

TO MAKE OR TO MAR¹: THE SUPREME COURT TURNS AWAY ANOTHER SECURITIES LAW PLAINTIFF

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I. INTRODUCTION

On June 13, 2011, the Supreme Court of the United States decided *Janus Capital Group, Inc. v. First Derivative Traders*.² Dutifully turning away another plaintiff in a securities fraud case,³ the Court held that the

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1. OXFORD ENGLISH DICTIONARY (OED) 1701 (1st ed. 1933) (stating that to make or to mar is “to cause either the complete success or ruin of (a person or thing)”).

2. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

3. In what has become a dreadfully-familiar scenario in recent years, the Court has generally cut back on the availability of implied private rights of action under the federal securities laws, particularly under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (2010). *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (denying recovery against customers and suppliers of a corporation issuing misleading statements because of a lack of reliance by the public on the conduct of secondary parties); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (holding that plaintiff must plead a “strong inference” of scienter under the Private Securities Litigation Reform Act); *Dura Pharm., Inc. v. Michael Broudo*, 544 U.S. 336 (2005) (holding that “alleging that a security’s price at the time of purchase was inflated because of the misrepresentation” is insufficient to “allege and prove ‘loss causation’” under 15 U.S.C. § 78u-4(b)(4)); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (holding that “[a] private plaintiff may not maintain an aiding and abetting suit under [section] 10(b)” or Rule 10b-5); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977) (holding that a plaintiff cannot recover under section 10(b) absent a showing of manipulation or deception); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (holding that a plaintiff cannot recover under section 10(b) and Rule 10b-5 absent a showing that defendant acted with scienter); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (holding that plaintiffs who are not actually purchasers or sellers of a security lack standing to sue under section 10(b) and Rule 10b-5).

Two other cases decided by the Court during the 2010–2011 Term, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011), and *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), do not alter the general movement away from expanding the rights of securities plaintiffs. Admittedly, in *Matrixx* the Court found that the

“maker” of a statement, for the purposes of Securities and Exchange Commission Rule 10b-5,⁴ is limited to “the person or entity with ultimate

plaintiff had sufficiently pled the Section 10(b)/Rule 10b-5 element of materiality to survive a motion to dismiss. *Matrixx*, 131 S. Ct. at 1313. Plaintiff’s complaint alleged that the defendant pharmaceutical company had failed to disclose adverse events reports concerning one of the defendant’s products, notwithstanding the fact that those reports did not reveal a “statistically significant number of adverse events.” *Id.* *Matrixx* achieves its significance from the fact that the Court has consistently viewed the highly fact-specific materiality inquiry as particularly resistant to a decision on the pleadings or by way of summary judgment. *See, e.g.*, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (noting that “the underlying objective facts . . . are merely the starting point for the ultimate determination of materiality” and observing that assessing materiality “requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.”). Only where reasonable minds could not differ on the question of materiality was a decision on the issue by summary judgment appropriate. *Id.* at 450.

Matrixx followed another of the Court’s materiality precedents, *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), by citing with approval the Court’s concern that “[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.” *Matrixx*, 131 S. Ct. at 1318 (quoting *Levinson*, 485 U.S. at 236). Far from broadening plaintiffs’ overall section 10(b)/Rule 10b-5 rights and remedies, *Matrixx* speaks only to the element of materiality. More narrowly, it expresses merely the Court’s reluctance to adopt the defendants’ bright-line, categorical rule that would consider adverse events reports to be material only if they disclosed a statistically significant number of such events. *Id.* at 1319. The case says nothing about any of the other elements of the Rule 10b-5 cause of action, including the one at issue in *Janus*: whether the defendant had “made” an untrue statement of material fact under Rule 10b-5(b).

Neither does the other recent securities case decided by the Court, *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011). In that case, the Court distinguished between the Rule 10b-5 elements of reliance and causation, and pointed out that although a plaintiff may invoke the rebuttable fraud-on-the-market theory of reliance to show that common questions of law and fact predominate over individual ones, thereby allowing the plaintiff to defeat attempts by defendant to deny certification of a class, the plaintiff is not required to prove loss causation at the class certification stage. *Id.* at 2184–87. But the Court was careful to point out that its decision was limited solely to the issue of what the plaintiff must show at the class certification stage and that its ruling went no further. Chief Justice Roberts noted succinctly at the very beginning of his opinion that “[t]o prevail on the merits in a private securities fraud action, investors must demonstrate that the defendant’s deceptive conduct caused their claimed economic loss.” *Id.* at 2183. Far from easing the ultimate prima facie burden on the plaintiffs, *Erica P. John Fund* simply clarified the requirements that must be met at the certification stage. Plaintiffs must still prove loss causation to prevail at trial.

A refreshing and rare recent example where the Court *has* apparently liberalized the implied private right of action is *SEC v. Zandford*, 535 U.S. 813 (2002), where the Court read the “in connection with” requirement of section 10(b) and Rule 10b-5 quite broadly. *Zandford*, however, may perhaps best be considered as the exception that proves the rule. The section 10(b)/Rule 10b-5 remedy is rapidly shrinking and is likely to continue doing so.

4. 17 C.F.R. § 240.10b-5 (2010):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any

authority over the statement, including its content and whether and how to communicate it.”⁵ In the Court’s view, anyone other than the person with such authority or control may be able to “suggest what to say,” but is not an actual maker of the statement in question.⁶ Apparently, then, there is one, and only one, potential maker of a statement. The concept of multiple makers or co-makers is foreign to the federal securities laws.

The *Janus* case involved misleading statements in the prospectuses issued by a group of mutual funds with respect to the funds’ policies on “market timing.”⁷ The plaintiffs argued that, in fact, it was the investment adviser to the funds, not merely the funds themselves, which “made” the misrepresentations about market timing.⁸ The plaintiffs based their claim largely on the close relationship between the funds and the adviser and the intimate involvement of the adviser in the management of the funds.⁹ Nonetheless, the Court noted that the funds and the advisers were separate business entities which operated largely independently of each other, and that all relevant corporate formalities were observed in the establishment and running of the funds and in the conduct of the advisory side of the business.¹⁰ The Court thus declined to “disregard the corporate form.”¹¹

The Court’s decision in the *Janus* case is troubling on a number of fronts. First, it stands the traditional method of statutory analysis—by which one starts with the language of the statute and then proceeds to

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

Id. (emphasis added).

5. *Janus*, 131 S. Ct. at 2302.

6. *Id.*

7. *Id.* at 2300 n.1 (describing “market timing” as a trading strategy that allows short-term traders with informational advantages about the true value of a security (in this case, mutual fund shares) that are not possessed by, or shared with, other, long-term fund investors to reap profits at the expense of the fund and the long-term investors). *See infra* note 28.

8. *Id.* at 2300–01. For simplicity, this article generally refers to First Derivative Traders as “plaintiffs” or “respondents,” rather than as “plaintiff” or “respondent.” This is because “First Derivative Traders . . . represents a class of plaintiffs who owned JCG stock as of September 3, 2003.” *Id.* at 2300.

9. *Id.* at 2304.

10. *Id.* at 2299, 2304. The Court was equally unswayed by the fact that a third entity, Janus Capital Group Inc., had created the funds and established the investment adviser firm, Janus Capital Management LLC, as its wholly-owned subsidiary. In the Court’s view the businesses were still independent. *Id.*

11. *Id.*

analyze, in descending order, the legislative history, statutory scheme, and lastly, policy considerations¹²—on its head. In this author’s view, the Court’s holding is based on raw policy and little else. The Court makes much of the fact that “in analyzing whether JCM ‘made’ the statements for purposes of Rule 10b-5,¹³ we are mindful that we must give ‘narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.’”¹⁴ Yet notwithstanding the Court’s use of the word “must,” nothing in the law compelled the Court to give a narrow reading to Rule 10b-5. The Court, following a disturbing recent trend,¹⁵ has voluntarily *chosen* to bar the gates to securities plaintiffs, despite the fact that the language of Rule 10b-5 and the definition of the word “make” did not by any means require such a decision.

Additionally, even if one focuses solely on the Oxford English Dictionary, it is evident that a multitude of definitions of the verb “to make” was available to the Court. Many of these definitions would have supported the plaintiffs in their efforts to hold JCM liable as a “maker” of the fund prospectus misstatements in question. But again, instead of actually utilizing any of the available definitions, the Court *chose* to superimpose a test of “ultimate authority” or “control” onto the meaning of the word “make,” without citing to any authority whatsoever to support its position. In this author’s opinion, a better method of determining what a word actually means is by using—not avoiding—the dictionary.¹⁶ For some reason, however, with one notable and peculiar exception analyzed below,¹⁷ the Court was reluctant to do this. One suspects that it was because the Court would not have liked what it might find had it delved farther into the realm of word meaning than it was willing to go.

12. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 694 (1985); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 201, 206 (1976).

13. The Court chose to ground its analysis on Rule 10b-5 rather than on section 10(b), which is the normal approach. *See, e.g., Ernst & Ernst*, 425 U.S. at 214 (noting that Rule 10b-5 may not exceed “the power granted the Commission by Congress under § 10(b)”); *see also* discussion *infra* Part III.A.

14. *Janus*, 131 S. Ct. at 2302 (quoting *Stoneridge Inv. Partners, LLC v. ScientificAtlanta, Inc.*, 552 U.S. 148, 167 (2008)).

15. *See* cases cited *supra* note 3.

16. Black’s Law Dictionary lends its support to an expansive definition of the verb “to make.” *See infra* notes 225–26 and accompanying text (consulting Black’s Law Dictionary and Greek epics to wax poetic on the definition of “to make”). It should also be noted that Black’s Law Dictionary does not contain anything approximating the “ultimate authority” test crafted by the Court.

17. *See infra* notes 185–98 and accompanying text (referring to the Oxford English Dictionary to suggest alternative interpretations of the word “make” to the definition the Supreme Court settled upon in *Janus*, as appropriate substitutes for the ultimate authority test which the Court introduced without citing to any authority).

Finally, the Court's reliance on the separate entity/corporate formalities issue seems misplaced. Without explicitly saying so, the Court apparently felt that the distinct entity status of the Janus businesses would have shielded the investment adviser from liability for the funds' misstatements had the plaintiff tried to pursue some analogue to the "piercing the corporate veil" theory, which it did not.¹⁸ Yet, even if it were true that the separateness of JCM and the funds might defeat attempts to pierce the veil on a "single economic entity," "alter ego," "instrumentality," or "identity" theory, the whole premise of the plaintiff's case was (securities) *fraud*, and the fact of separate entity status will not protect affiliated business enterprises that engage in fraud.¹⁹ The Court ignored this important distinction in its enthusiasm over the fact that JCM and the funds had met all the requisites for adhering to the corporate form. Such fastidiousness is irrelevant in the presence of fraud.

Part II of this article discusses the *Janus* case as it made its way up the federal court system. This Part zeroes in on the judgment for the defendants by the District Court for the District of Maryland, the reversal of that court's decision by the Fourth Circuit, and the subsequent reversal of the appellate decision by the Supreme Court. This Part goes on to suggest some alternative readings of "make" that would have easily and logically comported with the position espoused by the plaintiffs. Part III starts by analyzing the Supreme Court's discussion of the meaning of the word "to make," and criticizes the narrow test which the Court used in place of an actual definition. Part III continues by analyzing the significance the Court placed on the separate entity status of the various entities involved and argues that that significance was overstated and failed to account for the fraud-based nature of the plaintiff's complaint. Part III concludes with a return to the issue of who is a "maker." Meeting the Court on its own ground, that part suggests that if a test rather than a definition is in order, a workable test along the lines of two venerable Supreme Court precedents, *Dirks v. SEC*²⁰ and *Pinter v. Dahl*,²¹ provides the proper framework for determining who, in reality, "makes" untrue statements of material fact. Finally, Part IV closes with a brief lament over the future of the implied private right of action under section 10(b) and Rule 10b-5. Perhaps this last part should be characterized as more of a wake than a lament, as the Court seems wedded to a course that will most

18. See discussion *infra* Part III.B (discussing the meaning of the phrase "to use or employ" in the context of Rule 10b-5).

19. See *id.* (more discussion of the operation of the phrase "to use or employ" on the contours of a 10b-5 action).

20. 463 U.S. 646 (1983).

21. 486 U.S. 622 (1988).

likely push the statutory and administrative remedy into an irreversible coma.

II. THE CASE

The *Janus* case involved a number of related entities: Janus Capital Group, Inc. (hereinafter “JCG”), Janus Capital Management LLC (hereinafter “JCM”), and various mutual funds created by JCG and collectively referred to as the Janus Investment Fund or “JIF.”²² JCG was a publicly traded corporation; JCM, an investment adviser firm which managed the funds, was JCG’s wholly-owned subsidiary; and JIF was organized as a Massachusetts Business Trust.²³ At issue in the case was the extent to which JCM was liable for certain allegedly material misstatements in fund prospectuses issued by JIF,²⁴ based in large part on the close connection between JCM and JIF and JCM’s role in providing advisory and management services to the funds.²⁵ The Supreme Court held that “JCM cannot be held liable because it did not make the statements in the prospectuses.”²⁶

A. Lower Court Opinions

In the *Janus* case,²⁷ plaintiffs, the purchasers of JCG stock, alleged that the defendants, JCG and JCM, falsely stated in JIF-issued prospectuses

22. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct 2296, 2299 (2011).

23. *Id.* A “Massachusetts Business Trust” is “a form of business organization, similar to a corporation, in which investors receive transferable certificates of beneficial interest (instead of stock shares).” A HANDBOOK OF BUSINESS LAW TERMS 610 (Bryan A. Garner ed., 1999).

24. *Janus*, 131 S. Ct at 2299.

25. The parties disputed the extent to which the mutual funds were actually run, managed, or controlled by JCM. See Brief for Petitioners at 3–4, *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525), 2010 WL 3501188, at *3–4 (specifying that “JCG is a publicly traded financial services company; JCM is a subsidiary of JCG that provides investment advisory and administrative services to mutual funds, including series of Janus Investment Fund—a separate legal entity that is not owned, governed, or controlled by JCG or JCM.”); Brief for Respondent at 4, *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525), 2010 WL 4253501, at *4 (describing a “coordinated marketing strategy that blurred the distinction between the entities that constituted JCG’s business, so that investors perceived a unified Janus brand.”).

26. *Janus*, 131 S. Ct. at 2299.

27. See *Wiggins v. Janus Capital Grp. Inc. (In re Mut. Funds Inv. Litig.)*, 487 F. Supp. 2d 618, 620 (D. Md. 2007) (alleging that defendants ostensibly prohibited market timing in their funds while allowing hedge funds to transact in this manner), *rev’d*, 566 F.3d 111 (4th Cir. 2009), *rev’d sub nom. Janus*, 131 S. Ct. 2296 (2011). The district court in Maryland had already considered matters unrelated to this article in an earlier decision, *Wiggins v. Janus Capital Grp. Inc. (In re Mut. Funds Inv. Lit.)*, 384 F. Supp. 2d 845 (D. Md. 2005).

that they prohibited the practice known as “market timing”²⁸ in the mutual funds. In reality, the defendants permitted certain favored hedge fund clients to engage in that practice pursuant to secret arrangements with those hedge funds.²⁹ According to the complaint, the misstatements about market timing in the JIF prospectuses “fraudulently induced investors [other than plaintiffs] to buy shares in the Janus funds.”³⁰ Plaintiffs then theorized that the misleading impression about market timing created by these false disclosures caused more trading to occur in the funds than would otherwise have been the case, and that as a result, JCM enjoyed deceptively large increases in its management fees.³¹ Critically, some ninety percent of JCG’s income was derived from JCM’s revenues.³² The misstatements about market timing became public knowledge when details of the New York Attorney General’s investigation of the Janus entities were disclosed, and shortly thereafter, “massive withdrawals or redemption of [the mutual] fund securities were triggered. The assets under management by JCM decreased by \$14 billion,”³³ and the resulting “crisis of confidence” among JCG shareholders and the subsequent sell-off of JCG stock caused that stock to decline in value by twenty-three percent, to the injury of the plaintiffs.³⁴ The plaintiffs thereafter sued both JCG and JCM, arguing that

28. Simply stated, market timing is a process whereby certain investors exploit informational disparities in the pricing of largely foreign securities based on events that occur between the time that trading in those securities’ primary markets closes and the subsequent close of trading in the United States. For further discussion of the practice, see *In re Mut. Funds Inv. Litig.*, 566 F.3d at 116 and *Janus*, 131 S. Ct. at 2300 n.1. What is important for present purposes are not the mechanics of market timing, but rather the fact that although in *Janus* the practice worked to the advantage of the privileged, short-term traders in the funds (the hedge funds), it operated to the disadvantage of long-term investors in JIF. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 116.

29. *Id.* See Brief for Respondent, *supra* note 25, at 6–7 (explaining that the motivation for JCM and JCG’s allowing the hedge funds to engage in market timing was that, in return, the hedge funds apparently agreed to invest in other investment vehicles managed by JCM). See also *In re Mut. Funds Inv. Litig.*, 566 F.3d at 118 (explaining that the “secret arrangements” between JCM and the hedge funds came to light as a result of an investigation by the New York Attorney General’s Office, whose “complaint made public the actions taken by JCG and JCM’s executives to permit substantial market timing contrary to the Janus funds’ expressed policies”); *Janus*, 131 S. Ct. at 2300 n.2 (indicating that JCG and JCM ultimately settled the state action and “agreed to reduce their fees by \$125 million and pay \$50 million in civil penalties and \$50 million in disgorgement to the mutual fund investors.”).

30. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 118. One problem faced by the plaintiffs in the *Janus* action was, of course, the fact that they purchased shares in *JCG*, not in the mutual funds themselves. *Id.* This posed an obstacle in the view of the district court, but is otherwise beyond the scope of this article. See *infra* notes 46–50 and accompanying text (discussing the district court’s reading of the requirements of a 10b-5 action).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

they had violated section 10(b) of the Securities Exchange Act of 1934³⁵ and Securities and Exchange Commission Rule 10b-5.³⁶ The plaintiffs also included a “control person” claim against JCG under Securities Exchange Act section 20(a).³⁷

1. The District Court

The District Court for the District of Maryland dismissed the complaint.³⁸ That court, focusing initially on JCG’s potential liability, first noted that the Supreme Court has rejected the idea that private parties may sue defendants for aiding-and-abetting under section 10(b) and Rule 10b-5,³⁹ and that plaintiffs can only prevail where they can show that defendants engaged in a primary violation of the statute and rule by “making” a misrepresentation or omission that was directly attributable to them.⁴⁰ The court found the complaint deficient in that regard, pointing out that it contained “no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it.”⁴¹ Furthermore, although the court accepted for purposes of discussion the plaintiff’s argument that JCG was involved in the dissemination of the fund prospectuses, it found that mere dissemination or distribution of false and misleading statements made by others is an insufficient basis for the imposition of Rule 10b-5 liability.⁴² Importantly, the court noted that, with the possible exception of underwriters, “all other participants in securities offerings must literally *make* the allegedly false statements in order to be liable under Rule 10b-5.”⁴³ Since the plaintiffs failed to allege that JCG had made any of the misleading statements in the fund prospectuses, plaintiffs could not hold JCG liable.⁴⁴

35. 15 U.S.C. § 78j(b) (2007). For the relevant text of Section 10(b), see *infra* note 112 and accompanying discussion.

36. 17 C.F.R. § 240.10b-5 (2010). For the relevant text of Rule 10b-5, see *infra* note 177 and accompanying discussion.

37. 15 U.S.C. § 78t(a) (2007). See *Janus Capital Grp, Inc. v. First Derivative Traders*, 131 S. Ct 2296, 2301 n.5 (2011). The section 20(a) claim is beyond the scope of this article. In any event, the Supreme Court noted that the section 20(a) claim was dependent on whether the plaintiffs could successfully assert a claim under Section 10(b) and Rule 10b-5 against JCM. *Id.* Once the Court decided that plaintiffs’ claim against JCM had failed, the control person claim failed along with it. *Id.* at 2305.

38. *In re Mut. Funds Inv. Litig.*, 487 F. Supp. 2d 618, 624 (D. Md. 2007), *rev’d*, 566 F.3d 111 (4th Cir. 2009), *rev’d sub nom. Janus*, 131 S. Ct. at 2296.

39. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994).

40. *In re Mut. Funds Inv. Litig.*, 487 F. Supp. 2d at 621.

41. *Id.*

42. *Id.*

43. *Id.* (emphasis added).

44. *Id.* at 622.

As to JCM, the district court dismissed the complaint on another basis, namely the failure by the plaintiffs to meet the “in connection with” requirement for bringing a section 10(b)/Rule 10b-5 action.⁴⁵ The plaintiffs’ weakness in this regard stemmed from the fact that they had not purchased stock in the companies that were the subject of the false and misleading prospectuses, namely the mutual funds. Instead, they had purchased stock in *JCG*, as to which there were no misstatements or omissions: “there is no nexus between plaintiffs, as JCG shareholders, and JCM, the funds’ investment adviser.”⁴⁶ The court felt that there were two problems with plaintiffs’ status as JCG shareholders. First, JCM, while it might owe a duty to shareholders *in the mutual funds* not to make⁴⁷ misstatements in the mutual fund prospectuses, did not owe any such duty to the shareholders of the completely separate entity that had created and organized the mutual funds, JCG.⁴⁸ Second, because the misrepresentations in question did not concern the securities that plaintiffs actually purchased, those misstatements could not be considered “in connection with” a purchase of securities actually made by the plaintiffs.⁴⁹ As a result, the district court held that “a mutual fund investment adviser that allegedly made misrepresentations to mutual fund shareholders cannot be liable under section 10(b) to its parent’s shareholders who purchased no mutual fund shares.”⁵⁰

45. *Id.* at 622–24. The standard elements of a Rule 10b-5 action were stated by the Supreme Court in *Janus* as follows: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Janus Capital Grp, Inc. v. First Derivative Traders*, 131 S. Ct 2296, 2301 n.3 (2011) (quoting *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008)).

46. *In re Mut. Funds Inv. Litig.*, 487 F. Supp. 2d at 623.

47. Because the district court found that plaintiffs’ claim against JCM failed to meet the “in connection with” requirement and the duty requirement, it held that it “need not decide whether JCM made the alleged misstatements upon which plaintiffs rely.” *Id.* at 623 n.5.

48. *Id.* at 622–23. Whether the court’s emphasis on duty, which is a requirement in an omissions case but not in a misrepresentations case like *Janus*, may have been misplaced, is beyond the scope of this article. See *Chiarella v. United States*, 445 U.S. 222, 230–31 (1980) (discussing the duty requirement in an omissions case).

49. *In re Mut. Funds Inv. Litig.*, 487 F. Supp. 2d at 622–23. Again, the issue of whether the District Court properly read the “in connection with” requirement or properly construed cases such as *Semerenco v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000), is beyond the scope of this article. For a broad reading of the “in connection with” requirement, see *SEC v. Zandford*, 535 U.S. 813, 819–25 (2002).

50. *In re Mut. Funds Inv. Litig.*, 487 F. Supp. 2d at 624.

2. The Court of Appeals

The Court of Appeals for the Fourth Circuit reversed the district court.⁵¹ After holding that the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995⁵² only applied to the Rule 10b-5 element of scienter, and that the general fraud pleading requirements of Federal Rule of Civil Procedure 9(b) applied to the other elements of a Rule 10b-5 case,⁵³ the court held that the plaintiffs had adequately pled the element of reliance⁵⁴ by demonstrating that the defendants, JCM and JCG, “made” the misrepresentations in the Janus fund prospectuses.⁵⁵ The court observed that the “clear essence” of the complaint was to the effect that JCM and JCG “helped draft the misleading prospectuses”⁵⁶ and that this sufficiently demonstrated that they had “made” the misleading statements on which plaintiffs grounded their claim.⁵⁷ In addition, the court stated that the defendants could be deemed to have “made” the misrepresentations simply by having caused the prospectuses to be issued or disseminated, again disagreeing with the district court.⁵⁸ The court of appeals thus concluded that “JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents.”⁵⁹

The court then turned to the issue of whether the misstatements in the prospectuses had to be attributed to the defendants in order for the plaintiff to be able to show the element of reliance.⁶⁰ After discussing the circuit court split on this issue, the Fourth Circuit held that although attribution *is* required for reliance, a relaxed standard for demonstrating attribution applies at the pleading stage:

[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

51. *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 131 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 3499 (2010), *rev'd sub nom.* *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011).

52. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). See *infra* note 298 (discussing the difference in standards).

53. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 119–20.

54. *Id.* at 120. See also *Basic Inc. v. Levinson*, 485 U.S. 224, 241–47 (1988) (discussing the fraud-on-the-market theory).

55. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 121.

56. *Id.*

57. *Id.*

58. *Id.* The court was impressed in this regard by plaintiffs’ allegations that JCM and JCG had made the prospectuses available to the public on a joint Janus website.

59. *Id.*

60. *Id.*

for the statement at the time it was made, even if the statement on its face is not directly attributed to the defendant.⁶¹

The court found such an inference plausible on the facts before it, “based on JCM’s duties as investment advisor to the Janus funds, JCG’s role as an asset management firm and parent of JCM, and the two defendants’ active dissemination of the Janus fund prospectuses”⁶² The interconnection among the various Janus entities demonstrated to the court’s satisfaction that “either or both defendants played a substantial role in drafting or approving the allegedly misleading prospectuses,”⁶³ even absent a showing that their role was specifically called to the attention of investors in the mutual funds. This “plausible inference” of attribution was sufficient.

The court ultimately went on, however, to limit its attribution holding to JCM, and did not extend it to JCG.⁶⁴ The court justified this distinction based on the fact that, while “an investment advisor is well known to be intimately involved in the day-to-day operations of the mutual funds it manages,”⁶⁵ the same could not be said of an investment adviser’s parent company. The fact that JCG sponsored a family of mutual funds was not an adequate reason to subject it to Rule 10b-5 liability.⁶⁶ In the court’s view, although it might be true that JCG participated in dissemination of the misleading prospectuses, that alone did not meet the attribution requirement, which further required a showing that investors in the funds would have believed that JCG had also participated in the drafting or approval of the prospectuses in question.⁶⁷

61. *Id.* at 124.

62. *Id.*

63. *Id.* The court later emphasized that the key to attribution, absent express language to that effect, lay in “the nature of the relationship between the defendants (JCG and JCM) and the Janus funds” *Id.* at 125.

64. *Id.* at 127–28. As to the investment adviser, 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 [securities].” *Id.* at 127. Among the (mis)stated policies “affecting the purchase or sale of [securities],” of course, was the policy regarding the funds’ supposed intolerance of market timing. *Id.*

65. *Id.* at 128.

66. The court did, however, find JCG liable as a “control person” under section 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a) (2007). *Id.* at 129–31.

67. *Id.* The court of appeals also considered issues of loss causation, scheme liability, and control person liability beyond the scope of this article. *Id.* A concurring opinion by Judge Shedd found that the attribution requirement, which the majority found to have been met with respect to JCM but not to JCG, was also met as to the parent company. *Id.* at 131–32 (Shedd, J., concurring).

B. *The Supreme Court*

The *Janus* defendants who lost in the court of appeals timely filed a petition for a writ of certiorari in the Supreme Court.⁶⁸ In the petition, JCM and JCG characterized the Fourth Circuit's opinion as having held that an investment adviser who merely "helped" draft the misleading prospectuses of another company and "participat[ed]" in the writing and dissemination of those prospectuses could be held liable under Rule 10b-5.⁶⁹ The questions presented in the writ were whether the Fourth Circuit erred in deciding that a "service provider"⁷⁰ could be held primarily liable under Rule 10b-5 for "help[ing]" or "participating in" another company's misstatements, and whether that court also erred by concluding that a "service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider."⁷¹

The Supreme Court granted the petition on June 28, 2010.⁷² Oral argument took place on December 7, 2010, and the Court issued its opinion reversing the Fourth Circuit on June 13, 2011.⁷³ The majority opinion was written by Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito.⁷⁴ Justice Breyer filed a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan.⁷⁵

1. The Opinion of the Court

The majority began its opinion by noting that although JCG had created both the Janus funds (JIF) and JCM, all of the entities in question had separate, distinct identities, and that, in particular, JCM's independence from JIF exceeded what was demanded of an investment company under the Investment Company Act of 1940.⁷⁶ The Court then recounted the facts

68. *In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3271 (U.S. Oct. 30, 2009) (No. 09-525).

69. *Id.*

70. Use of the term "service provider" was clearly intended to encourage the Court to view JCM in the same light that it had viewed the "service providers," Scientific-Atlanta and Motorola, in *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008).

71. *Petition for Certiorari in i, Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525), 2009 WL 3614467.

72. *Janus Capital Grp. Inc. v. First Derivative Traders*, 130 S. Ct. 3499 (2010).

73. *Janus*, 131 S. Ct. at 2305.

74. *Id.* at 2299.

75. *Id.*

76. *Id.* Section 10(a) of the Investment Company Act permits an investment company to have no more than sixty percent of its board made up of "interested persons," which would include representatives of the investment adviser. 15 U.S.C. § 80a-10(a) (2007). As the Court noted, only one member of JIF's board was associated with JCM. *Janus*, 131 S.

as found by the lower courts, including the fact that JIF had issued misleading prospectuses about its funds containing misrepresentations about the funds' market timing policies.⁷⁷ After then detailing the plaintiffs' theory of recovery against JCM based on JCM's alleged responsibility for the market timing disclosure deficiencies,⁷⁸ the Court squarely and simply posed the issue as whether JCM had "made" the misstatements in the JIF prospectuses.⁷⁹ The Court held that it had not.⁸⁰

The Court believed that there can only be one "maker" of a statement (or a misstatement): "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."⁸¹ The majority opinion held that without such control or authority, a person may be said to suggest a statement but cannot be deemed its "maker."⁸² The Court also implied, without specifically deciding the matter, that attribution was a prerequisite to determining who a statement's "maker" is.⁸³

The Court then opined that expanding the definition of "maker" beyond persons with ultimate authority would be tantamount to overruling its earlier decisions in *Central Bank*,⁸⁴ which abolished private aiding-and-abetting liability under Section 10(b) and Rule 10b-5, and *Stoneridge*,⁸⁵ which held that customers/suppliers of a company that issued fraudulent financial statements to its shareholders were not liable to those shareholders, because those shareholders could not be said to have relied on any fraudulent conduct or speech on the part of the customers or suppliers. The majority thus felt constrained to give a limited reading to the judicially-created, implied private right of action under Section 10(b) and Rule 10b-5,⁸⁶ and it was clear that in its view the plaintiffs were merely engaged in an end-run around the restrictive holdings of the Court's two earlier cases.

After giving a narrow interpretation of what it means "to make" a misstatement, the Court then emphasized that, notwithstanding the close relationship between an investment adviser and the mutual funds which

Ct. at 2299. Notwithstanding this fact, it should be noted that *all* of the officers of JIF were also officers of JCM. *Id.*

77. *Id.* at 2300.

78. *Id.* at 2300–01.

79. *Id.* at 2301.

80. *Id.*

81. *Id.* at 2302.

82. *Id.*

83. *Id.* (stating that attribution is "strong evidence" of who is the *only* maker of a statement).

84. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

85. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

86. *Janus*, 131 S. Ct. at 2303.

that adviser manages, in this case it was quite significant that all the requisite corporate formalities designed to ensure separate entity existence had been scrupulously followed by JCG, JCM, and JIF, and that as a result, grounds did not exist for “disregard[ing] the corporate form.”⁸⁷ The majority noted that the obligation to file the prospectuses which were alleged to be misleading rested on JIF alone, not on JCM, and that there was no indication on the face of the prospectuses that any statements contained therein came from JCM rather than from JIF.⁸⁸ Although the plaintiffs argued that JCM was “significantly involved in preparing the prospectuses,” the Court held that “this assistance, subject to the ultimate control of Janus Investment Fund, does not mean that JCM ‘made’ any statements in the prospectuses.”⁸⁹ As a result, the majority concluded that JIF was the sole maker of the misstatements about market timing that appeared in the funds’ prospectuses and that the plaintiffs had therefore failed to prove the very first element of a Rule 10b-5 action against JCM, namely that it was the *defendant* who “made” those misstatements.⁹⁰

2. The Dissent

Justice Breyer’s dissent started out by emphasizing the intimate relationship among all the Janus entities.⁹¹ He pointed out that each of JIF’s officers was also an employee of JCM, and that JCM virtually ran JIF without any outside assistance.⁹² The dissent used this close connection to take issue with the majority’s cramped construction of the verb “make,” which Justice Breyer found unjustified as a definitional or legal matter. He then went on to note that there may often be multiple “makers” of a statement, and that this was a situation where, given the close involvement of JCM in all of JIF’s affairs, it was eminently reasonable to hold JCM a

87. *Id.* at 2304.

88. *Id.* at 2304–05.

89. *Id.* at 2305.

90. *Id.* The Court also refused to read the adverb “indirectly” in a broad manner, limiting it to the manner in which a statement is communicated. In the Court’s view, the adverb sheds no light on who actually makes a statement. *Id.* at 2305 n.11. The Court also held that it was unnecessary for it to determine the contours of what it means to communicate a misstatement “indirectly” because none of the statements in the prospectuses was attributed to JCM, and thus JCM actually “made” none of the statements. *Id.* In the Court’s mind, “to find that a person or entity made a statement indirectly, . . . attribution is necessary.” *Id.* (For a critique of the Court’s persistent failure to deal “directly” with the adverb “indirectly,” see *infra* text accompanying notes 109–38.).

91. *Janus*, 131 S. Ct. at 2306 (Breyer, J., dissenting).

92. *Id.* JCM managed the “purchase, sale, redemption, and distribution” of JIF investments, and it “prepares, modifies, and implements the Janus Fund’s long-term strategies. And [JCM], . . . through [its] employees, carries out the Fund’s daily activities.” *Id.*

“maker” of the JIF prospectus misstatements.⁹³

Justice Breyer also attacked the “ultimate authority” test crafted by the majority, observing that “[e]very day, hosts of corporate officials make statements with content that more senior officials or the board of directors have ‘ultimate authority’ to control,”⁹⁴ yet nonetheless it was well recognized that these subordinate officials were at least *a*, if not *the*, maker of the statements in question.⁹⁵ He added that “[p]ractical matters related to context, including control, participation, and relevant audience, help determine who ‘makes’ a statement and to whom that statement may properly be ‘attributed,’”⁹⁶ The dissent clearly felt that these “practical matters” weighed heavily in favor of finding JCM responsible as a “maker” of the misstatements in the prospectuses of the various funds it managed.⁹⁷

The dissent then concluded by reemphasizing the close and intimate relationship, not to say control relationship, which JCM had with JIF.⁹⁸ Pointing out that the Court, at least “*sometimes*,”⁹⁹ has recognized that corporate officials can be held liable for misstatements made in a document (or by a third person) that the officials do not legally control, and that many lower courts have found actors without “ultimate authority” to be primarily liable for various misstatements,¹⁰⁰ Justice Breyer argued that JCM fell well within these precedents.¹⁰¹ As he noted, “[t]he relationship between Janus Management [JCM] and the Fund [JIF] could hardly have been closer. Janus Management’s involvement in preparing and writing the relevant

93. *Id.*

94. *Id.* at 2307.

95. *Id.*

96. *Id.*

97. Justice Breyer also stated that both *Central Bank* and *Stoneridge* were inapplicable to the facts at hand. *Central Bank* involved the *secondary* liability of a bank which served as an indenture trustee, whereas in *Janus* the plaintiffs had proceeded against JCM on the basis of *primary* liability. And in *Stoneridge*, there were no allegations that the “service providers” had made any misstatements that were communicated to the public. In *Janus*, on the other hand, JCM *had* allegedly made misstatements about market timing that were disclosed to the marketplace and on which the plaintiffs arguably relied. *Id.* at 2307–10. Justice Breyer went on to address the Section 20(a) control person claim, as well as problems of proof, which might have doomed an SEC action against JCM based on an aiding-and-abetting theory. *Id.* at 2310–11. Although *Central Bank* abolished private aiding-and-abetting liability under Section 10(b) and Rule 10b-5, after that case Congress quickly adopted Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e) (2007), to give the Commission aiding-and-abetting authority. These other issues, however, are beyond the scope of this article.

98. *Janus*, 131 S. Ct. at 2311–12.

99. *Id.* at 2311 (emphasis in original).

100. *Id.*

101. *Id.* at 2312.

statements could hardly have been greater.”¹⁰² As a result, the dissent determined that “[u]nless we adopt a formal rule . . . that would arbitrarily exclude from the scope of the word ‘make’ those who manage a firm . . . , the management company [JCM] at issue here falls within that scope.”¹⁰³ Unfortunately, in Justice Breyer’s view, the majority had adopted just such a formal and arbitrary rule, thereby working what he considered to be a clear injustice on deserving plaintiffs.

III. ANALYSIS

A. *English as she is spoke*¹⁰⁴ (“*Words, words, words*”¹⁰⁵)

1. Section 10(b)

It has to strike one as curious that the Supreme Court in *Janus* almost completely ignored the need to start with the statute, Section 10(b) of the Exchange Act,¹⁰⁶ rather than with SEC Rule 10b-5.¹⁰⁷ After all, this is the same Court that has chided the reader time and time again to begin with the statute rather than the rule,¹⁰⁸ and that has more specifically pointed out that the express language of the statute, the legislative history, and the legislative scheme are the predominant factors to consider in any statutory analysis case, and that further, reliance on policy concerns should come last, not first.¹⁰⁹ It is axiomatic that the SEC’s administrative mandate may

102. *Id.*

103. *Id.*

104. PEDRO CAROLINO, ENGLISH AS SHE IS SPOKE: OR, A JEST IN SOBER EARNEST (1884). *But see* that authority of authorities, Wikipedia.org: “English As She Is Spoke is the common name of a 19th century book written by Pedro Carolino and falsely credited to Jose da Fonseca.” WIKIPEDIA, http://en.wikipedia.org/wiki/English_As_She_Is_Spoke (last visited August 16, 2011).

105. WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

106. 15 U.S.C. § 78j(b) (2007).

107. 17 C.F.R. § 240.10b-5 (2010).

108. *See, e.g.*, *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977) (concerning a minority shareholder’s action opposing a merger under 10(b) of the Securities Exchange Act of 1934 and the Commission’s Rule 10b-5); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (concerning an action against an accounting firm seeking recovery under 10(b) of the Exchange Act and Rule 10b-5).

109. *See supra* note 12 and accompanying text. As noted earlier, the proper approach to statutory analysis in the securities field has been stated perhaps most consistently in some of the opinions authored by Justice Lewis F. Powell (*see, e.g.*, *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985) (concerning sale of unregistered stock under the Exchange Act and Securities Act of 1933); *Ernst & Ernst*, 425 U.S. at 185 (concerning an action against an accounting firm seeking recovery under section 10(b) of the Exchange Act and Rule 10b-5). One starts with the language of the particular statutory provision at issue, proceeds next to the legislative history of that provision, and then looks at the statutory scheme, those sections of the law which “surround,” “accompany,” or “complement” the

specific provision under consideration. Only thereafter, and generally *last* rather than first (which is the reverse of what the Court did in *Janus*), does one proceed to consider policy concerns. Interestingly, the Court in *Central Bank*, somewhat ironically, given the *Janus* Court's strenuous efforts to use policy to keep that earlier case from being eroded, showed its disdain for policy matters rather pointedly: "Policy considerations cannot override our interpretation of the text and structure of the [Exchange] Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 188 (1994) (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991)). It is the position of this author that the Court's substitution of a policy-laden "ultimate authority" or "control" test for the text and structure of Rule 10b-5 was what was bizarre about the *Janus* opinion, not the language of the rule.

It should also be pointed out that Justice Clarence Thomas, who wrote the majority opinion in *Janus*, has not always elevated policy over statutory concerns. In his cogent dissent in *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995), Justice Thomas took the majority to task for having engaged in an essentially policy-driven approach, albeit masked as "statutory" analysis, when it decided the question of whether a privately-negotiated secondary market purchase agreement for the stock of a corporation was a "prospectus" for purposes of Section 12(a)(2) of the 1933 Securities Act, 15 U.S.C. § 77l(a)(2) (2007). *Id.* at 564. In the majority opinion in *Gustafson*, Justice Kennedy, who authored *Central Bank*, by and large ignored the definitions section of the 1933 Act, which actually *defined* the term "prospectus," preferring instead to employ the very limited meaning of the term as found in Section 10 of the Act, 15 U.S.C. § 77j (2007), which, in the Court's words, describes a prospectus as "confined to documents related to public offerings by an issuer or its controlling shareholders." *Id.* at 569. Although Justice Kennedy *did* later make reference to the definitions section, § 2(a)(10), 15 U.S.C. § 77(b)(10) (2007), he apparently felt that the restricted meaning of "prospectus" in Section 10 prevented the Court from giving the word the broader meaning clearly intended by Congress in the definitions section itself. *Id.* at 573–75. This conclusion can only be explained by the Court's having already decided, as a policy matter, that the rescissionary remedy contemplated by Section 12(a)(2) should not apply to privately negotiated, secondary market securities transactions. It was certainly *not* justified by the language of the statute.

In his dissent, Justice Thomas, joined by Justices Scalia, Ginsburg, and Breyer, made this very point. *Id.* at 584 (Thomas, J., dissenting). After repeating the old saw that "[t]he starting point in every case involving construction of a statute is the language itself," Justice Thomas stated that he "believe[d] that the proper method is to begin with the provision actually involved in this case, § 12[(a)](2), and then turn to the 1933 Act's definitional section, § 2[(a)](10), before consulting the structure of the Act as a whole." *Id.* (quoting *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). He then went on candidly to opine that "[t]he majority's analysis of § 12[(a)](2) is motivated by its policy preferences." *Id.* at 594. Thus, although he pointed out that he shared "the majority's concern that extending § 12[(a)](2) to secondary and private transactions might result in an unwanted increase in securities litigation," the solution to this problem lay with Congress, the body charged with amending the statute, not with the Court. *Id.* The Court had no business substituting its policy preferences for the actual language used in the statute.

It is a pity, perhaps, that in *Janus* Justice Thomas saw fit to abandon his adherence to the language actually used by Congress in Section 10(b) or by the SEC in Rule 10b-5 and preferred instead to superimpose a policy-weighted "ultimate authority" or "control" test onto the plain meaning of the word "make." It is not a sufficient justification for this approach to say that the words at issue in *Gustafson* were actually defined in the statute,

not exceed the power which Congress has given the agency in the relevant statute,¹¹⁰ so why did the Court, when it donned its lexicographical robes, not start with the language of Section 10(b)? Had it done so, it might have come to the awkward conclusion that JCM was a primary violator of that provision of the federal securities laws. Perhaps that is a sufficient explanation as to why the Court shied away from the statute.

Section 10(b), as noted earlier,¹¹¹ provides in relevant part as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹¹²

whereas Rule 10b-5 does not actually define the word “make.” Just as the term “prospectus” in the earlier case was susceptible of plain meaning, so too is the word “make.” See *infra* Part III.A.2. Justice Thomas had it right in *Gustafson*. But just as he noted in the earlier opinion that “[t]he majority transforms § 10 into the tail that wags the 1933 Act dog,” *Gustafson*, 513 U.S. at 589 (Thomas, J., dissenting), so too in *Janus*, now writing for the majority, Justice Thomas chose to let the sleeping dog of language lie.

A fifth prong to statutory analysis, one that was a favorite with former Justice John Paul Stevens, consists of a consideration of what the lower federal courts have done. See, e.g., *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 192–201 (1994) (Stevens, J., dissenting). In this hierarchy, the consideration of lower court opinions would probably rank on the same level as policy concerns and come after consideration of the overall legislative scheme. The Court does not always consider what the lower courts have done, however, except perhaps to ignore their holdings, as happened in *Central Bank* itself. See *infra* note 176.

110. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212–14 (1976):

Rule 10b-5 was adopted pursuant to authority granted the Commission under § 10(b). The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law Thus, despite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).

111. See *supra* note 35.

112. 15 U.S.C. § 78j(b) (2007). An interesting argument made by the *Janus* petitioners in their initial brief was to the effect that the terms “directly or indirectly” were intended somehow to modify the jurisdictional reference to interstate commerce, which was provided in the statute to locate the federal securities laws within Congress’s enumerated powers under Article I, section 8, clause 3 of the Constitution. See Brief for Petitioners, *supra* note 25, at 38 n.7. As aptly pointed out by both the respondents and the United States as *amicus curiae*, however, “directly” and “indirectly” are adverbs that cannot grammatically modify prepositional phrases. Instead, of course, these terms modify the verbs “use” and “employ,” and it is the view of this author that where one uses or employs a deceptive device or

What can be gleaned from the operative words of this provision?¹¹³ Much.

a. Indirectly

The Court since the days of *Central Bank* has blithely ignored Polonius's advice, "by indirections find directions out."¹¹⁴ In *Central Bank*, the Court decided that there is no aiding-and-abetting liability in a private action brought under Section 10(b) and Rule 10b-5, thereby expressing its concern that too broad a reading of the adverb "indirectly" would allow the plaintiff to recover from "persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do."¹¹⁵ It is perfectly reasonable, of course, for the Court, when "seeing no evil, hearing no evil" in the wording of a statute, to point out that a statute does *not* say what it does not say,¹¹⁶ but it should at least make some effort to

contrivance, which JCM surely did, at least *indirectly* (if not directly), by allowing JIF to issue prospectuses which falsely promised that the Janus entities would prohibit market timing when, in fact, they were allowing certain hedge funds to engage in market timing, one has clearly violated Section 10(b). See Brief for Respondent, *supra* note 25, at 27; Brief for the United States as Amicus Curiae Supporting Respondent at 15 n.6, *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525), 2010 WL 4339892.

113. By "operative words," this author means the following: "indirectly," the *bête noire* of the Court since the days of *Central Bank*, see *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994): "use," "employ," "device," and "contrivance." The terms "deceptive" and "manipulative" have by and large had fixed meanings since *Santa Fe*. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977). The word "deceptive," which is the only one of these latter two which has any relevance to the *Janus* case, has been understood by the Court to refer to what one can call "a failure of disclosure" (i.e., either a material misrepresentation or a material omission), as those terms are understood in Rule 10b-5(b), which was the provision that the Court actually construed in *Janus*. See *Santa Fe Indus.*, 430 U.S. at 469.

114. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 1, l. 64. Rather than have a potential reader point out that the argument to be presented shortly is only a retreat of this author's position in James D. Redwood, *Toward a More Enlightened Securities Jurisprudence in the Supreme Court? Don't Bank on It Anytime Soon*, 32 HOUS. L. REV. 3, 18–21 (1995), let me do so first. This author believes that where the Court ignores language which appears in a statute which it says it is "construing," it not merely engages in, at the best, "selective," and at the worst, "sloppy," analysis, but it also engages in raw judicial policy-making while purporting to show deference to the legislative will. Apparently the Court doesn't like the word "indirectly" any more than it liked the words "or any security not so registered" when it recently declared that Section 10(b) has no extraterritorial application. See *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2873 (2010) (concerning action by foreign investors against an Australian banking corporation). Yet, in both cases, the words are in the statute and are presumably there for a reason.

115. *Central Bank*, 511 U.S. at 176.

116. Keeping in mind, of course, that words are in the eyes of the beholder: "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less." LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 99 (1917)

acknowledge that the statute *does* say what, in fact, it does say. And Section 10(b) *does* say that it is unlawful *indirectly* to use or employ a manipulative or deceptive device or contrivance in contravention of SEC rules. So what does that mean?

According to the 1933 edition of the Oxford English Dictionary, the adverb “indirectly” means, among other things, “[b]y indirect action, means, connexion, agency, or instrumentality; *through some intervening person* or thing; mediately.”¹¹⁷ The petitioners in the *Janus* case made much of the fact that JCG, JCM, and JIF were all separate entities¹¹⁸ whose separate existence had to be respected by the courts.¹¹⁹ Although the respondents vigorously disputed petitioners’ characterization of the *Janus* entities as distinct and argued that the misleading JIF prospectuses were, in reality, issued by JCM in conjunction with JIF,¹²⁰ the definition of “indirectly” given above respects the concept of separate corporate or entity status or existence. Yet even if it is true that JIF *directly* issued the prospectus with the misleading information about market timing, JCM, an entity distinct from JIF, could still be held liable as a primary violator of Section 10(b) for having *indirectly*, through an intervening person (JIF), made the misrepresentations in question. This is so regardless of whether JCM controlled JIF, as plaintiffs alleged,¹²¹ and regardless of the extent to which the funds and the investment adviser could be considered independent entities that adhered to the requisite formalities for separate organization and functioning.

The Court’s only reference to the adverb “indirectly”¹²² was in

(emphasis in original).

117. OED, *supra* note 1, at 1418 (emphasis added).

118. Business entities still qualify as “persons” for purposes of the federal securities laws. *See, e.g.*, 15 U.S.C. § 77b(a)(2) (2007) (defining “person” in the Securities Act as “an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof . . .”). *See also* 15 U.S.C. § 78c(a)(9) (2007) (defining “person” in the Exchange Act as “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.”).

119. *See* Brief for Petitioners, *supra* note 25, at 37; Reply Brief for Petitioners at 1, *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525), 2010 WL 4774263.

120. *See* Brief for Respondent, *supra* note 25, at 37. *See also infra* Part III.B for an argument to the effect that analogues to the veil-piercing theory of corporate law could lead to the not unreasonable conclusion that whatever separate status JCM and JIF (and JCG as well) may technically have enjoyed was overborne in this instance by the fraudulent nature of the conduct at issue, aside from any consideration of the close connection among all three entities and the high degree of control JCM apparently exercised over JIF’s business activities.

121. Brief for Respondent, *supra* note 25, at 26.

122. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2305 n.11 (2011). The Court’s sole reference to the adverb occurred within the framework of Rule

footnote 11, and it does little to advance the reader's understanding of the term as used by either Congress or the SEC. Indeed, the Court limited the word to a description of the method by which a statement is communicated, not that by which a statement is "made".¹²³ "We think that the phrase ['directly or indirectly'] merely clarifies that as long as a statement is made, it does not matter whether the statement was communicated directly or indirectly to the recipient."¹²⁴ The Court then raised a familiar ghost, informing the reader that to hold otherwise would "erase the line between primary violators and aiders and abettors established by *Central Bank*."¹²⁵ The Court also undercut one of the petitioner's dubious linguistic arguments, namely that "indirectly" modifies the prepositional jurisdictional phrases rather than the verbs of actions that appear in both the statute and the rule.¹²⁶ The majority correctly noted that the adverb "modifies not just 'to make,' but also 'to employ' and 'to engage.'"¹²⁷ Finally, the Court stated that it was unnecessary for it to decide what was meant by communicating a made statement indirectly because "none of the statements in the prospectuses were [sic] attributed, explicitly or implicitly, to JCM," and without attribution, there was no evidence that JIF was using a statement JCM originally "made."¹²⁸

The Court's analysis here does not withstand closer scrutiny. First, although it is certainly true that "indirectly" modifies the verbs "to employ" and "to engage," the adverb does not any less modify the verbs "to make [a material misstatement]" and "to omit [to state a material fact]." It appears that the Court wished to minimize the significance of the adverb's modification of "make" by coupling it with the two other verbs it mentioned, while, if the reader will allow, "omitting" for some reason to point out that "indirectly" also modifies "omit." But so what? After all, "indirectly" appears in the lead-up language to the substantive provisions of Rule 10b-5, and no one disputes that the adverb was meant to cover the conduct prohibited in Rule 10b-5(a) and (c) as well as the speech proscribed in Rule 10b-5(b). Yet the *extent of coverage* of a legal

10b-5 since (as noted above, *see supra* text accompanying notes 106–10) the Court for some unexplained reason grounded its decision in the rule rather than in the statute. This emphasis on the rule as opposed to the statute makes no difference for present purposes, however.

123. As the term "make" is used in the SEC rule. *See infra* Part III.A.2 for a discussion of the multiple meanings of the word "make." As far as the unanalyzed *statute* is concerned, the Court's view would apparently be that the adverb "indirectly," as it appears therein, delimits the method by which a "device" or "contrivance" is *communicated*, rather than that by which a device or contrivance comes about or is "made."

124. *Janus*, 131 S. Ct. at 2305 n. 11.

125. *Id.*

126. *See supra* note 112 and accompanying text.

127. *Janus*, 131 S. Ct. at 2305 n.11.

128. *Id.*

provision is no sure clue as to its *meaning*, and to say that a word applies to other sections of a rule does nothing to elucidate that meaning. The Court seems to have ignored this distinction.

Second, to make a statement, or to use or employ a device or contrivance, is not the same thing as conveying, communicating, disseminating, broadcasting, dispersing, publishing (what have you) the statement that was made or the device or contrivance that was used or employed. The familiar refrain that emerging creative writers are often told is that it is just as important to write a novel and put it in your file cabinet as it is to have that novel published and end up on the *New York Times* Bestseller List. Few writers who have undergone the arduous task of trying to produce the next great American novel would agree with that assessment, however. Authors write, “or make,” if you will, a novel in order to have it communicated after it is made; an uncommunicated novel is just as “made” as a communicated one, but nowhere near as gratifying to the “maker.”¹²⁹

Furthermore, neither the actual language of Section 10(b) and Rule 10b-5 nor the grammatical structure of the statute and rule supports the Court’s limitation of the word “indirectly” to the method of communication. In fact, nowhere in either provision do the words “communicate” or “communication” appear. Yet the words “make,” “use,” “employ,” “engage,” and “omit” *do* appear. A Court wary of imparting hidden meaning to provisions of the securities law should not be so eager to import hidden language instead.

Perhaps the Court felt that Congress’s inclusion of the word “communication” in *other* provisions of the securities laws justified its reading the word into Rule 10b-5. For example, it is true that the jurisdictional nexus statement within Section 5 of the Securities Act¹³⁰ contains the words “means or instruments of transportation or *communication* in interstate commerce,”¹³¹ but that then exposes the Court to the well-worn argument that Congress chose its words carefully, that had it wished to add the word “communication” to Section 10(b) it knew how to do so and would have done so, and that therefore the absence of the word in either Section 10(b) or Rule 10b-5 was the product of a deliberate choice. This point should not be made to carry more freight than is reasonable, however, because the jurisdictional language in Section 10(b) and Rule 10b-5 differs only slightly from that in Section 5 of the Securities Act. The more important point, as noted earlier,¹³² is that the adverb “indirectly” may not, grammatically, modify the jurisdictional language,

129. See *infra* notes 201–04 and accompanying text.

130. 15 U.S.C. § 77e (2007).

131. 15 U.S.C. §§ 77e(a)–(c) (emphasis added).

132. See *supra* note 112.

whether that language is the equivalent of “communicate[d]” or not, since that language appears in a string of prepositional phrases. As alert students of English grammar know only too well, adverbs modify verbs, adjectives, or other adverbs, not prepositions. In Section 10(b), therefore, “indirectly” modifies the verbs “to use” or “to employ”; in Rule 10b-5, it modifies the verbs “to employ,” “to engage,” “to omit,” and also, alas, to the Court’s evident chagrin, “to make.”

Additionally, for the Court to state that any other construction of “indirectly” would eliminate the distinction between primary and aiding-and-abetting liability adds nothing to *Central Bank*, which said virtually the same thing.¹³³ Worse, this observation is the wolf of policy dressed up as the sheep of language, allowing the Court to stand statutory analysis on its head. Policy should come last, not first, and should not be used to ignore the words actually chosen by both Congress and the SEC. The Court’s not-so-subtle agenda, in which policy now apparently trumps everything else if the statutory language stands as an inconvenient obstacle to the decision favored by a majority of the justices, is made manifest by the Court’s interment of the guiding philosophy behind *Affiliated Ute*,¹³⁴ among other early cases, with its Pollyannaish pronouncement that Section 10(b) should be “construed ‘not technically and restrictively, but flexibly to effectuate its remedial purposes.’”¹³⁵ That sentiment now seems a bit quaint, and today the Court’s clarion call is far different: “[C]oncerns with the judicial creation of a private cause of action caution against its expansion”¹³⁶ Therefore, “in analyzing whether JCM ‘made’ the statements for purposes of Rule 10b-5, we are mindful that we must give ‘narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.’”¹³⁷ That is fine, except that in effectuating its policy preferences, the Court ignored the words actually used when Congress “enacted the statute.”

Finally, when the Court announced that it did not need to explore what was meant by the infinitive phrase “to communicate a ‘made’ statement indirectly,” followed by the subordinate adverbial clause “because none of the statements in the prospectuses were [*sic*] attributed . . . to JCM,”¹³⁸ the

133. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

134. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). The Court in that case held that a private plaintiff need not prove reliance in a Section 10(b)/Rule 10b-5 omissions case, as long as the omissions in question are material. *Id.* at 153–54.

135. *Id.* at 151 (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963)).

136. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 148 (2008)).

137. *Id.* (quoting *Stoneridge*, 552 U.S. at 167).

138. *Janus*, 131 S. Ct. at 2305 n.11.

majority apparently confused the Section 10(b)/Rule 10b-5 element of *reliance* with the element which requires that the defendant *make* a material misstatement or omission.¹³⁹ As the parties' briefs pointed out,¹⁴⁰ one can "make" a misstatement that no one relies on, as the term "reliance" has come to be understood through several cases at the Supreme Court level.¹⁴¹ Regardless of whether the fraud-on-the-market theory of *Basic* applies, it is standard securities law that the private plaintiff alleging fraud must prove reliance as part of his case-in-chief. Although the Court in *Janus* did not definitively hold that reliance could only be proven where the misstatements in question are attributed, either explicitly or implicitly, to the defendant,¹⁴² it mistakenly appeared to believe that absent attribution, a statement is not even *made*. But as noted earlier,¹⁴³ one can make a statement that never sees the light of day, but which is nonetheless still indisputably made. If the Court wishes to hold, after *Stoneridge*, that a misstatement which never comes to the attention of the plaintiff is not one on which the plaintiff can be said to have relied, and then to deny recovery on that basis, that is one thing. But that does *not* mean that a misstatement was not actually *made* by the defendant, and the Court should not conflate what are in fact two separate elements of the Rule 10b-5 cause of action.

b. To use or employ

Section 10(b) of the Exchange Act makes it unlawful for any person "to use or employ" any manipulative or deceptive device or contrivance in contravention of SEC rules.¹⁴⁴ The terms "use" and "employ" need not detain the reader long. Among the OED definitions of "to use" are the following: "to pursue or follow as a custom or usage";¹⁴⁵ "to enforce or put

139. *See id.* at 2301 n.3 (setting out the standard elements of a Rule 10b-5 action). *See also supra* note 45.

140. *See, e.g.*, Brief for Petitioners, *supra* note 25, at 9; Brief for Respondent, *supra* note 25, at 9.

141. *See generally Stoneridge*, 552 U.S. at 148; *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (decision regarding the presumption of reliance by class members in an action alleging a Securities Exchange Act section 10(b) violation), *and* *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

142. Unlike some courts. *See, e.g.*, *Pacific Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 157–58 (2d Cir. 2010), *cert. denied*, No. 10-535, 2011 WL 2437055 (June 20, 2011) (concerning an action against an attorney and a brokerage firm accused of fraudulent transactions where the court held that attribution was a necessary requirement for liability). Other courts find attribution unnecessary, at least in SEC actions, where reliance is not an element. *See, e.g.*, *SEC v. Wolfson*, 539 F.3d 1249 (10th Cir. 2008) (action by the SEC against a consultant alleged to have violated Federal securities law).

143. In what we can now perhaps call "The Great American Novel File Cabinet Rule." *See supra* text accompanying note 124.

144. 15 U.S.C. § 78j(b) (2007).

145. OED, *supra* note 1, at 3574.

into practice”;¹⁴⁶ “to prosecute or pursue (some course of action); to do, perform, carry on”;¹⁴⁷ “to make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose”;¹⁴⁸ “to employ or make use of . . . , esp. for a profitable end or purpose”;¹⁴⁹ and “to employ or give utterance to (words, phrases, etc.) to say, utter.”¹⁵⁰ According to the same source, the verb “to employ” means, *inter alia*, “to apply a thing to some definite purpose; to use as a means or instrument, or as material”;¹⁵¹ “to apply, devote (effort, thought, etc.) to an object”;¹⁵² and “to make use of.”¹⁵³ Had the Supreme Court in *Janus* construed these two terms of the statute, rather than the word “make” in SEC Rule 10b-5, what might have been the outcome?

Assuming that the misleading statements about market timing in the JIF prospectuses (or the prospectuses generally—the misstatements therein contained being considered “manipulative” or “deceptive”) could be deemed to be “devices” or “contrivances,”¹⁵⁴ at the very least the previously quoted definition of “to use” could apply to JCM’s involvement in the *Janus* offerings. If “to use” means “to say” or “to utter,” then it is virtually indistinguishable from the Court’s view that “to make a statement” is the equivalent of “to state.”¹⁵⁵ Granted, this does not answer the question of who the sayer, the utterer, or the employer of a (mis)statement is, any more than we know who the “maker” of a (mis)statement is from the language of Rule 10b-5. The point is simply that the Court could, and should, have focused on the statute rather than the

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* It is interesting to note that this definition plays the same word game with “give” that the *Janus* Court did with “make.” See *infra* text accompanying notes 175–86. “To give utterance to” can be shortened to “to utter,” but does that tell us anything about the meaning of “give”? Or does it tell us who “gives” a particular utterance?

151. OED, *supra* note 1, at 855.

152. *Id.*

153. *Id.* As examples of this last definition, the OED in parentheses lists “time” and “opportunities,” but without the “etc.” that occurs in the parenthetical of the definition of “to use” (see *supra* text accompanying note 150). If the terms “time” and “opportunities” are meant to be exclusive rather than merely illustrative, then the term “to employ” in the sense of “to make use of” would not apply to the misstatements “made” in the *Janus* fund (JIF) prospectuses.

154. See *infra* notes 163–72 and accompanying text (providing a discussion of the statutory terms ‘device’ and ‘contrivance’).

155. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011). See *infra* notes 180–91 and accompanying text (extending the discussion of the Court’s rather peculiar fascination with the formulaic shortening of ‘to make a statement’ as being the equivalent of ‘to state’). See also *supra* note 150 (discussing the comparably unclear understanding of the phrase ‘to give [utterance]’).

rule, and that, had it done so, it could have remained comfortably inside its policy-driven comfort zone, being predisposed as it was to deny liability in any event.

Many of the other terms in the two OED definitions can also be substituted for “to make” without doing violence to the facts of the *Janus* case. According to the allegations of the complaint, which must be accepted on appeal from a motion to dismiss,¹⁵⁶ Janus (JCM) put into (deceptive) practice statements in the JIF prospectuses to the effect that it would restrict market timing. Janus made use of those misstatements (assuming they may be considered “immaterial things”) as a means or instrument to achieve certain ends or purposes, such as: currying favor with certain hedge funds, maintaining JCM’s inflated revenue, ensuring that the price of JCG stock remained artificially high (in the minds of the plaintiffs).¹⁵⁷ Those same ends or purposes were certainly intended to inure to the profit or benefit of JCM, bringing JCM’s conduct within another of the related definitions of “to use,” namely “[t]o employ or make use of [the prospectuses or the misstatements] for a profitable end or purpose.”¹⁵⁸ As for the word “employ,” again, it can be said that JCM used the misstatements in question as a means or instrument to attain some definite purpose or object.¹⁵⁹ That purpose was the benefit gained by appeasing the hedge fund clients who wished to engage in market timing and the deception of JIF’s long-term investors, who were unaware that Janus was permitting market timing to occur.

Therefore, in essence, the verbs “to use” and “to employ” may be substituted for the verb “to make.” This substitution would still allow the Court to reach its desired conclusion: that JCM was no more the “user” or “employer” of a deceptive device or contrivance than it was the “maker” of an untrue statement of material fact in the JIF prospectuses.¹⁶⁰

So why did the Court rely on the rule rather than the statute? Perhaps because it is one thing for the Court to withhold deference from an administrative rule which in its mind exceeds the agency’s statutory

156. See *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 119 (4th Cir. 2009) (quoting *Hatfill v. New York Times Co.*, 416 F.3d 320, 329 (4th Cir. 2005)) (“We must accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiffs.”).

157. See Brief for Respondent, *supra* note 25, at 42 (explaining the preparation and filing of the challenged statements in the *Janus* case).

158. OED, *supra* note 1, at 3574.

159. This is something of a combination of the definition of ‘employ’ in the sense of “to apply (a thing) to some definite purpose” and ‘employ’ in the sense of “to apply, devote (effort . . .) to an object.” *Id.* The latter is listed in the OED as Definition 1.b and appears to be a subset of the former, which is listed as main Definition 1. OED, *supra* note 1, at 855. The two may thus be combined for the sake of clarity.

160. However, it is the position of this author that JCM was the ‘maker,’ ‘user,’ or ‘employer’ of the misstatements in the JIF prospectuses.

mandate, but it is a far more difficult matter for the Court to deny deference to a validly enacted statute.¹⁶¹ This is an especially awkward course for the justices to pursue where the statute, as construed, leads to the same conclusion as the rule the Court wishes to call into question. After all, in an area of statutory interpretation such as the federal securities law, the Court can only invalidate a statute if it is unconstitutional; more often, its task is simply to construe the meaning of the statute and glean the intent of Congress. Furthermore, its construction is always subject to Congressional override. SEC rules are far more vulnerable to judicial attack, however, and if the agency wishes to protect itself from a court ruling with which it disagrees, it must go to Congress and seek to persuade that body to assert itself on the Commission's behalf.¹⁶² The *Janus* Court followed the easier path by deciding that JCM fell outside the language of the rule, enabling it to avoid having to deal with the virtually identical language of the statute.

*c. Device or Contrivance*¹⁶³

As already noted, manipulative or deceptive “devices” and “contrivances” are prohibited by Section 10(b).¹⁶⁴ This language focuses on the “what,” rather than the “who” that was at issue in *Janus*, so again the analysis need not detain the reader long. According to the Oxford English Dictionary, among other things, a “device” is “[t]he action of devising,

161. See, e.g., Brief for Petitioners, *supra* note 25, at 44 n.9 (arguing that SEC views of private actions should receive no deference).

162. This is exactly what the SEC did after *Central Bank*, by getting Congress to amend Section 20 of the Exchange Act (adding new subsection (e)) to preserve the Commission's aiding-and-abetting authority. See 15 U.S.C. § 78t(e) (2007) (providing the new section). However, the decision in *Central Bank* was based on Section 10(b) rather than on Rule 10b-5.

163. Construction of the terms ‘deceptive’ or ‘manipulative’ is beyond the scope of this article. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977) (analyzing the meanings of ‘manipulative or deceptive’ within the context of Rule 10b-5). Simply stated, ‘deceptive’ speech actionable under Section 10(b) is shorthand for a material misstatement or omission. *Id.* at 474 (deception requires proof of “a material misrepresentation or material failure to disclose.”). It does not appear that defendant JCM contested the issue of whether the JIF prospectuses contained material misstatements concerning market timing. What it *did* contest, of course, was *who* ‘made’ those misstatements:

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

Brief for Petitioners, *supra* note 25, at 9 (emphasis in original). The issue of reliance is beyond the scope of this article.

164. 15 U.S.C. § 78j(b) (2007).

contriving, or planning . . . ; invention, ingenuity”;¹⁶⁵ and “[s]omething devised or contrived for bringing about some end or result; an arrangement, plan, scheme, project, contrivance; an ingenious or clever expedient; often one of an underhand or evil character”¹⁶⁶ A “contrivance” is defined similarly as “[t]he action of contriving or ingeniously endeavouring the accomplishment of anything; the bringing to pass by planning, scheming, or stratagem; . . . deceitful practice.”¹⁶⁷ “Contrivance” is also defined as “[a] plan or scheme for attaining some end; an ingenious device or expedient; an artifice, a trick.”¹⁶⁸

Much of the language of “devices” and “contrivances” refers to the defendant’s state of mind (“underhand,” “evil character,” “deceitful practice”) and is therefore more properly understood as part of the Section 10(b)/Rule 10b-5 element of scienter.¹⁶⁹ The question here, however, is merely whether it is possible to consider the JIF prospectuses as either a “device” or a “contrivance.” Regarding “device,” the prospectuses appear to have been the product of an “action of devising,” or “an invention,” of JCM, in conjunction with JCG and JIF (according to the plaintiffs), or of JIF alone (according to the defendants). Additionally, those prospectuses may be considered as “something devised for bringing about [a particular] end or result,”¹⁷⁰ namely the purchase of fund shares for long-term hold by investors ignorant of the fact (because it was not disclosed to them) that they were doing so to their disadvantage because of the presence of market timers in the funds as well.

Each JIF prospectus can equally be considered a “contrivance.” The term “contrivance” is tied to the accomplishment of, or the intent to accomplish, a desired end: “ingeniously endeavouring the accomplishment of anything”; “[a] plan or scheme for attaining some end.”¹⁷¹ In this case, the obvious purpose sought by a securities prospectus is the purchase of a security by the offeree who receives and presumably reads the prospectus.¹⁷² The “intent” behind a prospectus that violates Section 10(b) and Rule 10b-5 is to forestall non-sales of the securities in question by

165. OED, *supra* note 1, at 708.

166. *Id.*

167. *Id.* at 542.

168. *Id.*

169. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (defining ‘scienter’ as follows: “In this opinion the term ‘scienter’ refers to a mental state embracing intent to deceive, manipulate, or defraud.”).

170. OED, *supra* note 1, at 708.

171. *Id.* at 708 and 542.

172. A ‘prospectus’ is defined in broad general terms in section 2(a)(10) of the 1933 Securities Act. That section provides, in relevant part, that “[t]he term ‘prospectus’ means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security” 15 U.S.C. § 77b(a)(10) (2007).

hiding the truth. The allegedly undisclosed truths in the *Janus* case were that the presence of market timers would injure the long-term investors in the Janus funds, and that the representations to the effect that market timers would be banned by the funds could not be taken seriously. The “plan” or “scheme,” i.e., the “device” or “contrivance,” for accomplishing that desired purpose was the various Janus prospectuses that were the subject of the plaintiffs’ lawsuit.

2. Rule 10b-5 Meets Its Maker

As mentioned earlier, without explanation the Supreme Court in *Janus* grounded its refusal to hold JCM liable for the misstatements about market timing that appeared in the JIF prospectuses on the language of SEC Rule 10b-5 rather than on Section 10(b).¹⁷³ Although this is contrary to the Court’s established jurisprudence, which places preeminence on the statute,¹⁷⁴ the Court’s doctrinal preference for the term “make” in Rule 10b-5 must be accepted. The Court’s conclusion that JCM was not the “maker” of the misstatements in the JIF prospectuses led it to craft a test, rather than adopt a definition or accept any of the common dictionary definitions of the words “make” or “maker.”¹⁷⁵ As a result, it is the view of this author that the Court thereby engaged in the kind of inappropriately activist judicial lawmaking that it is wont to condemn.¹⁷⁶ In fact, none of the myriad definitions of the verb “to make” supports the limitations that the Court

173. See *supra* Part III.A.1.

174. See, e.g., *Ernst & Ernst*, 425 U.S. at 197 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)) (“In addressing this question [whether negligence is sufficient to show scienter, a question which the Court answered in the negative], we turn first to the language of § 10(b), for ‘the starting point in every case involving construction of a statute is the language itself.’”).

175. For purposes of the present article, analysis will be primarily, although not exclusively, confined to the meaning of the word ‘make,’ rather than the meaning of the word ‘maker.’ This is not to suggest that the meaning of the noun differs in any material respect from the meaning of the verb.

176. Perhaps excessive meddling on the part of judges in matters beyond the judicial ken was one of the things that was on the Court’s mind in *Central Bank*, given that every single court of appeals that had considered the issue had come to the conclusion that a private party could sue for aiding-and-abetting violations of Section 10(b) and Rule 10b-5. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 192 (1994) (Stevens, J., dissenting) (discussing the majority’s treatment of aider-and-abettor liability under Section 10(b)). This problem, if it is one, was certainly on the Court’s mind when it recently rejected the Second Circuit’s ‘conduct’ and ‘effects’ test for extraterritorial application of Section 10(b) and held that, given the silence of the statute on the issue of whether it applied to foreign transactions, “[t]he results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality.” *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2881 (2010).

placed on the term, suggesting that the Court deliberately chose to superimpose its raw policy preferences onto the actual language of Rule 10b-5.

Rule 10b-5 provides in relevant part as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.¹⁷⁷

As noted earlier,¹⁷⁸ the traditional elements of a Rule 10b-5 action are the following: “(1) a material misrepresentation or omission [made] by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”¹⁷⁹

The Supreme Court began its analysis in *Janus* with the uncontroversial observation that “[o]ne ‘makes’ a statement by stating it.”¹⁸⁰ The Court then demonstrated its fascination with a supposed definition to the effect that “[w]hen ‘make’ is paired with a noun expressing the action of a verb, the resulting phrase is ‘approximately equivalent in sense’ to that verb.”¹⁸¹ The Court was equally enamored with the conclusion of Noah Webster or his lexicographical progeny that “[m]ake followed by a noun with the indefinite article is often nearly equivalent to the verb intransitive corresponding to that noun.”¹⁸² All this

177. General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.10b-5 (2010).

178. See *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301 n.3 (2011) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008)) (stating the standard elements of a Rule 10b-5 action).

179. *Id.*

180. *Id.* at 2302.

181. *Id.* (quoting OED, *supra* note 1, at 1701 (1st ed. 1933)). The Court noted in parenthesis that the OED language was taken from “(def. 59)” *Id.* The ensuing discussion in this article also refers to this definition as “definition 59,” following the Court’s example.

182. *Id.* (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1485 (2d ed. 1934))

may be true, but so what?

It should first be observed that these are not really definitions of the verb “to make” but rather examples of its usage. It is a way of saying that one can use shorthand if “make” is used in a certain way, but not when it is used in other ways. The Court illustrates this point by saying that there is a difference between “making a statement,” which can be shortened to “to state,” and “making a chair,” which obviously cannot be sensibly shortened to “to chair.”¹⁸³ The sources cited by the Court do indeed support this proposition, and it is not here pretended otherwise. For example, the OED lists some 118 examples of shorthand usages of “make” followed by certain nouns, some of which, concededly, refer to speech (e.g., to make a proclamation, a reply, a proposal, etc.), although many others do not (e.g., to make an advance, an appearance, a stand, etc.).¹⁸⁴ But how does the fact that the verb can be “shorthanded” in certain situations, but not in others, actually tell us who “makes” something, whether that something be a statement, a chair, or anything else? If “definition 59”¹⁸⁵ were truly a definition, presumably it would tell us. All it does, however, before providing us with the list of examples mentioned above, followed by the etymological evolution of the term which is standard to the OED, is to say the following:

With sbs. [subjects] expressing the action of vbs. [verbs] (whether etymologically cognate or not), *make* forms innumerable phrases approximately equivalent in sense to those verbs.¹⁸⁶ In some of these phrases the obj. [object]-noun appears always without qualifying word,¹⁸⁷ in others it may be preceded by the indefinite article, or by a possessive adj. [adjective] relating to the subject of the sentence.¹⁸⁸ When standing alone,

(emphasis in original)). It is peculiar that the Court decided to use dictionaries which were dated in 1933 and 1934, at the time the two main securities statutes on which it did *not* rely, the Securities Act of 1933 and the Securities Exchange Act of 1934, were enacted, rather than on dictionaries published around 1942, when Rule 10b-5 was promulgated by the SEC. This author uses the 1884 version of the OED, which was the one on which the 1933 edition was based. See OED, *supra* note 1 (defining the term “to make or to mar.”).

183. *Janus*, 131 S. Ct. at 2302. Of course, one can make someone the chair (person) of something, but in that case the shorthand expression “to chair” refers not to the act of having been appointed to that position, but rather to the exercise of the powers of that position after the appointment. This, obviously, was not what the Court was trying to articulate.

184. OED, *supra* note 1, at 1701. If one wished to be picky, one might note that this list does not contain the words “make a statement,” but in fairness it should be pointed out that the list does not purport to be exhaustive. *Id.*

185. *Id.*

186. Note that this does *not* actually tell us what the “sense” (or meaning) of any of those verbs actually is.

187. For example, one normally says “to make mention” rather than “to make a mention,” both of which could be “shorthanded” to “to mention.”

188. For example, “to make a change,” (i.e., “to change”) is an example of make

the combination of *make* with its object is equivalent to a verb used *intr.* [intransitively] or *absol.* [absolutely],¹⁸⁹ but in many instances the obj.-noun admits or requires construction with *of*, and this addition converts the phrase into the equivalent of a transitive verb.¹⁹⁰

All of this may help explain why James Henry Murray was such a colorful, not to say eccentric, person,¹⁹¹ but to state the *effect* of certain *usages* of a word does not in and of itself give a clue as to its *meaning*. What we now know is that certain shorthand usages of “make” apparently sometimes render the verb transitive in nature and at other times render it intransitive. And it must be borne in mind that the Court (and the above discussion) focuses only on “definition 59” of the verb “make.”¹⁹² The OED contains, including definitions of “make” followed by prepositions and adverbs, some ninety-six definitions in total.¹⁹³

What the foregoing is meant to suggest is that the Court’s dabbling in

followed by the indefinite article. This is of course much different than “to make change” in the sense of exchanging coins for dollar bills, which cannot be “shorthanded” in any meaningful sense. *See also infra* note 189. “He made his discovery of (i.e., “he discovered”) her insincerity too late to be of any use” is an example of the object noun (“discovery”) preceded by the possessive adjective “his” which relates to the subject of the sentence (“He”).

189. Again, if one says “to make change,” that apparently is the equivalent of “make” used intransitively, as would be the case with the phrase “to make reference (to),” (i.e., “to refer (to)”). It should be noted, however, that the expression “to make change” is *not* an example of “make” forming a phrase which is approximately equivalent in sense to the verb “to change,” whereas “to make *a* change” is, as is true also of “to make reference (to),” which corresponds nicely with “to refer (to).” “Absolute construction” has been explained as follows::

Defined by the OED as ‘standing out of the usual grammatical relation or syntactical construction with other words,’ it consists in English of a noun or pronoun that is not the subject or object of any verb or the object of any preposition but is attached to a participle or an infinitive

HENRY W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 4 (2d ed. 1965). Fowler does not give a citation for his OED quotation, but he does give a couple of examples of “absolute construction”: “*The play being over, we went home*” and “Let us toss for it, *loser to pay*.” *Id.* (emphasis in original).

190. OED, *supra* note 1, at 1701 (emphases in original). This is not altogether clear. Presumably what is meant here is that, for example, the phrase “to make offer” or “to make an offer” requires addition of the preposition “of” after “offer.” Both are the equivalent of the infinitive “to offer” (not requiring the preposition but followed by a direct object), but because the phrases formed with “make” both require the addition of the preposition, “make” is to be considered the equivalent of a transitive verb.

191. Murray was the editor of the OED at the time of the 1884 edition, on which the 1933 version which the *Janus* Court cited was based. *See* OED, *supra* note 1; *see also* JAMES MURRAY (LEXICOGRAPHER), http://en.wikipedia.org/wiki/James_Murray (lexicographer) (last visited August 18, 2011).

192. *See supra* note 181.

193. OED, *supra* note 1, at 1700–03.

syntax and word construction did very little to elucidate meaning. This is regrettable because the meaning of the word “make,” as used in Rule 10b-5(b) was, after all, the primary issue in the *Janus* case. Perhaps recognizing that its excursion into “definition 59,” dead-ending as it did in the cul-de-sac of the transitive versus intransitive debate, did almost nothing to advance understanding of the term, and being perhaps too daunted to tackle any of the other ninety-five definitions propounded by the OED, the Court abruptly abandoned the definitional field entirely and substituted instead a “test” for what is meant by the verb “to make.”¹⁹⁴ The Court, without citing to *any* authority, held the following:

For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not ‘make’ a statement in its own right.¹⁹⁵

The Court justified this test, which it fashioned out of whole cloth, by reiterating its belief that lack of attribution prevents one from being a maker, which, as noted earlier,¹⁹⁶ goes to the separate element of *reliance*, not the element of whether the defendant *made* an untrue statement. The majority opinion also repeated the familiar refrain that for the Court to decide otherwise would be tantamount to overruling *Central Bank* and would obliterate the distinction between primary and aiding-and-abetting liability.¹⁹⁷ Finally, the Court played its policy hand: “[o]ur holding . . . accords with the narrow scope that we must give the implied private right of action Although the existence of the private right is now settled, we will not expand liability beyond the person or entity that ultimately has authority over a false statement.”¹⁹⁸ The result of the Court’s decision is clear: the already-enfeebled private Rule 10b-5 right is now on life support and cannot be expected to survive.

In justifying its novel “control” or “ultimate authority” test, the Court cited to an example suggested by the petitioners:¹⁹⁹ although a speechwriter drafts a speech for someone, it is the person who delivers the speech who has ultimate control over it and who is therefore the speech’s *sole* “maker.”²⁰⁰ Initially, it should be noted that nothing in logic or

194. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011).

195. *Id.*

196. *See supra* text accompanying notes 138–43.

197. *Janus*, 131 S. Ct. at 2302. The Court also felt that the definition of “make” propounded by the respondents and the government was at odds with *Stoneridge*. *Id.* at 2303.

198. *Id.*

199. *See* Brief for Petitioners, *supra* note 25, at 11.

200. *Janus*, 131 S. Ct. at 2302. The petitioners used the example of a speechwriter for the President; *see also* Brief for Petitioners, *supra* note 25, at 11.

linguistics compels the conclusion that a statement, or indeed anything else, has to have one and only one “maker.” The Court’s “either-or” approach is thus ill-founded. Can it be said, for example, that a building has but one “maker”?²⁰¹ Although a sign on a construction site might identify the architect or the general contractor,²⁰² does that any the less make unidentified subcontractors *not* also the “makers” of the building? Certainly a person injured by faulty plumbing or electrical wiring in a building would expect that the subcontractor who designed, manufactured, constructed, or installed the defective plumbing or wiring would be held at least partly responsible for her injury, on the common understanding that that subcontractor was one of the “makers” of the building (assuming, of course, that the cause of the injury could be traced to the work of that subcontractor). And this would be so regardless of whether the architect or the general contractor might also be liable. Would a plaintiff be forced to choose a single defendant, on the theory that only that defendant and no one else “made” the defect? What if it is ultimately established that the feature that caused plaintiff’s injury was defective in design, construction, manufacture, *and* installation? Who is the “maker” then?²⁰³ Is it sensible in this context to limit liability solely to that one person with “ultimate authority” and “control,” presumably the general contractor? Just to ask the question is to indicate a serious shortcoming in the *Janus* Court’s analysis and to point out that the majority’s conclusion that there can be one and only one “maker” of a statement is overly simplistic.

Another example more akin to the Court’s analysis than the world of construction law should suffice to make this point clear. Who is the “maker” of a newspaper article? Who is the “maker” of a short story striving to make its way in the highly competitive world of literary magazine publication? Or a poem? The reporter or creative writer who crafts the piece lacks “ultimate authority over the statement, including its content”²⁰⁴ and whether and how to communicate it.”²⁰⁵ That discretion lies

201. Or one “builder”? Note that although it was apparently significant to the Court that “to make a statement” is “to state,” and that one cannot “shorthand” to make a chair” to “to chair,” one can shorten “to make a building” to “to build.” Is that significant, however? Does it tell us who actually is the maker or builder?

202. Again, although attribution, either express or implied, may help prove or disprove the reliance element per *Stoneridge*, *PIMCO*, and similar cases, it says nothing definitive about who is the “maker,” which is necessary in order to satisfy the critical first element of Rule 10b-5, namely that a misstatement or omission be “made” by the defendant. *See supra* note 45 (detailing the standard elements of a Rule 10b-5 action).

203. It should be noted that the capacious field of products liability law is well beyond the scope of this article. The whole point of the foregoing discussion is merely to emphasize the difficulty in limiting the term “maker” to one, and only one, person or entity, as the *Janus* Court appeared to do.

204. With respect to “content,” at least, this statement may not be entirely accurate. In today’s busy world of commercial and literary publication, many editors, and even agents,

with the editor. However, the fact that the strategic decisions as to whether to accept the work, what to cut and what to add (the editing process), or where in the newspaper or literary magazine the article, short story, or poem will appear (layout) are all made by someone other than the reporter or writer who actually authored the piece does not make that reporter or writer any less its true “maker.” The general assumption about such short written pieces is that the author is indeed the “maker,” the sole maker, if the Court wants it that way. And this is so even though the fate of that author (in terms of whether his or her handiwork ever sees the light of day) lies entirely in the hands of an editor. For longer works the “maker” is even clearer: a historian is the “maker” of a history book; a novelist is the “maker” of a novel, not the agent or the publisher. The plaintiffs in *Janus* alleged that JCM, the investment adviser, wrote or drafted the misrepresentations about market timing that appeared in the JIF prospectuses. To hold that JCM was *the*, or at least *a*, maker of these misstatements comports with the common understanding of authorship discussed above.²⁰⁶

Furthermore, the Court’s “ultimate authority” or “control” test is unmoored to any of the myriad definitions of “make” found in the OED, none of which contains such a requirement. Without attempting an exhaustive enumeration, the verb “to make” is defined in the OED in various ways as follows: “To bring into existence by construction or elaboration”;²⁰⁷ “[to] compose, write as the author (a book, poem, or other literary²⁰⁸ work . . .)”;²⁰⁹ “[t]o draw up (a legal document)”;²¹⁰ “[t]o cause

barely edit an author’s work, if they do so at all. They do not have the time. The work is often simply accepted or rejected as is. So who, then, in that situation, has “ultimate authority” over *content*? Not the editor or the agent. And as to who decides “whether and how to communicate [a written piece],” what about self-publication? Or online publication?

205. *Janus*, 131 S. Ct. at 2302.

206. The petitioners in *Janus* tried to draw a distinction between a newspaper article that appears under the byline of a particular reporter and a newspaper editorial (or perhaps a court’s unsigned per curiam opinion). See Brief for Petitioners, *supra* note 25, at 41–42. As discussed earlier, however, this distinction goes to attribution and the Rule 10b-5 element of reliance and says nothing about who, in fact, “makes” the statements in an editorial or in a per curiam opinion. See *supra* text accompanying notes 138–43.

207. OED, *supra* note 1, at 1700.

208. Is a prospectus a “literary” work? Debate on this issue is well beyond the scope of this article, and the topic is probably better left alone.

209. OED, *supra* note 1, at 1700.

210. *Id.* Is a prospectus a “legal” document? Given how few people apparently read it, indubitably. See, e.g., MUTUAL FUND NAV, THE MUTUAL FUND PROSPECTUS—ANYBODY READING THEM?, <http://www.mutualfundnavx.com/the-mutual-fund-prospectus-anybody-reading-them/> (last visited Aug. 19, 2011) (“Some regulators have come to the conclusion that the average ‘mom and pop’ investor has a difficult time even picking up and perusing—much less understanding—the statutorily required hundred-plus-page prospectuses that mutual funds distribute.”).

to be or become (something specified);²¹¹ “[t]o do, perform, accomplish”;²¹² and finally, “[t]o offer, present, render.”²¹³

None of these definitions precludes the possibility of multiple makers, nor does any of them require a single maker. In addition, not one of them limits the term “make” to a person or entity with ultimate authority, control, or final say over the content of the made statement, whether it is communicated, or how it is communicated. Yet all of these potential definitions could easily encompass JCM as a “maker” of the misstatements in the JIF prospectuses.²¹⁴

It is apparent, then, if one accepts the allegations of the complaint, that JCM, at least indirectly, “brought into existence by construction” the JIF prospectus misrepresentations to the effect that the funds would not condone market timing.²¹⁵ Therefore, JCM can be considered the “author” of the misstatements in question.²¹⁶ And, although the Court in the *Janus* case expressed reservations about the theory of the government and respondent that one can be deemed the “maker” of a statement simply by causing that statement to exist,²¹⁷ it is worth noting that the OED expressly

211. OED, *supra* note 1, at 1701.

212. *Id.*

213. *Id.* at 1702.

214. One bone of contention during oral argument in the *Janus* case that was not entirely cleared up was *who*, exactly, actually drafted the prospectuses. *See, e.g.*, Transcript of Oral Argument at 12–13, *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011) (No. 09-525):

JUSTICE GINSBURG: Mr. Perry [Counsel for Petitioners-Appellants, Janus Capital Group, Inc., et al.], you—you said that it was the fund’s lawyers who drafted the prospectus, but, in fact, it was JCM’s lawyers, the lawyers—they were in-house lawyers for JCM. And they served—and they served the funds in doing this prospectus, but they were on the payroll of JCM, and they were JCM’s legal department.

MR. PERRY: Your Honor, like all lawyers, they wear multiple hats. I represent multiple clients. These lawyers represent multiple clients.

JUSTICE GINSBURG: I thought they were in-house lawyers?

MR. PERRY: They are in-house lawyers at JCM, but they also represent the funds, and the SEC has specifically recognized in the context of investment companies that where an adviser counsel is representing the funds, his client or her client, for those purposes, is the funds. And here, these lawyers are very careful to separate who their—their clients are for various purposes.

215. If ‘construction’ is accepted as the equivalent of ‘composition.’

216. *See supra* text accompanying note 206 (discussing the issue of authorship even in the absence of ultimate control.)

217. *Janus*, 131 U.S. at 2303–04 (noting that the Court dismissed this assertion, first, by falling back on the unconvincing and baffling distinction between “to make a chair” and “to make a statement” (*see supra* text accompanying notes 180–93), and second, by essentially retreating, incorrectly, into the reliance rationale illustrated by *Stoneridge*). *But see supra* text accompanying notes 138–43 (explaining that reliance is a separate issue from that of whether defendants actually “made” a misstatement.)

recognizes that very possibility: to “make” is “[t]o cause to be or become.”²¹⁸ JCM can also be said to have “accomplished” the misstatements by drafting the prospectuses and may further have been said to have “offered, presented, or rendered” them as well.²¹⁹ This last definition may fall within the classification of dissemination and distribution, which, according to the petitioners, was an insufficient basis on which to find that someone is a “maker,”²²⁰ but it should be emphasized that the OED definitions are comprehensive and include both the creative and distributive processes as being part of what it means “to make.”²²¹

One can readily see that the dictionary does not limit the words “make” or “maker” to a single person or entity, and certainly not to those who have the power of “ultimate authority” or “control.”²²² Since the Court’s task was to determine the meaning of the word “make” in the SEC prohibition to the effect that it is unlawful “[t]o make an[] untrue statement of material fact . . .,” it is curious that the majority gave such cavalier treatment to what the dictionaries actually say.²²³ Perhaps the Court was simply reluctant to rely on *lay* dictionaries to define what it deemed to be essentially a *legal* term, although the Court in its opinion never expressed any reservations to that effect. In any event, the analysis given in this article would not change if one consulted Black’s Law Dictionary. “Make,” according to that authoritative source, is, among other things, “[t]o cause to exist . . . [t]o form, to fashion, or produce. To do, perform, or execute . . . to prepare and sign²²⁴ . . . to sign, execute, and deliver . . . [t]o

218. OED, *supra* note 1, at 1701.

219. *Id.*

220. *See, e.g.*, Brief for Petitioners, *supra* note 25, at 42–43 (describing dissemination as understood in *Janus*).

221. The Court objected to the government’s definition of ‘make’ as being the functional equivalent of ‘create,’ *Janus*, 131 S. Ct. at 2303. But once again, if one uses an actual definition rather than applying an artificial test designed necessarily to screen out all but one person or entity—namely that person or entity with ‘ultimate authority’ or ‘control’—the verb ‘to create’ can be seen to be fully compatible with the verb ‘to make.’ *See, e.g.*, OED, *supra* note 1, at 1700 (noting that to “make” is “[t]o compose, write as the author . . .”).

222. *Janus*, 131 S. Ct. at 2302.

223. 17 C.F.R. § 240.10b-5(b) (2010). This subsection of the rule also prohibits material omissions, but the plaintiffs in *Janus* did not pursue JCM on an omissions theory, largely because they were the purchasers of JCG stock, not stock in JIF, and JCM owed them no duty with respect to any omissions in the JIF prospectuses for which JCM might have been responsible. Brief for Petitioners, *supra* note 25, at 46. A successful omissions case must be premised on breach of a disclosure duty. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) (noting that “[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5”); *Chiarella v. United States*, 445 U.S. 222, 230 (1980) (adopting a similar rule).

224. This part of the definition might have made JCM squirm, but fortunately the Court never dredged it up to embarrass the petitioners. According to the respondents, JCM prepared the JIF prospectuses, and ‘Janus,’ using the name collectively, apparently signed them. Brief for Respondent, *supra* note 25, at 20, 32–33. It was also the view of the plaintiffs that in the minds of the public the *Janus* entities were virtually indistinguishable.

conclude . . . , as to make a contract”²²⁵ As can be seen, these terms largely mirror the lay definitions of “make” utilized by both parties and the Court. Using them, one can easily conclude that JCM was a “maker” of the JIF misstatements.

The Court thus appears to view the word “make” as a policy gatekeeper, rather than as a term that has definitional significance. There can only be one “maker” in the Court’s monotheistic securities world, and although it must be acknowledged that we are thereby enabled to avoid some of the messy entanglements and petty jealousies that afflict polytheistic mythologies, we thereby do violence to the written law.²²⁶ As perhaps the most scrupulous and astute exponent of the securities laws ever to sit on the high Court has reminded us, one should always start with the language of the statute,²²⁷ and should give it full effect before moving on to other considerations.²²⁸ Had the Court in *Janus* done so, paying conscientious attention to what the word “make” actually means, it would have been forced to recognize that JCM was indeed a “maker,” even if only

See id. at 4, 53. The fungibility of the various *Janus* entities goes well beyond the problem of attribution and addresses squarely the issue confronted (and, in the view of this author, incorrectly decided) by the Court, namely who ‘made’ the misstatements in the various JIF prospectuses.

225. BLACK’S LAW DICTIONARY 861 (5th ed. 1979). The Court might have derived some comfort from the fact that the Eldorado word “authority” does, in fact, appear among the legal definitions of “make,” but it would have then quickly had to realize that it had merely struck a vein of Fool’s Gold: “[t]o have authority [note the absence of the crucial adjective “ultimate”] or influence; to support or sustain; as in the phrase, ‘This precedent makes for the plaintiff.’” *Id.* Of course, most of the Supreme Court’s precedents in the securities law area “make” rather loudly for the defendant, not for the plaintiff. *Janus* is simply the latest addition to the choir.

226. One need merely consult THE ILIAD or THE ORESTEIA to see the disadvantages of belief in multiple makers. *See* HOMER, THE ILIAD (Richmond Lattimore, trans. 1951); AESCHYLUS, THE ORESTEIA (David Grene & Wendy Doniger O’Flaherty, trans. 1989). Both works aptly presage Gloucester’s dismal observation that “[a]s flies to wanton boys are we to the th’ gods / They kill us for their sport.” William Shakespeare, KING LEAR, act 4, sc. 1, ll. 36–37. Yet, even if this is the case with respect to literature and religion, the law need not labor under similar disadvantages.

227. Alternatively, one should start with the rule, as in this case, since the Court chose to base its decision on Rule 10b-5 rather than on Section 10(b).

228. The reference is to Justice Lewis Powell, a successful corporate lawyer with Hunton & Williams in Richmond, Virginia, and one-time president of the American Bar Association. Although considered conservative, Justice Powell would not have elevated other concerns, including policy considerations, over the language of the statute. For a good example of Justice Powell’s close attention to statutory language, *see* John Nuveen & Co. v. Sanders, 450 U.S. 1005, 1008–11 (1981) (Powell, J., dissenting) (noting that Congress used its words with precision, and the term “reasonable care” in Securities Act § 12(a)(2), 15 U.S.C. § 77l(a)(2) (2007), does not mean the same thing as the term “reasonable investigation” in Securities Act § 11(b)(3), 15 U.S.C. § 77k(b)(3) (2007)). Perhaps the same respect for statutory language does not move the Court as much today as it did in the days of Justice Powell.

a co-maker, of the misrepresentations in the JIF prospectuses, rendering it subject to liability as a primary violator of Rule 10b-5 (as long as all the other elements of Rule 10b-5 liability were satisfied). The Court, however, was apparently unwilling to do this, preferring instead to let the tail of policy wag the dog of language. In the process the Court has continued down the path of restricting the implied private right of action under the securities laws to a mere shell of its former self.²²⁹

B. A Side Note on Veil-Piercing

Although the respondents in the *Janus* case did not explicitly seek to pursue liability against JCM on a piercing-the-corporate-veil theory,²³⁰ the Supreme Court refused to extend liability beyond JIF, the (sole) party that the Court deemed to possess ultimate authority and control over the misstatements in the funds' prospectuses, partly out of a belief that to do so would unwarrantably require it to "disregard the corporate form."²³¹ The Court placed great emphasis on the fact that although JCM, as the investment adviser to JIF, exercised "significant influence" over the funds,²³² all "corporate formalities were observed" and JCM and JIF remained "legally separate entities . . ." ²³³ This may be so, yet the respondents convincingly demonstrated that there was substantial overlap among the three *Janus* entities, JCG, JCM and JIF, and significant confusion in the minds of the public as to *who* the actual issuer of the

229. The high-water mark of securities litigation in the Supreme Court can be deemed to extend from the Court's earliest cases, such as *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (adopting the "investment contract" test for what is a security), and *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953) (construing the "private offering" exemption of § 4(2) of the Securities Act, 15 U.S.C. § 77d(2) (2007)), until about the early 1970's, in cases such as *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (holding that Congress in § 10(b) intended to bar securities fraud in face-to-face transactions as well as in the organized marketplace). Beginning shortly after that time—with a few exceptions, such as, for example, *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (showing that allegations of fraud in a registration statement are cognizable under § 10(b), as well as under Securities Act § 11, 15 U.S.C. § 77k); *Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588 (2001) (noting that the sale of an option to buy a security with no intention to honor that option is actionable § 10(b) fraud); and *SEC v. Zandford*, 535 U.S. 813 (2002) (holding that a broker who sells customer securities and then misappropriates the proceeds commits fraud "in connection with" the purchase or sale of a security under § 10(b) and Rule 10b-5)—the Court has mostly read the 1933 and 1934 Acts, particularly Section 10(b) and Rule 10b-5, quite restrictively. The *Janus* case is merely the latest in a long line of cases representing this trend toward retrenchment. See cases cited, *supra* note 3 (illustrating this trend toward retrenchment).

230. Brief for Respondent, *supra* note 25, at 41 n.19.

231. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

232. *Id.*

233. *Id.*

prospectuses really was (an entity vaguely identified simply as “Janus”).²³⁴ Therefore, even if it *is* true that there was respect for the separate entity status of the collective petitioners and that they honored all corporate formalities, these are beside the point, as will next be shown. It is unfortunate that the Court did not recognize this.

It is elementary hornbook law that courts will “pierce the corporate veil” of limited liability and impose liability on another entity or on the individual(s) behind the corporation in order “to prevent fraud or to achieve equity.”²³⁵ It has also been noted that “[t]here are three primary variants within the ‘piercing the corporate veil’ jurisprudence—(1) the ‘instrumentality’ doctrine, (2) the ‘alter ego’ doctrine, and (3) the ‘identity’ doctrine.”²³⁶ The first of these doctrines, the “instrumentality rule,” focuses on three factors: (a) control amounting to complete domination by one business entity or individual over another business entity; (b) the use of such control to perpetrate *fraud* or other wrongdoing; and (c) a showing by the plaintiff that the defendant’s abuse of the corporate form proximately caused the plaintiff injury.²³⁷ The “alter ego” test is generally shortened to two factors: (a) such unity of interest and ownership between the corporate entity and its controlling shareholder(s) that the independent entity status of the corporation has ceased to exist, and (b) a concern that failure by the court to pierce the veil would sanction a *fraud* or lead to inequity.²³⁸ The “identity” theory, a less frequently used approach, is virtually indistinguishable in content and articulation to the “alter ego” doctrine.²³⁹

It should first be noted that in the *Janus* situation the veil-piercing doctrine would not have applied *per se*, given the fact that the entities sought to be pierced, the various Janus funds, were publicly owned by their shareholders and not private or closely held corporations.²⁴⁰ This is presumably one reason why the plaintiffs did not pursue the theory in their attempts to go behind the shield provided by the Janus funds in order to reach JCM. Given this fact, however, it is curious that the Court placed

234. See, e.g., Brief for Respondent, *supra* note 25, at 53; Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 112, at 29 (discussing the issuer of the prospectus).

235. *Walkovszky v. Carlton*, 18 N.Y.2d 414, 417 (1966) (quoting *Int’l Aircraft Trading Co. v. Mfi’s Trust Co.*, 297 N.Y. 285, 292 (1948)).

236. JAMES D. COX & THOMAS L. HAZEN, *BUSINESS ORGANIZATIONS LAW* 127 (3d ed. 2011).

237. *Id.*

238. *Id.* at 127–28.

239. *Id.* at 128. Indeed, as the hornbook authors note, all three approaches to veil-piercing are essentially interchangeable. *Id.*

240. Brief for Petitioners, *supra* note 25, at 3; Brief for Respondent, *supra* note 25, at 3. See also Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991) (stating that “piercing occurs only in close corporations or within corporate groups; it does not occur in public corporations”).

such heavy emphasis on the separate corporate existence of the various Janus entities and their adherence to corporate formalities, which are significant by and large primarily in the veil-piercing context.²⁴¹ These factors are important when courts weigh whether two purportedly separate corporations are in fact a “single economic entity,”²⁴² under some version or another of the instrumentality, alter ego, or identity test.²⁴³ More specifically, these factors are relevant only to show the *degree of control* which one entity has over another (in this case, JCM over JIF), or which an individual (or more than one individual) exercises over an entity. They are totally beside the point given the gravamen of the *Janus* plaintiffs’ complaint, which was based on *fraud*. Fraud constitutes grounds for piercing the corporate veil separate and apart from the control, domination, or “uniquely close relationship” theory which seemed to obsess the Court.²⁴⁴ Where fraud exists, the party whose veil plaintiff seeks to pierce need *not* be controlled or dominated by the person or entity behind the corporate shield, and the Court should have recognized this distinction and given it credence.

It has been cogently noted that “[m]isrepresentation is a familiar and widely used concept in the law Moreover, it is the dominant approach in fact used by the courts in deciding whether to pierce the corporate veil.”²⁴⁵ Although some sources limit application of a misrepresentation or fraud approach to justify veil-piercing to situations where “separate incorporation is misleading to creditors,” driving up the information costs

241. The Court’s somewhat egregious mention of the separate corporate existence and adherence to formalities factors came as a reply to the respondent’s argument that there was a “well-recognized and uniquely close relationship between a mutual fund and its investment adviser.” *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011) (quoting Brief for Respondent, *supra* note 25, at 21). This assertion by the respondent the Court did not deny. And although the Court emphasized that the board of trustees of the funds contained only one member with a connection to JCM, making the board more independent than was required by the two main statutes governing these entities, the Investment Company Act of 1940 and the Investment Advisers Act of 1940 (*see id.* at 2299, 2304), the Court was forced to acknowledge that *all* of the officers of JIF were also officers of JCM. *Id.* at 2299. Since, according to the respondents, the Janus funds had *no* employees of their own (*see* Brief for Respondent, *supra* note 25, at 40), the veil-piercing factors of control and domination would almost certainly have been met had the doctrine applied.

242. *See, e.g.*, *Fletcher v. Atex, Inc.*, 68 F.3d 1451 (2d Cir. 1995) (analyzing the factors to determine separate corporate existences).

243. *See supra* text accompanying notes 236–39.

244. *See supra* note 241 and *Janus*, 131 S. Ct. at 2304 (quoting Brief for Respondent, *supra* note 25, at 21).

245. Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 521 (1976). *See also* Thompson, *supra* note 240, at 1059: “a large segment of the contract cases . . . arise [sic] in situations where the court is concerned with possible misrepresentation, and courts pierce the veil in almost all cases in which they find misrepresentation.” (footnote deleted).

of the creditors, who must incur greater expense “to ascertain the true creditworthiness of the corporations with which they deal,”²⁴⁶ or to situations where there are “misrepresentation[s] as to the corporation’s assets and financial condition, and misrepresentation[s] as to the party responsible for payment,”²⁴⁷ several observations are in order. To begin with, Judge Posner’s concern with the fraudulent nature of misleading separate incorporation clearly applies to the *Janus* situation, if the allegations of the complaint are to be accepted: “the creditor dealing with a group of affiliates in related businesses is more likely to be misled into thinking he is dealing with a single corporation [than would be the case were the affiliates engaged in unrelated businesses].”²⁴⁸ This accurately describes one of the misrepresentation-based problems in *Janus*, which might have justified veil-piercing on the grounds of fraud. The argument is not that JCM controlled or dominated JIF to such an extent that veil-piercing could be had under the alter ego, instrumentality, or identity theory, but rather that the conflation of these three entities (all dubbed “Janus”) in SEC filings and in the mutual fund prospectuses distributed to investors misled the investors into thinking they were dealing with JCM and that it was JCM, not JIF, that “made” the misrepresentations about market timing that ultimately injured the plaintiffs.²⁴⁹ Indeed, one of the plaintiffs’ strongest arguments was that the various Janus entities presented themselves to the public as a unitary bloc and that they were virtually (and fraudulently) indistinguishable.²⁵⁰ If these companies deliberately confused the public about exactly who and what constituted “Janus,” this confusion might well have provided the Court with a reasonable basis on which to pierce the veil.²⁵¹ At the very least, given that veil-piercing is not available

246. Posner, *supra* note 245, at 520.

247. Thompson, *supra* note 240, at 1044 n.53.

248. Posner, *supra* note 245, at 514.

249. It should be borne in mind that problems which the plaintiffs in *Janus* might otherwise have had with the “in connection with” and loss causation requirements of their Section 10(b)/Rule 10b-5 cause of action are beyond the scope of this article. These issues, as well as the reliance-attribution problem touched upon briefly above (*see supra* text accompanying notes 138–43), arise as a result of the fact that the plaintiffs did not purchase any of the mutual funds’ stock, but rather purchased stock only in JCG. Failure to meet some or perhaps all of these other elements might well have proved fatal to the plaintiffs’ case in any event, and it is not here pretended otherwise.

250. Brief for Respondent, *supra* note 25, at 53.

251. One commentator has stated that when it comes to piercing the corporate veil on a fraud theory, “in most cases the misrepresentation is less than that required to recover under common-law fraud (or some codification of that rule of law).” Thompson, *supra* note 240, at 1044 n.53. Although the extent to which securities fraud incorporates or codifies principles of common-law fraud is a subject of some debate (*see, e.g., Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 149 (2008)), certainly common-law fraud principles were a relevant starting point for the 1933 and 1934 Congress that passed the Securities Act and the Securities Exchange Act. *See* LOUIS LOSS ET AL., FUNDAMENTALS OF

in the case of public corporations, as noted earlier,²⁵² such intentionally-created public confusion among entities should have caused the Court to pause before breezily noting that “Janus” respected the separate existence of its constituent entities and observed all required corporate formalities.²⁵³

Yet this is not all. Aside from the issue of whether JCM was responsible, at least in part, for any alleged misrepresentations about the separate corporate existence (or lack thereof) of JCG, JCM, and JIF, there was at least one other significant misrepresentation which, had the Court applied the veil-piercing theory, would potentially have made JCM liable. This resulted from the fact that the plaintiffs, bringing a securities fraud disclosure action, focused their attention on the deficiencies in the prospectuses with respect to market timing. It has been observed that “[o]ne common ground for voiding an agreement²⁵⁴ is fraud. Hence, . . . if the creditor can show that the defendant induced the creditor to do business with the corporation by making misrepresentations,²⁵⁵ this will be grounds to pierce.”²⁵⁶ Gevurtz’s CORPORATION LAW goes on to add that “it has become customary among both courts and commentators to state that fraud provides grounds to pierce.”²⁵⁷ Gevurtz notes that actionable misrepresentations include deceptive statements about a corporation’s financial status and misrepresentations which mislead the plaintiff into believing that someone other than the corporation whose veil the creditor seeks to pierce stands behind the obligation to the plaintiff.²⁵⁸ Additionally,

SECURITIES REGULATION 1251–69 (6th ed. 2011).

252. Thompson, *supra* note 240, at 1039.

253. The element of ‘scienter’ is also beyond the scope of this article, yet a close distillation of the respondent’s brief gives the impression that the confusion created by the defendants’ use of the name ‘Janus’ to refer to all of JCG, JCM, and JIF was deliberate. Brief for Respondent, *supra* note 25, at 20.

254. The courts and commentators distinguish between contract creditors and tort creditors in veil-piercing cases, although the results do not necessarily vary all that much depending on which type of creditor is at issue. *See, e.g.,* COX & HAZEN, *supra* note 236, at 124–25; FRANKLIN A. GEVURTZ, CORPORATION LAW 72–75 (2d ed. 2010). One major difference is in the potential applicability of some sort of plaintiff’s “due diligence” requirement, which would apply to contract creditors but not to tort creditors. *See, e.g.,* Kinney Shoe Corp. v. Polan, 939 F.2d 209, 212–13 (4th Cir. 1991).

255. The veil-piercing doctrine provides a right of action to unpaid creditors of a closely-held corporation, as opposed to the standard remedy available to shareholders of a corporation, namely a suit for breach of fiduciary duty. The fact that the *Janus* case was brought by shareholders—and not even shareholders of the corporations that issued the misleading prospectuses (*see supra* notes 45–50 and accompanying text)—rather than by creditors is, of course, another reason why the plaintiffs did not pursue a veil-piercing action against JIF and JCM.

256. GEVURTZ, *supra* note 254, at 73–74.

257. *Id.* at 82.

258. *Id.* at 82–84. These two types of misrepresentations may be deemed the functional equivalent of the kinds of actionable misrepresentation recognized by Judge Posner and mentioned earlier. *See* Posner, *supra* note 245, at 514, 520–22.

Gevurtz points to a third, important type of misrepresentation that may also lead to veil-piercing: “the possibility of finding fraud in statements made by the defendant in promising corporate performance.”²⁵⁹ In such a situation, since “promises contain within them an implied statement as to the speaker’s present intention with respect to performance. . . . [i]f the speaker never intended to perform, then this implied statement is false.”²⁶⁰ Intriguingly, in what the reader might consider to be a prescient dismissal of the *Janus* Court’s fixation with the separate corporate existence issue, Gevurtz also notes that “the world might be more sensible if attorneys of small corporate clients spent less time urging compliance with corporate formalities, and more time suggesting care and candor in communicating with creditors.”²⁶¹ That candor, of course, includes the obligation not to “make any untrue statement of material fact”²⁶²

The relevance to the *Janus* case is apparent. In making misrepresentations about its commitment to prevent market timing, Janus (including, as discussed above, JCM, the investment adviser to JIF), made an actionable misstatement dealing with corporate performance, namely that it would take adequate steps (i.e., would perform in a certain way in order) to stop market timing by any investors in its funds.²⁶³ Had plaintiffs been allowed to proceed beyond the motion to dismiss stage, they would have been required to show that at the time JCM made the reassuring statements in the prospectuses to the effect that market timing would not be tolerated, it had no intention of following through on the promised performance (namely, stamping out that market timing).²⁶⁴ Plaintiffs could have demonstrated this intention simply by the fact that JCM allowed certain hedge fund clients to engage in market timing in exchange for the hedge funds’ agreement to invest in other funds managed by the adviser.²⁶⁵ Additionally, and this goes to one of the standard methods of proving the Rule 10b-5 element of reliance,²⁶⁶ a fraudulent basis for piercing the corporate veil can be found where the misrepresentations in question “induced the creditor to do business with the corporation.”²⁶⁷ A fair

259. GEVURTZ, *supra* note 254, at 83.

260. *Id.* Again, it should be noted that the Rule 10b-5 element of scienter, the “intent to deceive, manipulate, or defraud” (*see* *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 188 (1976)), is beyond the scope of this article.

261. GEVURTZ, *supra* note 254, at 83.

262. 17 C.F.R. § 240.10b-5(b) (2010).

263. *See supra* text accompanying note 234.

264. Again, this can perhaps be best considered part of the unanalyzed scienter element of Rule 10b-5.

265. *See* Brief for Respondent, *supra* note 25, at 6–7.

266. A full analysis of this element is also beyond the scope of this article, as is anything other than the brief discussion of attribution in the context of reliance given above. *See supra* text accompanying notes 138–43.

267. GEVURTZ, *supra* note 254, at 73–74.

reading of respondent's brief is to the effect that the funds' shareholders were induced, at least to some extent, to make their long-term investment in the funds relying on assurances in the prospectuses that they would not be thereby injured by the presence of short-term market timers whose actions would have deleterious effects on their interests, including dilution, increased management expenses, and the like.²⁶⁸ It is true, as noted above, that this reliance argument is complicated and may ultimately break down because of the fact that the actual plaintiffs purchased JCG stock and did not invest in the funds themselves.²⁶⁹ Yet, had the Janus plaintiffs been allowed to make their case, they might have been able to show that since the value of JCG stock depended primarily on the extent of JCM's profits, generated by management fees, and since those management fees declined sharply when investors in JIF liquidated large amounts of their holdings after the truth about Janus's actual market timing policy became known, they (the plaintiffs) were induced to purchase their JCG stock at least in part because of the misrepresentations about market timing.²⁷⁰ All that is argued here is that the equities for veil-piercing on the grounds of fraud appear to be present. It is apparently easier to show "veil-piercing fraud" than it is to show the elements of common-law fraud or "some codification of" common-law fraud,²⁷¹ such as the federal securities law. Accordingly, the extent of connection between misrepresentations about the Janus funds and the purchase by the plaintiffs of JCG stock, rather than of mutual fund stock, should not stand as an insurmountable barrier to recovery on a veil-piercing theory or some appropriate analogue thereto.

It thus appears that the Supreme Court in *Janus* paid undue deference to the petitioners' position that the Janus entities were separate entities that had adhered to corporate formalities, which led it, unfortunately, to "decline [the respondents'] invitation to disregard the corporate form."²⁷² In so doing, however, the majority focused on the wrong theory. The issue was not whether JCM and JIF constituted a "single economic entity,"²⁷³ or whether veil-piercing or some functional equivalent might have been appropriate on the basis of the "alter ego," "instrumentality," or "identity" rule.²⁷⁴ The whole premise of plaintiff's case was *fraud*—material misrepresentations under the federal securities law.²⁷⁵ Fraud provides a

268. See Brief for Respondent, *supra* note 25, at 6.

269. See *supra* text accompanying notes 45–50.

270. In reality, such an argument would have probably foundered on the attenuation and remoteness problem noted by the court in *Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148, 159 (2008).

271. Thompson, *supra* note 240, at 1044 n.53.

272. *Janus Capital Grp. Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011).

273. See *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1458 (2d Cir. 1995).

274. See *COX & HAZEN*, *supra* note 236, at 127.

275. Material misrepresentations constitute actionable deception (fraud) under the

long-recognized basis for veil-piercing apart from problems of control and domination or the extent of connection between the corporation whose veil is sought to be pierced and the person or entity on whom the plaintiff ultimately wishes to affix liability.²⁷⁶ It is unfortunate that the *Janus* Court failed to perceive the distinction and follow up on the true nature of the plaintiff's claim. But that, of course, might have required the Court to breathe new life into the endangered species known as the implied private right of action under Securities Exchange Act Section 10(b) and SEC Rule 10b-5. And this the Court was obviously unwilling to do.

C. *Who Is a "Maker"?: A Workable Test*

The Supreme Court in *Janus* could have chosen another way, a better way in the opinion of this author, which would have been a combination of a definition of "make" or "maker" and a test. This approach has not been unheard-of, the Court having utilized it at least twice before in the securities field.²⁷⁷ This combination of definition and test would have focused on the "benefit" prong of *Dirks v. SEC* and *Pinter v. Dahl*.²⁷⁸ This would have kept the Court grounded in the actual language used by the SEC, while at the same time allowing the Court to screen out potential "makers" who were too far removed from the (mis)statements that were made.

In the *Dirks* decision, the Court considered the potential liability of a tippee of an insider.²⁷⁹ The insider did not trade on the basis of, or obtain a personal benefit from the use of, the inside information which he imparted to the tippee, and neither did the tippee, Raymond Dirks.²⁸⁰ Rather, Dirks shared nonpublic negative information about the insider's former company, Equity Funding of America, with his brokerage clients, who then sold their Equity Funding stock prior to public disclosure of the fraud, thereby avoiding substantial losses.²⁸¹ The Supreme Court was apparently concerned about the SEC's overzealousness in bringing an enforcement action against a party that had not traded and that had acquired the nonpublic information from an insider who also had not traded. The Court

holding of *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474 (1977). See *supra* note 163.

276. See, e.g., *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1451 (N.D. Ill. 1991): "if the other party or persons associated with it, deceive you into thinking that you are dealing with a substantial enterprise, and not a mere shell, then the fiction of separate corporate existence does become an engine of fraud, and you can pierce the veil . . . fraud is independently actionable."

277. See *Pinter v. Dahl*, 486 U.S. 622 (1988); *Dirks v. SEC*, 463 U.S. 646 (1983).

278. *Id.*

279. *Dirks*, 463 U.S. at 646.

280. *Id.* at 666-67 n. 27.

281. *Id.* at 649.

reached a reasonable accommodation given these unusual facts, holding that a tippee will not be liable unless “the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.”²⁸² More importantly for present purposes, the Court held that to show a breach of duty by a non-trading insider, “the test is whether the insider personally will benefit, directly or indirectly,²⁸³ from his disclosure.”²⁸⁴

Pinter also involved the element of “benefit.” This case is perhaps more on point than *Dirks* because the justices in *Pinter* had to consider one of the definitions sections of the 1933 Securities Act. In this later Supreme Court decision, purchasers of unregistered oil and gas interests, including Dahl, sued the seller (*Pinter*) for violations of Section 12 of the 1933 Act when their investment turned out to be unsuccessful.²⁸⁵ The defendant counterclaimed against Dahl, arguing that Dahl could be considered a “seller” under Section 12(a)(1), along with *Pinter*, because he had helped line up the other purchasers and had also helped them negotiate the purchase of their interests from *Pinter*.²⁸⁶ Dahl, in the defendant’s mind, had thereby “induced *Pinter* to sell and deliver the securities.”²⁸⁷ The Supreme Court was thus called upon to determine the meaning of the word “seller” and construe its potential application to Dahl.

The Court rested its analysis partly on statutory language and partly on a benefit test. After pointing out that Section 2(a)(3) of the Securities Act defines the terms “sale,” “sell,” and “offer,” among others, to include “every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value,”²⁸⁸ the Court held that the term “seller” includes not only those who pass title to a security, but also those who “solicit” a purchaser on behalf of the person who passes title.²⁸⁹ Yet

282. *Id.* at 660 (footnote deleted).

283. The *Dirks* case was decided by Justice Powell, a man not afraid to give meaning to the word “indirectly” when necessary. By “indirect” benefit in this context, the *Dirks* Court suggested “a gift of confidential information to a trading relative or friend.” *Id.* at 664. A kickback from the actual trader to the insider, by contrast, might be considered a “direct” benefit.

284. *Id.* at 662.

285. *Pinter v. Dahl*, 486 U.S. 622, 626 (1988); see also 15 U.S.C. § 771(a)(1) (2007). Section 12(a)(1) provides in relevant part that “[a]ny person who . . . offers or sells a security in violation of Section 5 . . . shall be liable . . . to the person purchasing such security from him.” *Id.* Section 12 allows for rescission if a defendant “offers or sells a security in violation of Section 5” of the 1933 Act, the registration provision. *Id.*; see also 15 U.S.C. § 77(e) (2007).

286. *Id.* at 628.

287. *Id.* *Pinter* also asserted a claim against Dahl for *in pari delicto*, which is irrelevant for present purposes. See *id.* at n.6.

288. 15 U.S.C. § 77b(a)(3) (2007).

289. *Pinter*, 486 U.S. at 646.

the Court was concerned about an overly expansive definition of “seller” or “solicitor,” and so it crafted a limitation on those terms which is highly pertinent to the *Janus* situation: “Congress did not intend to impose rescission based on strict liability [under Section 12(a)(1)] on a person who urges the purchase but whose motivation is solely to benefit the buyer.”²⁹⁰ As in *Dirks*, benefit was the key: “[t]he language and purpose of § 12[(a)](1) suggest that liability extends only to the person who successfully solicits the purchase, *motivated at least in part by a desire to serve his own financial interests or those of the securities owner.*”²⁹¹ Only such a person could be deemed, beyond the person who actually passes title, to be a Section 12(a)(1) “seller.” The Court remanded the case so that the lower courts could determine whether “Dahl had the kind of interest in the sales that make him liable as a statutory seller . . . ,”²⁹² i.e., whether he was motivated, at least in part, to *benefit* himself or Pinter.

These two cases suggest a reasonable, workable test for who can be deemed a “maker” of a misstatement or omission under Rule 10b-5(b), a test which nicely reflects the realities of the *Janus* situation. A “maker” would include not merely the actual person who issues the false statements (in this case JIF, who can be likened to the person who actually passed title in *Pinter*, namely Pinter himself), but also any other related²⁹³ party who, *motivated at least in part by a desire to serve his own financial interests*, was in a position to promote or influence the creation and distribution of the misleading statements. Under this test, JCM, and perhaps JCG as well, would be liable for violations of Rule 10b-5 arising out of the misstatements about market timing that appeared in the JIF prospectuses. As noted earlier,²⁹⁴ JCM had everything to gain from making sure that long-term investors in JIF never learned the truth about the market timing advantages conferred on the short-term traders, the hedge fund investors in JIF and in other funds managed by JCM,²⁹⁵ and everything to lose from

290. *Id.* at 647.

291. *Id.* (emphasis added). The Court earlier framed one of the issues it had to decide as being “whether one must intend to confer a benefit on himself or on a third party in order to qualify as a seller within the meaning of § 12[(a)](1).” *Id.* at 625. The Court answered this question in the affirmative.

292. *Id.* at 654.

293. By “related,” in this context, this author means any other party who, by virtue of its connection to the party that actually makes the misstatements in question, is in a position to control or influence the creation, drafting, issuance, and/or dissemination of those misstatements. This limiting principle should, but probably will not, satisfy the current Supreme Court.

294. *See supra* text accompanying note 33 (pointing out that when the truth did come out, the assets under management by JCM declined by \$14 billion).

295. *See* Brief for Respondent, *supra* note 25, at 1, 5–6 (explaining that JCM told investors its mutual funds would not allow market-timing in order to induce greater long-term investment, but at the same time allowed select hedge fund investors to engage in

disclosure of the truth. The amount of JCM's advisory fees depended on how much money it had under management. According to the complaint, when the actual facts about JIF's market timing policies became known and there was a run on the JIF funds, JCM's income plummeted.²⁹⁶ It is hard to imagine a clearer example than this of a party who is motivated to hide material facts out of a concern for its own financial interests and welfare. Furthermore, under this suggested new test, it is clear that JCM, based on the close relationship it had with JIF and the extent of control it exercised over JIF as its investment advisor,²⁹⁷ was in an ideal position to influence the creation, content, and dissemination of the misstatements in question. Lest this be seen, however, as a simple rephrasing of the Supreme Court's "ultimate authority" test and considered as this author's mere disagreement with the Court as to who possessed that "ultimate authority," it should be stressed that the critical element in the proposed test that was totally lacking in the *Janus* analysis is the focus on the *benefit* derived by JCM from JIF's misstatements.²⁹⁸ The emphasis is not on the fact of "ultimate authority"; it is rather on the fact that, in order to hold an allegedly behind-the-scenes party like JCM, Dahl, or Secrist²⁹⁹ liable for violations committed in the first instance by someone else, and still preserve the distinction between primary and aiding-and-abetting liability after *Central Bank*, the Court should consider both the reasons why that behind-the-scenes party might have wanted to conceal the truth and also that party's power and ability to keep the truth hidden. When the problem is looked at in this light, it is clear that JCM was at least one of the "makers" of the misstatements in the JIF prospectuses. And as such, JCM should have been

market-timing at the expense of long-term investors in order to collect more in management and advisory fees).

296. *Id.* at 1.

297. *Id.* at 10.

298. This "motivational benefit" is not the same thing as the scienter element of Rule 10b-5, which would be subject to the heightened pleading standards of the PSLRA. The level of proof necessary to show that the "maker," here JCM, was motivated to keep its revenues artificially inflated by concealing the truth about JIF's market timing policies is not as high as what the plaintiffs would have to show in order to survive a motion to dismiss for failure to adequately plead scienter. See Securities Exchange Act of 1934 § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2) (2007) ("In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."). In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007), the Court construed the "strong inference" standard of the PSLRA to require, in a Section 10(b)/Rule 10b-5 action, the following: "A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." (footnote omitted).

299. The non-trading insider in *Dirks*.

held liable under Rule 10b-5.

IV. CONCLUSION

If the implied private right of action under Securities Exchange Act Section 10(b) and SEC Rule 10b-5 were a low-lying island,³⁰⁰ then securities plaintiffs would probably feel a lot like those who are helplessly watching the sea level rise around them as a result of global warming. Little by little the Supreme Court has chipped away at this well-recognized right, once the staunchest bulwark of defrauded plaintiffs against “[t]he evil that men do”³⁰¹ Perhaps soon the right will no longer be able to keep its head above water as the tide of high Court cases restricting it (and lower court cases following in the Supreme Court’s footsteps³⁰²) rushes over it.

300. “No man is an island,” according to John Donne. *See Devotions upon Emergent Occasions, Meditation XVII*, in JOHN DONNE, *THE WORKS OF JOHN DONNE* 574–75 (1839). This is the same essay that gave us the equally famous expression, “[f]or whom the bell [actually *this* bell] tolls” *Id.*

301. Which, in the words of the dramatist, “lives after them.” WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2, l. 75. The good, as we know, ends up in an ossuary. *Id.* at act 3, sc. 2, l. 76.

302. Cases construing the meaning and scope of *Janus* have quickly followed on the heels of the Supreme Court’s opinion. Representative early decisions include, *inter alia*, the following: *In re Merck & Co., Inc. Sec., Derivative and “ERISA” Litig.*, 2011 WL 3444199 (D.N.J. Aug. 8, 2011) (distinguishing *Janus* and holding Merck’s Executive Vice President for Science and Technology and President of Merck Research Laboratories liable for violating Rule 10b-5 for product safety misrepresentations about Vioxx, partially on the grounds that, whereas in *Janus* the plaintiff had tried to hold one legal entity (JCM) liable for misrepresentations made by an entirely separate legal entity (JIF), here the plaintiff was simply attempting to hold liable a corporate *officer* of one entity only). The court in *Merck* stated that the corporate official actually “made” the misrepresentations in question, since:

[A]t the time of each attributed statement [he was] an officer of Merck. He signed SEC forms and was quoted in articles and reports in his capacity as Merck’s Executive Vice President for Science and Technology and President of Merck Research Laboratories. He made the statements pursuant to his responsibility and authority to act as an agent of Merck.

Id. at *25. The court decided, given these facts, that liability did not depend on whether the corporate official had “ultimate authority” over the statements at issue. *Id.*; *In re Textron, Inc., S’holder Derivative Litig.*, 2011 WL 4079085, at *6 (D.R.I. Sept. 13, 2011) (where only one director made allegedly misleading statements concerning the corporation’s backlog, he was “the only Director Defendant who can be held directly liable as a maker of the statements under Section 10(b)” (*citing Janus*); the court did not discuss the “ultimate authority” issue, perhaps because the main focus of the case was on whether pre-filing demand was excused under *Aronson* and *Rales*, the court concluding that demand was *not* excused because of the unlikelihood that the other directors would face any § 10(b) liability).

Other cases have considered the “ultimate authority” or “control” issue to be critical, however. *See Hawaii Ironworkers Annuity Trust Fund v. Cole*, 2011 WL 3862206 (N.D. Ohio Sept. 1, 2011) (absolving defendant lower-level corporate officials, in the wake

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The *Janus* case is simply the most recent wave to hit the eroding shoreline. Surely there will be more.

This article has taken the position that the Court in *Janus* turned statutory analysis on its head in its determination to deny the plaintiff a remedy at all costs. The Court's willful slighting of the actual meaning of the word "make," and its activist substitution of an artificial test of "ultimate authority" or "control" for a reasonable definition of the word, without any precedent to back up its approach, were unfounded measures which the facts did not justify. Furthermore, the Court missed an opportunity to make clear to the securities industry that merely taking the requisite formal steps to establish and maintain separate entity status will not, and should not, protect those who are bent on defrauding others by their involvement in the "making" of material misstatements or omissions connected to a securities sale. Finally, the article suggested a new test to decide who "makes" a misstatement, one that is based on the benefit analysis of the Court's own earlier *Dirks* and *Pinter* opinions. It is unlikely that this new test will move the Supreme Court, however. For as long as at least five of the current justices remain ready, willing, and able, not to say eager, to slice off bigger and bigger chunks of the little remaining land shoring up the hapless securities plaintiff, without much if any prodding needed on the part of the defendants' bar, the implied private right of action under Section 10(b) and Rule 10b-5 will be threatened with eventual submersion. Let's hope the plaintiff, whoever she is, knows how to swim.

of *Janus*, largely on the grounds that these defendants had acted at the directive of management senior to them and had no discretion to refuse to engage in the production of misleading forecasts as to the corporation's financial condition). As a result, the court held that "[t]he complaint does not state a claim for primary liability under *Janus*, because the defendants did not have ultimate authority over the content of the statement." *Id.* at *5. *Accord*, Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 2011 U.S. Dist. LEXIS 93873, at *3 (N.D. Ala. Aug. 23, 2011) (deeming defendants the "makers" of misstatements in Sarbanes-Oxley Act certifications accompanying the corporation's SEC filings because they were "in ultimate authority over their statements").