investment advisory agreement between JCM and the Funds *on behalf of JCM*, *see* Pet. Br. Add. 9a, thereby underscoring the Funds’ lack of independence from JCM.

<sup>11</sup> Petitioners may assert that, in drafting the prospectuses, JCM’s in-house lawyers acted as counsel to the Janus Funds. *See* JA507a; *see also* Pet. Br. 24, 31. But the assertion that the members of JCM’s legal department performed the Funds’ legal work would serve only to undermine further the Funds’ alleged independence from their adviser. Moreover, the claim that the in-house lawyers represented the Funds in drafting the prospectuses would be dubious, particularly considering the supposedly independent relationship between JCM and the Funds. As petitioners note (at 24), the SEC considers “an attorney employed by an investment adviser who prepares, or assists in preparing, materials for a [mutual fund] that the attorney has reason to believe will be submitted to or filed with the Commission by or on behalf of [the fund] [to be] appearing and practic-

**C. Petitioners’ Contention That JCM Did Not “Make” The Prospectus Misstatements As A Matter Of Law Is Unpersuasive**

Petitioners contend (at 31-43) that the complaint does not adequately allege that JCM “made” the misstatements regarding market timing in the prospectuses. Their theory of Rule 10b-5 is inconsistent with the SEC’s own reasonable interpretation of the rule’s language and mischaracterizes both the Fourth Circuit’s decision and the complaint.

*1. Holding JCM liable is consistent with § 10(b)’s text*

Under the statute’s plain language, JCM “use[d] or employ[ed]” a “deceptive device or contrivance,” 15 U.S.C. § 78j(b), when it represented to the market – including potential investors in JCG’s stock – that JCM did not permit market timing in its funds, while at the same time permitting favored hedge funds to engage in market timing. Publicly disclosing that JCM allowed market timing in the Janus Funds

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ing before the Commission” for the purposes of the Commission’s rules on professional conduct before the Commission. *Implementation of Standards of Professional Conduct for Attorneys*, 68 Fed. Reg. 6296, 6302 (Feb. 6, 2003). But such an attorney is still representing the adviser in preparing such materials. See *Implementation of Standards of Professional Conduct for Attorneys*, 67 Fed. Reg. 71,670, 71,679 (Dec. 2, 2002) (“In effect, an attorney employed by the investment adviser and representing the [mutual fund] before the Commission has joint clients.”); see also *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (“In any complex securities fraud, . . . there are likely to be multiple violators”). In any event, in determining the legal sufficiency of the complaint, the Court is obliged to disregard those assertions by petitioners that seek to contradict the complaint’s well-pleaded allegations that JCM made the misstatements in the prospectuses.

would have discouraged investments in those funds, resulting in lower management fees and reduced revenues for JCM and JCG, with a corresponding negative effect on JCG's stock price. Petitioners' assertion (at 37-38) that imposing liability here is inconsistent with § 10(b)'s text, therefore, is incorrect.

Moreover, JCM's dissemination of the Funds' prospectuses, *see* App. 72a (¶ 38); App. 18a; JA413a (¶ 21), reinforces its culpability under § 10(b) as a primary violator. Section 10(b) and Rule 10b-5 prohibit not only making material misstatements but also engaging in deceptive conduct, as this Court has recognized. *See Stoneridge*, 552 U.S. at 158 ("Conduct itself can be deceptive"); 17 C.F.R. § 240.10b-5(a), (c).<sup>12</sup>

Even if one were to accept petitioners' (incorrect) assertion that the Janus Funds issued the prospectuses on their own, courts have recognized that an issuing corporation can violate § 10(b) and Rule 10b-5 by providing misleading information regarding its own operations to an independent market analyst with the intent that the analyst communicate that information to the public. *See, e.g., Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 373 (5th Cir. 2004); *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002); *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). Petitioners' assertion (at 33 n.6) that an automobile parts supplier is not responsible for a policy that it prepares and sup-

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<sup>12</sup> Although the Fourth Circuit concluded that it need not reach respondent's allegations of deceptive conduct under Rule 10b-5(a) and (c), *see* App. 35a-36a, it reversed the district court's judgment in its entirety, *see* App. 40a. Petitioners thus erroneously suggest (at 13, 40 n.8) that this Court cannot consider JCM's deceptive acts.

plies to a manufacturer for inclusion in the manufacturer's prospectus contradicts not only those cases but also this Court's decision in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). There, the Court affirmed a finding of primary liability against an accounting firm that prepared a portion of a company's registration statement. *See id.* at 378-79 & n.5, 387.

Indeed, petitioners appear (at 38 n.7) to accept the correctness of the analyst cases, except to the extent they suggest that the phrase "directly or indirectly" in § 10 modifies only the jurisdictional requirement ("by the use of any means or instrumentality of interstate commerce"). But § 10's grammar and structure make clear that those adverbs modify the infinitive verbs "[to] use or employ," not the prepositional phrase containing the jurisdictional requirement. *See* 15 U.S.C. § 78j. Ultimately, petitioners' arguments about § 10(b)'s language fail to support their contention that JCM did not "make" misstatements within the meaning of Rule 10b-5, the SEC's authoritative implementation of § 10(b).

2. *The SEC's interpretation of the term "make" in Rule 10b-5 is consistent with the regulation*

Petitioners do not contend that Rule 10b-5's prohibition on "mak[ing]" misstatements is an unreasonable interpretation of § 10(b). Any such contention would be inconsistent with this Court's cases. *See, e.g., Stoneridge*, 552 U.S. at 157 ("Rule 10b-5 encompasses only conduct already prohibited by § 10(b).").

Instead, petitioners rely on a 72-year-old Fourth Circuit opinion to assert that "[t]he accepted meaning of 'make' in the context of 'making a statement' is . . . 'to put forth; give out; deliver; as to make a speech.'" Pet. Br. 40 (quoting *Reass v. United States*, 99 F.2d 752, 755 n.4 (4th Cir. 1938)). But accepted



dictionary definitions, to which this Court ordinarily turns in identifying the plain meaning of statutory and regulatory language, *see, e.g., National Ass'n of Home Builders*, 551 U.S. at 668; *Smith*, 508 U.S. at 228, are not so narrowly drawn. They define “make” to mean “[t]o cause to exist, appear, or occur” or “to create.” *Webster’s Second* at 1485; *Webster’s Third* at 1363; *see supra* Part I.A.<sup>13</sup> Thus, “[t]he word ‘make,’ in reference to a statement, ordinarily refers to one authoring the statement or repeating it as his own.” *Tambone*, 597 F.3d at 450-51 (Boudin, J., concurring). That is particularly true in the context of written (as opposed to oral) statements, such as the prospectuses at issue here. Given the ample support for the SEC’s definition of the term, petitioners certainly cannot show that the Commission’s interpretation is “plainly erroneous or inconsistent with the regulation.” *Coeur Alaska*, 129 S. Ct. at 2470 (internal quotations omitted).

Petitioners’ presidential-speechwriter analogy (at 41) is thus inapt. Unlike petitioners’ analogy, JCM wrote the misstatements regarding market timing, described JCM’s own conduct in supposedly precluding market timing, disseminated those statements, and expressed the prospectus statements in a form that the investing public reasonably attributed to

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<sup>13</sup> Petitioners’ assertion (at 41) that “to make a statement” means “to state” is not more helpful to them, because the meaning of the verb “state” in the context of a written document is consistent with the SEC’s interpretation of “make” as to create or cause to exist. *See Webster’s New International Dictionary* 2461 (2d ed. 1950) (“[t]o express the particulars of”).

JCM. JCM is thus no mere speechwriter (or law clerk or courier, *cf.* Pet. Br. 42).<sup>14</sup>

Petitioners' reliance (at 38-39) on § 18 to argue that "make" cannot mean "cause to be made" is unavailing. Even within the same act, the presumption that a word has identical meanings in different provisions is "not rigid." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (internal quotations omitted). Petitioners cite no authority for applying such a presumption here with respect to a word contained in, on the one hand, a statutory section and, on the other hand, an SEC regulation implementing a different statutory provision. Nor is this a case in which the defendant caused *another* person to make a misstatement. Rather, the Court can resolve this case by holding that a defendant "makes" a false statement actionable under § 10(b) and Rule 10b-5 when the defendant creates or causes a misstatement to exist, falsely describes its own conduct, and disseminates that statement.<sup>15</sup>

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<sup>14</sup> For similar reasons, the concerns of petitioners' *amici* regarding the potential liability of auditors and outside counsel are unfounded. Imposing liability on an entity that creates and disseminates statements misrepresenting its own conduct would not affect the exposure of auditors, outside counsel, or other service providers.

<sup>15</sup> Petitioners' argument (at 42-43) that one does not violate § 10(b) and Rule 10b-5 by preparing, filing, and disseminating a misstatement is unavailing. As petitioners admit (at 42), to say that an entity "prepared" a statement is another way of saying that it created that statement or caused it to exist, which suffices for liability under the SEC's reasonable construction of Rule 10b-5. *See supra* Part I.A. Further, judicially noticeable facts contradict petitioners' assertion that JCM did not "file" the prospectuses, *see supra* Part I.B.3, and petitioners concede (at 43) that JCM disseminated the prospectuses on the Janus website, *see also* JA413a (¶ 21). Although petitioners dispute that

3. *Petitioners' interpretation of "make" creates a roadmap for securities-fraud violators*

Petitioners' interpretation of the term "make" in Rule 10b-5, which would apply in SEC enforcement proceedings and criminal prosecutions as well as private actions, would open a significant loophole in the securities laws. If adopted by this Court, petitioners' approach would immunize companies that create and disseminate false statements about their operations for the purpose of defrauding investors, so long as the statements are issued in another's name. It would encourage companies to form shell corporations that would then issue public statements about the affiliated corporation's activities. That mechanism would shield unscrupulous actors from private securities-fraud suits and SEC enforcement actions, because the Commission also must show that the defendant made a misstatement to establish a Rule 10b-5(b) violation.

Nor is it clear that the SEC could bring an enforcement action on an aiding-and-abetting theory against an entity that creates and disseminates misstatements issued in another entity's name. Courts have held that aiding and abetting requires a primary violator of the statute. *See, e.g., SEC v. Di-Bella*, 587 F.3d 553, 566 (2d Cir. 2009) ("the government must prove . . . the existence of a securities law violation by [a] primary (as opposed to the aiding and abetting) party") (internal quotations omitted). But there may be no primary violator in the case of a corporate shell with no employees whose only purpose is to issue public statements created by others.

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filing or disseminating alone suffices for liability, they do not (and cannot) contend that those facts are irrelevant in determining whether JCM is a primary violator.

*Cf. Ernst & Ernst*, 425 U.S. at 188 (plaintiff must show “intent to deceive, manipulate, or defraud on the part of the defendant”); *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3 (companion case in the MDL proceeding dismissing claims against the Janus Funds arising out of the same facts as this case). The Commission has explained that its ability to enforce aiding-and-abetting liability is insufficient to police the securities markets. *See SEC PIMCO Br.* at 4.

Contrary to petitioners’ assertions (at 37, 41), neither the First nor Second Circuit has rejected the interpretation of “make” articulated here. In *Tambone*, the First Circuit rejected the proposition that “one may ‘make’ a statement within the purview of the rule by merely using or disseminating a statement *without regard to the authorship of that statement*” and where the statement did not involve the defendant’s own conduct. 597 F.3d at 438 (emphasis added). Both the court’s opinion and the concurrence indicated that “make” means “create [or] cause,” “compose,” and “cause (something) to exist,” *id.* at 443 (internal quotations omitted; alteration in original); *see id.* at 450-51 (Boudin, J., concurring), all of which are consistent with respondent’s interpretation of “make.” In *Pacific Investment Management Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010) (“*PIMCO*”), the Second Circuit held that a statement must be “attributed” to the defendant to be actionable under § 10(b), even if the defendant “drafted” it. *Id.* at 151, 157-58. That is quite different from saying that a defendant who creates a statement does not make it (and it is erroneous in any event, *see infra* Part II).

4. *Petitioners mischaracterize the Fourth Circuit's decision and the complaint*

a. In criticizing the Fourth Circuit's reasoning (at 34-36), petitioners attack a straw man. The Fourth Circuit did not hold JCM liable merely for "helping" the Janus Funds make misstatements. Rather, the court reviewed the allegations in the complaint and referenced documents as a whole, *see* App. 17a-18a, as this Court's cases require, *see Tellabs*, 551 U.S. at 322. The court below focused on the allegations that petitioners "'wrote and represented [their] policy against market timers'" and "'represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans.'" App. 17a (quoting complaint; alteration in original). The court explained that, "[a]ccording to the complaint, [petitioners] made these representations by 'caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public.'" App. 17a-18a (quoting complaint; alteration in original). The court accordingly held that petitioners "*made* the misleading statements contained in the [prospectuses]." App. 18a.

The Fourth Circuit's statements that "JCG and JCM helped draft" and "participat[ed] in the preparation of the prospectuses" (App. 17a, 18a) are fully consistent with this Court's recognition that multiple entities can make a single misstatement. *See Central Bank*, 511 U.S. at 191 ("In any complex securities fraud, . . . there are likely to be multiple violators").<sup>16</sup>

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<sup>16</sup> Contrary to petitioners' assertion (at 35), the decision below also is fully consistent with *Stoneridge*, which did not address what it means to "make" a misstatement. The defen-

Moreover, the court plainly recognized that the preparation of the prospectuses could not have been performed by the Funds, for it acknowledged respondent’s allegations that, “[a]s investment advisor to the various Janus funds, JCM ‘is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds’” and that, “[a]s a practical matter, JCM runs the Janus family of funds.” App. 5a (quoting complaint; second alteration in original); *see* App. 27a (JCM “‘furnishes . . . administrative, compliance and accounting services for the funds’”) (quoting complaint); *see also* App. 29a (“[a] mutual fund does not operate on its own or employ a full time staff”) (internal quotations omitted).

**b.** Similarly, petitioners’ assertion (at 32) that the complaint fails adequately to allege that JCM made misstatements disregards the complaint’s allegations and fails to consider that document “in its entirety,” *Tellabs*, 551 U.S. at 322. The complaint states that, “[a]s described herein, during the Class Period, [JCM] made . . . a series of materially false or misleading statements about Janus’ business, operations and operating policies.” App. 110a (¶ 123). That “series of” misstatements, which is described in the complaint, included the statements in the prospectuses that the Janus Funds “were ‘not intended for market timing or excessive trading’ and [that] ‘Janus had measures in place to stop the trading.’” App. 72a (¶ 38).

The complaint also alleges that JCM “wrote and represented [the] policy against market timers,” App. 69a (¶ 31), and that JCM “caused mutual fund prospectuses to be issued for Janus mutual funds,” App.

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dants in that case “had no role in preparing or disseminating” the false financial statements. 552 U.S. at 155.

60a (¶ 6). Especially when considered together with the complaint’s allegations that JCM “is responsible for the . . . day-to-day management” of the Funds, App. 59a (¶ 2), including “administrative, compliance and accounting services for the funds,” App. 65a (¶ 18), the complaint plainly alleges that JCM made the misstatements. *See supra* Part I.B.1. Moreover, petitioners erroneously ignore “documents incorporated into the complaint by reference” and “matters of which a court may take judicial notice,” *Tellabs*, 551 U.S. at 322 – materials that confirm JCM’s liability here. *See supra* Part I.B.2-3.<sup>17</sup>

Petitioners assert (at 26, 33, 54) that the investment advisory agreements between JCM and the Funds provide that they do not cover preparing prospectuses. But the advisory agreement that petitioners proffer, which does not apply to any of the Funds addressed in the complaint, provides only that the investment advisory *fee* payable to JCM under that agreement does not cover, among other things, the

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<sup>17</sup> Contrary to petitioners’ assertion (at 32), the complaint also alleges where (in the prospectuses) and to whom (the investing public) JCM’s misstatements regarding market timing were made. *See supra* Part I.B.1. To the extent petitioners assert (at 31) that the complaint fails for lack of particularity, that issue is not properly before this Court, because petitioners failed to present it in their petition for a writ of certiorari, which cites neither Federal Rule of Civil Procedure 9(b) nor the pleading requirements of the Private Securities Litigation Reform Act of 1995 (“PSLRA”). *See* Sup. Ct. R. 14.1(a); *see also, e.g., Beck v. PACE Int’l Union*, 551 U.S. 96, 104 n.3 (2007) (refusing to address an issue on which petitioners did not seek certiorari). In any event, for the reasons explained in the text, the complaint pleads fraud with particularity. The SEC, which also is subject to heightened pleading requirements under Rule 9(b) (*see Tambone*, 597 F.3d at 442), agrees. *See* U.S. Cert. Br. 11-12.

“costs involved in” preparing prospectuses. *See* Pet. Br. Add. 4a-5a. That provision says nothing about *who* wrote and prepared the Funds’ prospectuses, which the complaint alleges was JCM.

**D. Petitioners’ Claim That JCM Is A Secondary Actor Is Incorrect And Irrelevant**

Petitioners’ argument (at 15-29) that JCM is a secondary actor is incorrect because JCG, JCM’s parent, is *the issuer* of the securities in which respondent transacted. And it is beside the point because, as petitioners recognize, even secondary actors can be liable when, as here, their conduct meets the elements of a private § 10(b) action. Moreover, JCM is no mere “service provider,” as petitioners claim.

1. *Respondent is suing the issuer of the securities it purchased, a holding company, for primary violations committed by that company’s wholly owned operating subsidiary*

Respondent purchased shares of JCG and is suing JCG, and its wholly owned operating subsidiary JCM, for their deceptive and fraudulent conduct in connection with the purchase and sale of JCG securities. This case therefore does not involve an investor suing one of the issuer’s service providers – such as an investment banker, outside auditor, or outside counsel – for misstatements made by the issuer. Indeed, because this case concerns *primary* actors and *primary* violators, it lies at the heart of § 10(b) and Rule 10b-5.

Contrary to Janus’s repeated assertions (at 15-16), it makes no difference in determining primary liability that the misstatements at issue were contained in prospectuses for the Janus Funds, rather than JCG’s own prospectuses. As petitioners’ own authority explains, a “secondary actor” is a party that is “not



employed by the issuing firm *whose securities are the subject of allegations of fraud.*” *PIMCO*, 603 F.3d at 148 n.1 (emphasis added). Thus, an entity’s status as a primary actor turns on whether it issued the shares in which the plaintiff invested, not whether the misstatements at issue were made “in the offering materials for [the defendant’s] securities,” as petitioners assert (at 22 n.3). Here, JCG issued the securities that “are the subject of allegations of fraud.” *PIMCO*, 603 F.3d at 148 n.1. JCM does not become a secondary actor with respect to statements it made to investors regarding its own conduct simply because the prospectuses marketed shares in the Funds rather than shares in JCG. *See also infra* note 20.

In any event, petitioners concede (at 14) that even a so-called “secondary actor” can be held liable if all the elements of a private § 10(b) action are satisfied. *See Stoneridge*, 552 U.S. at 158. As the Court explained in *Central Bank*, “[a]ny person or entity . . . who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator.” 511 U.S. at 191 (emphasis added); *see also Herman & MacLean*, 459 U.S. at 386 n.22.<sup>18</sup> Accordingly, whether petitioners are considered primary or secondary actors is immaterial here.

For similar reasons, petitioners erroneously accuse (at 14-15, 30-31) the Fourth Circuit of “expand[ing] the implied right of action” and “ma[king] new law” in conflict with this Court’s analysis in *Stoneridge*. The Fourth Circuit recognized that respondent was required to plead all of the elements of a private

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<sup>18</sup> In *Central Bank*, the plaintiffs conceded that the defendant “did not commit a manipulative or deceptive act within the meaning of § 10(b).” 511 U.S. at 191.

§ 10(b) action, and the court held that it had done so. App. 35a-36a. Courts regularly have imposed liability in circumstances analogous to those here. For example, courts of appeals have held that a corporate officer can be liable for having “made” misstatements, even if those misstatements are issued in the corporation’s name. *See, e.g., McConville*, 465 F.3d at 787-88; *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir. 2001); *see also Southland*, 365 F.3d at 365. The complaint’s allegations regarding the captive relationship between JCM and the Janus Funds demonstrate that JCM plays at least as great a role in the Funds’ operations as a corporate officer. *See, e.g., App. 71a* (¶ 34) (JCM “runs” the Janus Funds); *see also* Brief for the SEC as Amicus Curiae in Support of Affirmance at 10, *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) (No. 82-1200) (“SEC *Daily Income Fund Br.*”) (“[T]he adviser of [a mutual fund] typically exercises at least as much control over the [fund] as internal management does in other corporations.”); *cf. Wolfson*, 539 F.3d at 1251, 1260-61 (non-employee consultant who “played a significant role within the company” liable for misstatements in SEC filings he prepared, even though they “were issued in [the corporation’s] name” and he “did not sign, certify, or physically file” them); *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005).

The decision below thus is fully consistent with a judicial reluctance to extend liability in private actions to classes of actors that were not liable under the law as it existed when Congress enacted the PSLRA. Indeed, *petitioners*, not respondent, seek to alter the § 10(b) action. Petitioners urge the Court to confer legal immunity on issuers that make mis-

statements through nominally separate entities that they control. Such a rule would create a new, significant loophole in § 10(b) and Rule 10b-5.

Nor does respondent advocate a “view of primary liability [that] makes any aider and abettor liable under § 10(b) if he or she committed a deceptive act in the process of providing assistance,” *Stoneridge*, 552 U.S. at 162, as petitioners claim (at 17-18). JCM did not merely “provid[e] assistance”; it made the misstatements falsely describing its own conduct. In *Stoneridge*, by contrast, the defendants’ deceptive acts were never “communicated to the public.” 552 U.S. at 159. More fundamentally, the issuer in *Stoneridge*, not the defendants, “misled its auditor and filed fraudulent financial statements.” *Id.* at 161. The defendants in *Stoneridge* “had no role in preparing or disseminating” those statements, *id.* at 155, and nothing [the defendants] did made it necessary or inevitable for [the issuer] to record the transactions as it did,” *id.* at 161. Here, JCM not only “made it . . . inevitable” that the prospectuses would contain misstatements regarding its market-timing policy, but also “prepar[ed] [and] disseminat[ed]” those misstatements describing its own misconduct.

2. *JCM is not comparable to an independent service provider such as an auditor or outside attorney*

To support the claim that JCM is a mere “service provider” for the Funds, petitioners rely heavily (at 21-29) on the regulatory regime under the Investment Company Act of 1940 (“ICA”). The ICA, however, regulates the relationship between investment advisers and the funds they create with the goal of mitigating – not eliminating – the “conflicts of interest” inherent in the structure of a typical fund.

*Jones*, 130 S. Ct. at 1422 (internal quotations omitted). Nothing in the ICA renders implausible – or licenses courts to ignore – respondent’s well-pleaded allegations regarding JCM’s role in creating and disseminating the misstatements in the Funds’ prospectuses. *See supra* Part I.B.1. It would be improper for this Court to indulge petitioners’ effort to dispute facts that must be assumed as true given the current procedural posture of this case, particularly since SEC orders and judicial opinions confirm respondent’s allegations, *see supra* Part I.B.3.

Moreover, the regulatory authority on which petitioners rely to support JCM’s status as a mere service provider in fact supports respondent. In the SEC final rule that petitioners cite (at 21), the Commission explained that, “[u]nlike most business organizations, . . . mutual funds are typically organized and operated by an investment adviser *that is responsible for the day-to-day operations of the fund.*” 66 Fed. Reg. at 3735 (emphasis added). It further explained that, “[a]s a result of their extensive involvement, and the general absence of shareholder activism, investment advisers typically *dominate* the funds they advise.” *Id.* at 3735 n.3 (emphasis added). That is consistent with other SEC statements regarding the relationship between investment advisers and their captive mutual funds. *See SEC Daily Income Fund Br.* at 10; *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) (“[T]he term ‘investment adviser’ is to some extent a misnomer” because “[t]he so-called ‘adviser’ is no mere consultant. He is the fund’s manager. Hence the investment adviser almost always controls the fund.”) (citations omitted), *petition for review granted in part on other grounds, denied*

*in part, and remanded, Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd*, 450 U.S. 91 (1981).

Contrary to petitioners' assertion (at 23), the ICA does not obligate mutual funds to *prepare* their own prospectuses. See 15 U.S.C. §§ 80a-8(b) (providing that every fund "shall file" registration statement), 80a-24(a) (providing that a fund "may file" ICA registration statement with SEC in lieu of registration statement under Securities Act of 1933). Given that the Janus Funds have no employees of their own, they could not have complied with such an obligation in any event. *Cf. In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3.

Moreover, the ICA's requirement that the Janus Funds file prospectuses with the SEC does not relieve JCM of responsibility for statements it made in those prospectuses concerning its own conduct. Indeed, petitioners reject (at 42) the notion that filing a prospectus constitutes making the statements in the prospectus; in any event, the SEC has found that JCM filed the prospectuses, *see supra* Part I.B.3. Likewise, that the Funds' board assertedly "reviewed and approved" the prospectuses (Pet. Br. 25) does not mean that it alone created – or made – the statements in those prospectuses. Here, the statements involved actions that JCM pledged to take – to ensure that the Funds did not engage in market timing. Those actions fell exclusively within JCM's role in handling the Funds' day-to-day operations.

Petitioners also suggest (at 26-27) that investment advisers should be immune from liability for securities fraud because the ICA contains "broad provisions" prohibiting fraud by investment advisers. But the provisions on which petitioners rely protect *mutual fund* investors, not investors in the *adviser's*

stock. See 15 U.S.C. § 80b-6 (prohibiting advisers from defrauding a “client”); see also *Jones*, 130 S. Ct. at 1422 (ICA “created protections for *mutual fund shareholders*”) (emphasis added). If petitioners prevail here, JCG’s investors will be left with no remedy.<sup>19</sup>

## II. THE COMPLAINT ALLEGES RELIANCE

### A. Under *Basic*, Reliance On JCM’s Public, Material Misstatements Is Presumed

Although § 10(b) and Rule 10b-5 do not by their terms contain a reliance requirement, this Court has held that, to establish liability in a private § 10(b) action, a plaintiff must show that it relied on the defendant’s misconduct. See *Stoneridge*, 552 U.S. at 159; *Basic*, 485 U.S. at 243. There is, however, “more than one way to demonstrate the causal connection.” *Basic*, 485 U.S. at 243.

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<sup>19</sup> Petitioners’ assertion (at 28-29) that respondent would need to amend its complaint to add a § 20(a) controlling-person claim against JCM misunderstands respondent’s theory. JCM is liable for its own misconduct – making misrepresentations in the prospectuses about its own actions in managing the Funds’ operations. Cf. SEC *Klein Br.* at 12 n.5 (“[A] person can be a creator of a misrepresentation without controlling the person in whose name the misrepresentation is issued.”). Respondent is not attempting to hold petitioners liable for the Funds’ actions.

Likewise, petitioners’ suggestion (at 23 n.4) that respondent seeks to pierce the corporate veil is incorrect. The corporate veil need not be pierced to recognize that, by creating and disseminating misstatements about its own conduct, JCM made those misstatements, even though those statements assertedly were published under the name of the Funds. In any event, “the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.” *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629-30 (1983).

“[U]nder the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public,” because it can then “be assumed that an investor who buys or sells stock at the market price relies upon the statement.” *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247). The fraud-on-the-market doctrine rests on the premise 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 and its business.” *Basic*, 485 U.S. at 241 (internal quotations omitted). Investors thus rely on that “market price.” *Id.* at 244 (internal quotations omitted).

Here, the complaint alleges that JCM made misstatements in the prospectuses (*see supra* Part I), which indisputably “bec[a]me public” during the class period. *Stoneridge*, 552 U.S. at 159. Further, the misstatements in those prospectuses regarding JCM’s policy with respect to market timing were material. App. 61a (¶ 7); *see also* App. 109a-110a (¶¶ 121-125); *Basic*, 485 U.S. at 232 (information is “material” if a “reasonable investor” would consider it “significant”). When public disclosures revealed that JCM in fact had been *permitting* certain hedge funds to engage in market timing in the Janus Funds, massive withdrawals of assets from those Funds ensued. App. 34a. Those redemptions from the Funds directly reduced JCG’s profitability and affected its stock price adversely because JCG’s revenues depended almost entirely on fees determined as a percentage of assets under management in the Funds. *Id.* Indeed, in the days following the New York Attorney General’s disclosures regarding market timing in the Funds, JCG’s stock price declined precipitously. App. 34a-35a. Reasonable investors,

therefore, considered information regarding JCM's misstatements with respect to its market-timing policy to be significant. Moreover, the Funds' prospectuses were the best source of information about JCG's primary products – the funds it created and managed – and reasonable JCG investors could be expected to be aware of their contents.

Accordingly, under the fraud-on-the-market doctrine, which the Court reaffirmed in *Stoneridge*, “reliance is presumed” because it can “be assumed that” the class members who purchased shares in JCG after the public disclosure of the prospectuses “relie[d] upon” the material misstatements regarding market timing in those prospectuses. *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247).

#### **B. The Fraud-On-The-Market Doctrine Applies To JCM's Misstatements**

Relying heavily on *Central Bank* and *Stoneridge*, petitioners contend (at 44-49) that the fraud-on-the-market doctrine is inapplicable here, because JCM is a “secondary actor.” But JCM is not a secondary actor. *See supra* Part I.D. Instead, it is the wholly owned operating subsidiary of the “issuing firm whose securities are the subject of allegations of fraud.” *PIMCO*, 603 F.3d at 148 n.1. Consequently, whatever the merits of the rule petitioners advocate for secondary actors, they receive no benefit from it.

Further, petitioners' assertion that the fraud-on-the-market doctrine does not apply “in cases against defendants who did not themselves speak to the market,” Br. 49, is unpersuasive because JCM *did* speak to the market. It made misstatements regarding its market-timing policy in publicly disclosed prospectuses. *See supra* Part I. For that reason, this case is fundamentally different from *Central Bank*



and *Stoneridge*. In those cases, reliance could not be shown because the defendants' misconduct was never disclosed to investors.

1. In *Central Bank*, bond purchasers sued the issuer, the underwriters, and the trustee for the bond issue. 511 U.S. at 167-68. The purchasers alleged that the issuer and the underwriters violated § 10(b) by using an inaccurate appraisal of the proposed collateral for the bonds to market the bonds. *Id.* The trustee (Central Bank) was alleged to have known of concerns about the accuracy of the appraisal and to have failed to act on those concerns before the closing of the bond sale. *Id.* Based on those facts, the plaintiff-purchasers "alleged that Central Bank was 'secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud.'" *Id.* at 168. The Court held that § 10(b)'s text did not prohibit aiding and abetting and that the plaintiffs therefore had no claim against Central Bank. *See id.* at 177.

Having concluded that "this case concerns the conduct prohibited by § 10(b)" and that "the statute itself resolves the case," *id.* at 178, the Court nevertheless also considered other arguments for and against recognizing secondary liability in a private § 10(b) action, *id.* at 178-91. In that discussion, the Court stated that its reasoning was "confirmed" by the fact that recognizing aiding and abetting would impose liability without requiring proof of reliance. *Id.* at 180.

In *Central Bank*, there was no indication that the bond purchasers were aware of – let alone relied on – any statement or action by Central Bank. (Moreover, the bonds in *Central Bank* do not appear to have been traded on an efficient market, and the fraud-on-the-market doctrine thus would not have applied in

any event.) In addition, no actions by Central Bank made it necessary or inevitable for the issuer and underwriters to use the inaccurate appraisal.

In *Stoneridge*, the complaint alleged that Charter, a cable operator, conspired with its suppliers to increase its revenue by agreeing to pay the suppliers more for their products in exchange for the suppliers' agreement to purchase additional advertising time from Charter. 552 U.S. at 153-55. Charter filed with the SEC and disclosed to the public financial statements showing the artificially inflated revenue number. *Id.* at 155. The suppliers "had no role in preparing or disseminating Charter's financial statements," and "their own financial statements booked the transactions as a wash, under generally accepted accounting principles." *Id.*

The Court held that Charter's investors had not alleged the reliance element of a private § 10(b) claim against the suppliers. It explained that the suppliers' "deceptive acts were not communicated to the public" and that "[n]o member of the investing public had knowledge, either actual or presumed, of [the suppliers'] deceptive acts during the relevant times." *Id.* at 159. Noting that "reliance is tied to causation," the Court concluded that the defendants' "deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance. It was Charter, not [the suppliers], that misled its auditor and filed fraudulent financial statements; nothing [the suppliers] did made it necessary or inevitable for Charter to record the transactions as it did." *Id.* at 160-61.

Unlike the alleged misconduct in *Central Bank* and *Stoneridge*, therefore, JCM's misstatements regarding market timing were publicly disclosed in

the prospectuses, and those disclosures informed the investing public that JCM, as the investment adviser for the Janus Funds, would prohibit market timing in those Funds. It thus can “be assumed that” respondent and the members of the putative class “relie[d] upon” those statements. *Stoneridge*, 552 U.S. at 159 (citing *Basic*, 485 U.S. at 247).

2. In both *Central Bank* and *Stoneridge*, there was at least one more directly culpable party. In *Central Bank*, the bond purchasers alleged only that Central Bank “was ‘*secondarily liable* . . . for its conduct in *aiding and abetting* the fraud.’” 511 U.S. at 168 (emphases added). And, in *Stoneridge*, “[i]t was Charter, not [the suppliers], that misled its auditor and filed fraudulent financial statements.” 552 U.S. at 161. Here, by contrast, JCM, the wholly owned operating subsidiary of the issuer of the securities that respondent purchased, was the party directly responsible for both making the public statements in question and ensuring the falsity of those statements through its day-to-day management of the Funds. No facts support the Funds being more culpable than JCM. In dismissing private § 10(b) claims against the Funds in a related case, the district court observed that the Funds are a “*victim[]*” of the fraudulent scheme here alleged. *In re Mutual Funds*, 384 F. Supp. 2d at 853 n.3.

Petitioners incorrectly assert (at 48) that “the statements in *Stoneridge* – the issuer’s financial results – *were* publicly disclosed.” But the defendant-suppliers in *Stoneridge* did not *make* those false public statements. Instead, “[i]t was Charter, not [the suppliers], that . . . filed fraudulent financial statements,” and no actions by the suppliers “made it necessary or inevitable for Charter to record the

transactions as it did.” 552 U.S. at 161. The alleged misconduct of the suppliers – agreeing to the inaccurate supply contracts – was never disclosed to the public. *Id.* at 159-60.

In sum, petitioners’ contention that the fraud-on-the-market doctrine should not be applied in cases in which the defendant’s misconduct is not publicly disclosed is irrelevant here, because JCM publicly misstated its policy regarding market timing in the prospectuses and JCG investors acted in reliance on those misstatements.<sup>20</sup>

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<sup>20</sup> Petitioners also suggest (at 45 n.10) that there is not “a connection between the misrepresentation or omission and the purchase or sale of a security.” *Stoneridge*, 552 U.S. at 157. The district court did not accept that argument, *see* App. 49a n.4, and petitioners did not raise it in their petition for a writ of certiorari. It thus is waived and not properly before this Court. *See* Sup. Ct. R. 14.1(a); *supra* note 17.

In any event, petitioners are incorrect. This Court has articulated a broad interpretation of the “in connection with” language in § 10(b) and Rule 10b-5, requiring only that the fraud “coincide” with a securities transaction. *Zandford*, 535 U.S. at 825. It also has held that “one asserting a claim for damages based on the violation of Rule 10b-5 must be either a purchaser or seller of securities.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 749 (1975). Both requirements are met here because respondent and the members of the putative class purchased shares in JCG at a market price that incorporated JCM’s misrepresentations regarding its market-timing policy. *See In re Ames Dep’t Stores Inc. Stock Litig.*, 991 F.2d 953, 963 (2d Cir. 1993) (“[A] 10b-5 action may be brought when one, in reliance upon false and misleading statements in a registration statement, purchased securities which were not the subject of that registration statement.”) (citing *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951) (Frank, J.)); *see also Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000); *In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156 (2d Cir. 1998) (Winter, C.J.).

### C. Direct Attribution Is Not Necessary To Establish Reliance

Petitioners also contend (at 49-53) that, even where a defendant has made public misstatements, the fraud-on-the-market doctrine should not be applied unless those statements were “expressly,” “contemporaneously,” and “directly” “attributed” to the defendant. They base that contention on the assertion (at 51) that, without such attribution, “a necessary premise of the *Basic* presumption” – “that the market price for the relevant stock reflects *the defendant’s* misstatement” – is lacking.

1. Petitioners misconstrue *Basic*. Nothing in that decision suggests that the presumption depends on the market knowing the true *identity* of the person making the public misstatement. Rather, *Basic* makes clear that the market price incorporates “information” about “the company and its business,” so long as that information is “material.” 485 U.S. at 241 (internal quotations omitted). Thus, the key under *Basic* is the *materiality* of the information in question, not the identity of the true source of that information. *Cf. In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) (“[T]he premise of *Basic* is that, in an efficient market, share prices reflect ‘all publicly available information, and, hence, *any* material misrepresentations.’ It thus does not matter, for purposes of establishing entitlement to the presumption, whether the misinformation was transmitted by an issuer, an analyst, or anyone else.”) (quoting *Basic*, 485 U.S. at 246) (emphasis added in *Salomon*).

To be sure, an entity to which information is publicly attributed could have so little credibility in the market that the information would not be considered

“material.” But, assuming for the sake of argument that JCM’s misstatements about market timing were publicly attributed only to the Funds, a reasonable investor in JCG nonetheless would have considered the Funds’ representations that they do not tolerate market timing to be significant. Dishonesty with respect to such representations would harm JCM – through redemptions in the Funds that would reduce JCM’s management fees (thereby diminishing JCG’s revenues) – which JCG’s shareholders had an obvious interest in avoiding.

2. Contrary to petitioners’ suggestion (at 30) that liability without attribution is unprecedented, courts regularly impose liability on, for example, corporate insiders for misrepresentations issued in the corporation’s name. *See supra* p. 37. The cases on which petitioners rely (at 49-50) are inapt because they all involved claims against “secondary actors” – not issuers of the securities in which the plaintiff transacted. *See PIMCO, supra* (outside law firm); *Ziamba v. Cascade Int’l, Inc.*, 256 F.3d 1194 (11th Cir. 2001) (outside accounting firm, outside law firm); *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998) (outside accounting firm).<sup>21</sup> And those courts expressly limited the direct-attribution requirement they created to cases against “secondary actors.”<sup>22</sup> Thus,

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<sup>21</sup> Petitioners also cite (at 50) *Wolfson*, but the Tenth Circuit there rejected an attribution requirement in an SEC enforcement proceeding and noted that it had “never adopted an attribution requirement in a private securities case” either. 539 F.3d at 1259.

<sup>22</sup> *See PIMCO*, 603 F.3d at 148 (“We hold that a *secondary actor* can be held liable . . . only for false statements attributed to the secondary-actor defendant at the time of dissemination.”) (emphasis added; footnote omitted), 158 n.6 (leaving open whether direct-attribution requirement would apply to “claims

none of those cases involved an effort by an issuer (JCG) and its wholly owned operating subsidiary (JCM) to avoid liability for misstatements made by the operating subsidiary regarding its own conduct on the ground that those misstatements allegedly were publicly attributed only to a nominally separate entity controlled by the subsidiary (the Funds).

Further, *Wright* is inapt for the additional reason that the defendant in that case, an outside auditor, merely “orally approv[ed],” 152 F.3d at 171 – and did not “make” – the press release, which stated that the information in it was “unaudited.” *Id.*; *see id.* at 175 (“Ernst & Young neither directly *nor indirectly* communicated misrepresentations to investors” and, therefore, “the amended complaint failed to allege that Ernst & Young *made*” an actionable misstatement) (emphases added). Similarly, in *Ziemba*, the investor alleged only that the law firm provided “substantial *assistance* in the alleged fraud” and that the accounting firm “misadvise[d]” the issuer regarding whether its financial results should have been consolidated with those of a subsidiary. 256 F.3d at 1205, 1207 (emphasis added).

The *PIMCO* opinion is unpersuasive because the court merely asserted that reliance on a defendant’s misconduct cannot be established without attribution. *See* 603 F.3d at 156 (“Attribution is necessary to show reliance.”). But, like petitioners, the Second Circuit never explained why knowledge of an entity’s true *identity* is necessary to rely on that entity’s

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against corporate insiders”); *Ziemba*, 256 F.3d at 1205 (addressing a case against “a secondary actor, such as a lawyer or an accountant”); *Wright*, 152 F.3d at 171 (limiting holding to “circumstances” of outside auditor’s “private approval” of “information contained in” issuer’s press release).

*statement.* As the United States explains, an investor “may rely on a defendant’s statements . . . without knowing that they were made by the defendant.” U.S. Cert. Br. 15 n.6. Further, under *Basic*, which the *PIMCO* court did not cite, reliance is presumed where publicly disclosed information is material, regardless of its attributed source. For the same reasons, the Fourth Circuit erred in adopting an attribution requirement in this case. App. 18a-24a.

3. Creating a direct-attribution requirement would disserve the purposes of the federal securities laws. Congress passed the Exchange Act to ensure “honest securities markets and thereby promote investor confidence” and “to achieve a high standard of business ethics in the securities industry.” *Zandford*, 535 U.S. at 819 (internal quotations omitted). Imposing a direct-attribution requirement in § 10(b) actions would undermine those goals by enabling persons to mislead the securities markets without fear of liability so long as they avoid express, contemporaneous attribution for their misstatements. That could include persons who speak anonymously or use a false identity.<sup>23</sup> Even if such a requirement applies only in private actions – despite petitioners’ suggestion (at 44 n.9) that it should apply to the SEC as well – it would reduce deterrence of fraud and weaken enforcement of § 10(b). *See SEC PIMCO Br.* at 14 (“An attribution requirement, by allowing a person who created a false or misleading statement to escape primary liability because that person acted anonymously or in another person’s name, would

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<sup>23</sup> *See SEC PIMCO Br.* at 15 (“This concern is not merely theoretical. Wrongdoers in fact do distribute false and misleading statements that have a false name or no one’s name attached to them . . .”).



shield significant misconduct from liability.”); *see also Tellabs*, 551 U.S. at 313 (“meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions”).<sup>24</sup>

**D. In Any Event, The Fourth Circuit Correctly Concluded That A Reasonable Investor Would Have Attributed The Misstatements To JCM**

Although direct attribution is not an element of a private § 10(b) action, the Fourth Circuit correctly concluded that any attribution requirement is satisfied here.<sup>25</sup>

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<sup>24</sup> JCG also is liable for omitting to disclose that certain investors were allowed to engage in market timing in the Janus Funds. An omission can be the basis for a private § 10(b) claim when the defendant has made an inaccurate, incomplete, or misleading disclosure. *See* 17 C.F.R. § 240.10b-5(b); *Oran v. Stafford*, 226 F.3d 275, 285-86 (3d Cir. 2000) (Alito, J.) (“[A] duty to disclose may arise when there is . . . an inaccurate, incomplete or misleading prior disclosure.”). Here, JCG’s April 29, 2003 press release, which is incorporated by reference in the complaint (App. 95a (¶ 81)), stated that JCM may impose a “1% redemption fee . . . on shares held [in the Janus Funds] for less than 90 days.” JCG Form 8-K at 7 (Apr. 29, 2003). That statement was inaccurate, incomplete, or misleading because it implied, contrary to fact, that JCM did not allow favored investors to engage in market timing in the Funds. Because JCG omitted to state a material fact when it had a duty to disclose, respondent “need not provide specific proof of reliance.” *Stoneridge*, 552 U.S. at 159 (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972)).

<sup>25</sup> Contrary to petitioners’ assertion (at 53), respondent did not “concede[.]” the attribution issue in the district court. Rather, respondent argued that, even if the prospectus statements were not directly attributable to petitioners, dismissal was unjustified. *See* Pl.’s Mem. in Opp’n to Defs.’ Mot. To Dismiss Second Am. Parent Investor Class Compl. at 28-29 (filed Aug. 4, 2006).

1. The complaint describes the captive relationship between JCM as investment adviser and the Janus Funds: JCM “is responsible for the . . . day-to-day management” of the Funds, App. 59a (¶ 2), and it furnishes “administrative, compliance and accounting services for the funds,” App. 65a (¶ 18). The prospectuses publicly identified JCM as the Funds’ investment adviser and explained that JCM conducts the “day-to-day management” of the “business affairs” of the Funds as well as their “administrative” and “compliance” services. JA359a-360a. Further, the prospectuses were signed by “Janus,” a name to which JCM reserved the right, JA275a, and JCM’s and JCG’s address appeared under the signature line in the prospectuses, JA359a, 403a, 431a. JCM also disseminated the prospectuses and marketed the Janus entities as a single firm – “Janus.” App. 30a; JA413a (¶ 21).<sup>26</sup>

Accordingly, a reasonable investor would have attributed to JCM the statements in the prospectuses regarding its market-timing policy, as the Fourth Circuit correctly concluded. App. 27a-31a. Indeed, it is petitioners, not respondent, that seek to establish an “investment adviser exception” here; in denying the sufficiency of the complaint on this point, peti-

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<sup>26</sup> In light of the complaint’s allegations regarding the structure of the mutual-fund industry, App. 70a-71a (¶¶ 34-35), petitioners err in asserting (at 54) that the Fourth Circuit’s conclusion depends on an “unpleaded” understanding of the mutual-fund industry’s structure. Petitioners’ further assertion (at 54) that the Fourth Circuit’s understanding of that structure is “incorrect” not only improperly fails to assume the truth of the complaint’s factual allegations, *see Ashcroft*, 129 S. Ct. at 1950-51, but also contradicts the judicial and regulatory precedent recognizing the dominion that investment advisers typically exercise over their captive funds, *see supra* Parts I.B.2, I.D.2.

tioners seek a rule that “would allow advisers to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows.” U.S. Cert. Br. 16.

2. Petitioners incorrectly argue (at 54-56) that Congress has authorized the use of inferences only to plead scienter and that the Fourth Circuit’s ruling contradicts that determination. Courts applying Rule 9(b) long have followed the general rule of pleading that a court may draw “reasonable inference[s]” (*Ashcroft*, 129 S. Ct. at 1949) from the facts alleged in determining whether the complaint states a plausible claim for relief. *See, e.g., Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993) (“When we review the grant of a motion to dismiss under Rule 9(b) or Rule 12(b)(6), we accept as true the factual allegations of the complaint, and draw all inferences in favor of the pleader.”). Certainly, the facts giving rise to an inference of illegality must be pleaded with particularity. But that does not require courts to ignore the inferences that reasonably follow from those facts in determining the complaint’s sufficiency. *Cf. United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854-55 (7th Cir. 2009) (Easterbrook, C.J.) (under Rule 9(b), “[i]t is enough to show, in detail, the nature of the charge, so that vague and unsubstantiated accusations of fraud do not lead to costly discovery and public obloquy”; “much knowledge is inferential – people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime”).

The PSLRA does not preclude courts from drawing inferences in resolving motions to dismiss in private § 10(b) actions. Instead, Congress heightened the pleading standard for a particular element of the pri-

vate action, requiring dismissal where the complaint does not support a “strong” inference of scienter. 15 U.S.C. § 78u-4(b)(2); *see also Tellabs*, 551 U.S. at 319-21 (describing that provision’s origin). In requiring a “strong” inference for one element of the private § 10(b) action, Congress did not silently eliminate the drawing of inferences in determining the sufficiency of pleadings as to other elements. *See, e.g., ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (“Under the PSLRA, as with any motion to dismiss under Rule 12(b)(6), we accept well-pleaded factual allegations in the complaint as true and view all reasonable inferences in the plaintiffs’ favor.”).

In any event, attribution need not be inferred in this case because the complaint pleads facts sufficient to show that a reasonable investor would have attributed the misstatements in the prospectuses regarding market timing to JCM. *See supra* Part II.D.1.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 26, 2010