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Maker's Mark: *Janus* and Who "Makes" a Statement Under Rule 10b-5

Angelo Guisado*

I. INTRODUCTION

On June 13, 2011, in a 5–4 decision, the Supreme Court swiftly constricted the already narrow right for private individuals to bring claims under § 10(b) of the Securities Exchange Act of 1934 (the Exchange Act).¹ *Janus Capital Group, Inc. v. First Derivative Traders*, a third decision establishing the boundaries of the § 10(b) implied private right of action,² further clarified the role that ancillary individuals or entities would play in securities litigation.³

Pursuant to the Exchange Act, the Securities and Exchange Commission (SEC) promulgated Rule 10b-5,⁴ which delineates the forbidden conduct contained within § 10(b).⁵ In relevant portion, and to be addressed in further detail below, Rule 10b-5 forbids anyone “[t]o *make* any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading.”⁶ In *Janus*, the Court addressed in what circumstances auxiliary corporate actors may be liable under § 10(b) for making allegedly untrue or misleading statements.⁷ The Court drew a bright line between “secondary actors”—those who assisted in making the statement—and “primary actors”—those who can be easily characterized as having made the statement.⁸ The Court held that an actor is liable only if the actor actually made the statement at issue and articu-

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

2. See generally *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (evaluating the liability of vendors and customers under § 10(b)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (holding that private plaintiffs may not maintain an aiding and abetting suit under § 10(b)).

3. See *Janus*, 131 S. Ct. at 2303.

4. 17 C.F.R. § 240.10b-5 (2012).

5. 15 U.S.C. § 78j(b) (2006).

6. 17 C.F.R. § 240.10b-5 (emphasis added).

7. See *Janus*, 131 S. Ct. at 2302.

8. *Id.* at 2302–03.

lated that a statement's maker "is the person or entity with *ultimate authority over the statement*, including its content and whether and how to communicate it."⁹

In light of *Janus*, this Article will examine various subsequent cases that have grappled with establishing exactly who has ultimate authority over the statement. Part II will briefly articulate the relevant statutory law on which the decision was based, as well as the relevant preceding case law. Notably, the section will examine "attribution," which is both the key inquiry in discerning between primary and secondary liability under the Exchange Act and the legal principle behind holding secondary actors liable for misstatements and omissions under Rule 10b-5. Part II will first introduce the Fourth Circuit's decision, as well as the specific actors, issues, and circumstances of its opinion. It will then go into detail as to why the Supreme Court overturned the Fourth Circuit, paying particular attention to Justice Thomas's deference to prior case law, semantic reasoning, and general failure to be persuaded by a vocal dissent. Part III examines *Janus*'s impact by scanning subsequent case law. Notably, other cases have usually yielded consistent results in assessing the circumstances in which corporate officers and related corporate entities may be liable for statements made on behalf of a corporation. The part will also address and distinguish the decision's impact on SEC enforcement actions. This Article concludes with select critiques of the *Janus* decision and argues deference to corporate fraud in general.

II. AN OVERVIEW OF STATUTORY LIABILITY UNDER § 10(b) AND *JANUS*

A. *Statutory Liability*

Janus involved alleged misstatements in a prospectus disseminated on behalf of a group of mutual funds (the Funds) pertaining to market timing practices.¹⁰ First Derivative Traders (First Derivative), shareholders of Janus Capital Group (JCG) stock, filed a class action against both JCG and Janus Capital Management (JCM), alleging that JCG and JCM manipulated the Funds through the use of said market timing transactions, in which a fund broker manipulates variances in fund pricing due to gaps in time-zone differences between foreign and domestic markets.¹¹ The issue was whether JCM, the Funds' mutual

9. *Id.* at 2302 (emphasis added).

10. *See id.* at 2300.

11. *See In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 116–17 (4th Cir. 2009), *rev'd sub nom. Janus*, 131 S. Ct. 2296; *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 210–11 (4th Cir. 2008).

fund adviser, could be liable for its parent's—JCG's—dissemination of the prospectuses, which articulated a priority to forbid market timing.¹²

JCG and JCM issued prospectuses on behalf of the Funds, making them available to the investing public through a website.¹³ First Derivative alleged that through this procedure, the entities communicated the misleading impression that JCG and JCM would implement measures to curb market timing.¹⁴ However, no such measures were taken.¹⁵ Accordingly, had the truth been known, the Funds would have been less attractive to investors, and consequently, JCG would have realized lower revenues, depreciating JCG's share value.¹⁶

First Derivative contended that JCG and JCM “materially misled the investing public” and brought an action under § 10(b).¹⁷ The Exchange Act provides, in relevant part, that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.¹⁸

The SEC, pursuant to § 10(b), promulgated Rule 10b-5, which makes it unlawful “[t]o *make* any untrue statement . . . in connection with the purchase or sale of any security.”¹⁹ Although the text of the Exchange Act does not provide the right to bring a private cause of action—such that First Derivative could bring its class action—“the Court has found a right of action implied in the words of the statute and its implementing regulation.”²⁰

Unfortunately, First Derivative might have been doomed from the start. Permeating the *Janus* decision was the Supreme Court's hesitance to expand the implied private right of action in limiting the actors against whom plaintiffs may bring claims.²¹ In *Stoneridge*

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

13. *Id.* at 116.

14. *Id.* at 121.

15. *See id.*

16. *See id.*

17. *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301 (2011) (internal quotation marks omitted).

18. 15 U.S.C. § 78j(b) (2006).

19. 17 C.F.R. § 240.10b-5(b) (2012) (emphasis added).

20. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

21. *See id.* (noting that the Court did not extend the implied right in *Central Bank*). Further, “[t]he history of the § 10(b) private right and the careful approach the Court has taken before

Investment Partners, LLC v. Scientific-Atlanta, Inc., the Court observed that the “§ 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes,” and “it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.”²² The Court held that “[t]he decision to extend the cause of action is for Congress,” and “[t]hrough it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.”²³ Indeed, as evidence of its deference, the Court has noted that “Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud”²⁴ and that Congress and the SEC did not enact “§ 10(b) and Rule 10b-5 to cover the corporate universe.”²⁵

In *Stoneridge*, the Court articulated the six elements of a private cause of action under § 10(b): “(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.”²⁶ Earlier, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Court held that a defendant cannot be liable absent a “showing that the plaintiff *relied* upon the [defendant’s] statements or actions.”²⁷ It found that reliance is essential to ensuring that the “requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury” exists.²⁸ In *Stoneridge*, the Court found a “rebuttable presumption of reliance” in two different circumstances.²⁹ First, reliance exists if there is an omission of a material fact by one with a duty to disclose, whereby no specific proof of reliance is necessary, and second, relevant to this discussion, under the fraud-on-the-market doctrine,³⁰ reliance is pre-

proceeding without congressional direction provide further reasons to find no liability here.” *Id.* at 164; *see also* *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1085 (1991) (“[T]he breadth of the [private] right once recognized should not, as a general matter, grow beyond the scope congressionally intended.”).

22. *Stoneridge*, 552 U.S. at 164.

23. *Id.* at 165.

24. *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982).

25. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479–80 (1977) (quoting William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663, 700 (1974)) (internal quotation marks omitted).

26. *Stoneridge*, 552 U.S. at 157 (emphasis added).

27. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994) (emphasis added).

28. *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988).

29. *Stoneridge*, 552 U.S. at 159.

30. The fraud-on-the-market doctrine allows a claimant to bring a claim for fraud if it proves the alleged fraudulent statement affected the market as a whole. *See, e.g., id.* at 171.

sumed when alleged statements at issue become known to the public.³¹

Plaintiffs may struggle to establish reliance when ancillary actors operating behind the scenes are ultimately responsible for the misconduct.³² One scholar noted that “[a]s we move down the corporate hierarchy, attribution typically disappears, and so the case for declaring the deceptive actions of, say, a [secondary actor] to be a violation of Rule 10b-5 gets harder.”³³ For the first time in 1994, the Court addressed the scope of Rule 10b-5 and whether it reached such secondary actors.³⁴ Foreshadowing its judicial deference, the Court in *Central Bank* heeded that delineating the appropriate bounds of a § 10(b) claim “has posed difficulty because Congress did not create a private § 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme.”³⁵

In *Central Bank*, the Court examined whether a bank may be “secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud” when it assisted a bond issuer in making false statements.³⁶ In examining the bank’s § 10(b) liability, the Court first determined that the bank’s conduct³⁷ did not amount to actually making the false statements, but rather was no more than merely aiding and abetting the fraud.³⁸ The Court ruled that establishing public reliance on mere aiding and abetting would be extremely difficult.³⁹ The Court surmised that “[w]ere we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor’s statements or actions.”⁴⁰ Emphatically, the Court held that “Congress knew how to impose aiding and abetting liability when it chose to do so,” and if

31. *Id.* at 159.

32. See, e.g., *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011); *Stoneridge*, 552 U.S. 148; *Cent. Bank*, 511 U.S. 164.

33. Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence* 17 (Georgetown Pub. Law & Legal Theory Research Paper No. 12-019, 2012), available at http://scholarship.law.georgetown.edu/fwps_papers/162.

34. *Cent. Bank*, 511 U.S. at 169–70.

35. *Id.* at 173.

36. *Id.* at 166–67, 191 (internal quotation marks omitted).

37. The bank acted as an indenture trustee to a bond issuer, and through its position, the bank assisted a securities issuer in making false statements. *Id.* at 167.

38. *Id.* at 180.

39. This follows logically: a secondary actor’s mere assistance in conducting fraud could be well-shielded or discreetly performed, leaving the investor none the wiser as to the behind-the-scenes conduct.

40. *Cent. Bank*, 511 U.S. at 180.

“Congress intended to impose aiding and abetting liability, we presume it would have used the words aid and abet.”⁴¹

Despite holding that § 10(b) liability does not extend to aiders and abettors, the Court acknowledged that secondary actors, provided the right type of conduct, can still be held primarily liable for their actions.⁴² Assuming all of the other requirements are met, a secondary actor such as “a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies” may be liable under § 10(b).⁴³ The Court reasoned as such by observing the likelihood that multiple violators would participate in schemes to defraud in collusion with another, as opposed to acting alone.⁴⁴

The Court revisited the issue of secondary actor liability in *Stoneridge*, where respondents Scientific-Atlanta and Motorola were alleged to have participated in misconduct arising from, *inter alia*, Charter Communications’s fraudulent revenue reporting practices.⁴⁵ In finding that the respondents were not liable under § 10(b), the Court emphasized that “[r]espondents had no role in *preparing or disseminating* Charter’s financial statements,” but rather alleged only that they “knew or were in reckless disregard of Charter’s intention to use the transactions to inflate its revenues.”⁴⁶ Where respondents were only “acting in concert with Charter,” the Court, impliedly harkening back to *Central Bank*, found that “investors cannot be said to have *relied upon* any of respondents’ deceptive acts.”⁴⁷

B. Attribution

In light of *Central Bank*, courts increasingly required concrete evidence that secondary actors were directly responsible for the statements at issue.⁴⁸ Indeed, “[i]f *Central Bank* is to have any real meaning, a defendant *must actually make* a false or misleading state-

41. *Id.* at 176–77 (internal quotation marks omitted).

42. *See id.* at 191.

43. *Id.* (assuming that the secondary actors met all other requirements for liability).

44. *See id.* (noting that respondent named four violators in its complaint).

45. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 155 (2008).

46. *Id.* at 155, 166–67 (emphasis added).

47. *Id.* at 166–67 (emphasis added).

48. *See, e.g., Affco Invs. 2001, LLC v. Proskauer Rose, LLP*, 625 F.3d 185, 194 (5th Cir. 2010) (requiring explicit attribution to show reliance under § 10(b)); *Ziembra v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1206–07 (11th Cir. 2001) (outlining factors that require an actor to disclose information or otherwise become liable). *See generally* *Wright v. Ernst & Young LLP*, 152 F.3d 169 (2d Cir. 1998). *But see* *U.S. SEC v. Carter*, No. 10 C 6145, 2011 WL 5980966, at *2 (N.D. Ill. Nov. 28, 2011) (using the *Janus* theory of ultimate authority to deny defendant’s motion to dismiss a § 10(b) claim).

ment in order to be held liable under Section 10(b)."⁴⁹ Harkening back to *Central Bank*, regardless of the level of assistance, anything short of actually making the statement was held to be aiding and abetting, and is insufficient for § 10(b) liability.⁵⁰

One way courts have found that ancillary actors make fraudulent statements in fraud-on-the-market cases is by finding that investors would have relied on the statements through what is known as attribution.⁵¹ In such a case, the plaintiff must prove that interested public investors would attribute the allegedly misleading statement to the secondary actor.⁵² Inversely, "a secondary actor cannot incur primary liability under [Rule 10b-5] for a statement *not attributed* to that actor at the time of its dissemination."⁵³

Preceding the *Janus* decision, a circuit split existed over the degree of attribution necessary to satisfy the reliance requirement.⁵⁴ The Second, Fifth, and Eleventh Circuits adopted a bright-line attribution rule, finding that § 10(b) applies only to statements that were publicly attributable to the secondary actor that made the statement.⁵⁵ The Ninth Circuit, however, circumscribed that substantial participation or significant involvement in preparing the statement would be sufficient to give rise to § 10(b) liability.⁵⁶ The key inquiry—relevant to the Supreme Court's analysis—was whether the secondary actor's conduct, participation, or involvement in the fraud would signal to "interested investors . . . that the defendant was responsible for the statement at

49. *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) (emphasis added) (quoting *In re MTC Elec. Techs. S'holders Litig.*, 898 F. Supp. 974, 987 (E.D.N.Y. 1995)).

50. *Shapiro*, 123 F.3d at 720.

51. *See Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011); *Shapiro*, 123 F.3d at 720.

52. *See, e.g., In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 122 (4th Cir. 2009).

53. *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 153 (2d Cir. 2010) (emphasis added) (quoting *Wright*, 152 F.3d at 175) (internal quotation marks omitted).

54. *See infra* notes 55–58 and accompanying text.

55. *See, e.g., Affco Invs. 2001, LLC v. Proskauer Rose, LLP*, 625 F.3d 185, 195 (5th Cir. 2010); *Ziamba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1206–07, 1211–12 (11th Cir. 2001); *Wright*, 152 F.3d at 178.

56. *See, e.g., Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 & n.5 (9th Cir. 2000); *Dannenberg v. Painewebber, Inc. (In re Software Toolworks Inc. Sec. Litig.)*, 50 F.3d 615, 628–29 (9th Cir. 1994).

the time it was made.”⁵⁷ “Thus, a defendant must know or should know that his representation would be communicated to investors.”⁵⁸

1. Bright-Line Attribution

In *In re Global Crossing*, the class alleged that Arthur Andersen (Andersen) had prepared, directed, controlled, and helped create or materially assisted in preparing false statements.⁵⁹ In examining whether the public would attribute the statement to Andersen, the Southern District of New York observed that “in order for liability to attach to a defendant, the misrepresentation had to be attributed to that specific actor at the time of public dissemination, that is, in advance of the investment decision.”⁶⁰ Thus, the Court refocused its inquiry by citing to *In re Lernout & Hauspie*—a Massachusetts decision that allowed certain claims to survive a motion to dismiss on grounds that the plaintiffs had alleged that the KPMG affiliate had actually made the false statements through its active role in preparing them.⁶¹ The court in *In re Global Crossing* found that the plaintiffs had pled sufficient reliance to a significant portion of Andersen’s conduct because “Andersen can be held liable only for the statements it is alleged to have *made*” and not those in which it merely assisted or participated.⁶²

This decision contravened a recent Second Circuit decision, *In re Scholastic Corp.*, which held that “[a] defendant *may* be held liable for fraudulent statements under Section 10(b) where a plaintiff alleges sufficient facts that demonstrate that a defendant was personally responsible for making those statements, even if he or she *is not identi-*

57. See *In re Mut. Funds Inv. Litig.*, 566 F.3d at 124; accord *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 330 (S.D.N.Y. 2004) (“Thus, in order for a defendant to be held liable for a claim brought under Rule 10b-5, a plaintiff must allege that that defendant made a false or misleading statement or omission that was attributed to him or her, or that s/he participated in [a] fraudulent scheme or other activity proscribed by the securities laws.” (quoting *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 111 (2d Cir. 1998)) (internal quotations omitted)).

58. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 122 (quoting *Wright*, 152 F.3d at 175) (internal quotation marks omitted).

59. See *In re Global Crossing*, 322 F. Supp. 2d at 331.

60. *Id.* (quoting *Wright*, 152 F.3d at 175) (internal quotation marks omitted).

61. *Id.* (citing *Filler v. Lernout (In re Lernout & Hauspie Sec. Litig.)*, 230 F. Supp. 2d 152, 166–68 (D. Mass. 2002)).

62. *Id.* at 335. The Second Circuit has additionally held that plaintiffs may adequately plead reliance against corporate officers for statements appearing in analyst reports not directly attributed to the officers. *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000) (noting that in § 10(b) litigation a corporation and its officers could be liable for misleading information appearing in analyst reports when the corporation and its officers either intentionally fostered a mistaken belief concerning a material fact, or adopted or placed their imprimatur on the reports).

fied as the speaker."⁶³ Arguably, this decision was further from both *Janus* and the bright-line attribution test.⁶⁴ However, deferring to the Supreme Court's rationale in *Central Bank*, the court in *In re Global Crossing* found that Andersen would be liable only for the statements it directly made.⁶⁵

Likewise, in *Affco Investments, 2001 LLC v. Proskauer Rose, LLP*, the Fifth Circuit affirmed the need to establish a bright-line direct attribution test.⁶⁶ In that case, the plaintiffs had invested in a KPMG-architected tax avoidance structure.⁶⁷ The defendant, Proskauer, worked privately with KPMG and other defendants behind the scenes to prepare opinions and analyses reaffirming the legality and validity of the structure.⁶⁸ Affco invested in the tax structure, despite never having neither seen or heard of any Proskauer work on the deal nor been aware that Proskauer was directly responsible for the scheme.⁶⁹ As such, the court found that, "[w]ithout direct attribution to Proskauer of its role in the tax scheme, reliance on Proskauer's participation in the scheme [was] too indirect for liability."⁷⁰

2. Substantial Participation Test

The Ninth Circuit, however, took a less direct approach to secondary actor liability under § 10(b).⁷¹ In *In re Software Toolworks Inc.*, the court weighed § 10(b) claims against Deloitte, acting as auditor for Toolworks.⁷² Deloitte participated in drafting two letters that Toolworks sent to the SEC, which investors alleged to have falsely stated Toolworks's financial data and misled the SEC as to the existence of certain contracts.⁷³ The court held that Deloitte's substantial partici-

63. *In re Global Crossing*, 322 F. Supp. 2d at 331 (emphasis added) (discussing the *In re Scholastic Corp. Securities Litigation* decision, in which the court found the vice president of a corporation "primarily responsible for communications . . . [in which he was] involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements" (quoting *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001)) (internal quotation marks omitted)).

64. See *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011); see also *supra* note 55 and accompanying text.

65. *In re Global Crossing*, 322 F. Supp. 2d at 335.

66. See *Affco Invs. 2001, LLC v. Proskauer Rose, LLP*, 625 F.3d 185, 195–96 (5th Cir. 2010).

67. *Id.* at 187–88.

68. *Id.* at 188.

69. *Id.* at 188, 195.

70. *Id.* at 192; *accord Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 156 (2d Cir. 2010).

71. See, e.g., *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 & n.5 (9th Cir. 2000); *Dannenberg v. Painewebber Inc. (In re Software Toolworks Inc. Sec. Litig.)*, 50 F.3d 615, 628–29 (9th Cir. 1994).

72. *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d at 628–29.

73. *Id.* at 628.

pation and intricate involvement in the preparation of fraudulent statements were grounds for primary liability, even though that participation might not necessarily mean that Deloitte made the statements.⁷⁴

III. ANALYSIS OF *JANUS CAPITAL GROUP, INC. V. FIRST DERIVATIVE TRADERS*

A. *The Fourth Circuit Decision*

In light of *Central Bank*, *Stoneridge*, and significant other case law on the subject, the Fourth Circuit addressed where and how to draw the line between a primary actor—one who clearly makes the false statement—and a secondary actor—one who did not technically make the statement but whose participation might have been so vital as to satisfy the attribution standard.⁷⁵ The key inquiry was whether the secondary actors may be held primarily liable.⁷⁶ The court observed that even the courts that adopted the direct attribution test “concluded that in certain circumstances auditors and corporate officers may be responsible for statements issued by the corporation or analysts that were not directly attributed to the auditors or officers.”⁷⁷

By weighing JCM’s duties as investment adviser to the Funds, the Fourth Circuit had to determine whether “interested investors would have inferred that either or both defendants *played a substantial role in drafting or approving* the allegedly misleading prospectuses” based on JCG’s role as an asset management firm and parent of JCM.⁷⁸ While the prospectuses did not explicitly name JCG and JCM as the drafters, First Derivative nevertheless alleged that JCG and JCM may be held responsible for the statements in the prospectuses because “as a practical matter the management company [that is, JCM]” ran the Funds, and as a result, the public would attribute the misstatements in the prospectuses to JCM.⁷⁹

Although the Fourth Circuit did not adopt the substantial participation standard, it noted its significance given the uniquely pivotal and involved role investment advisers play in managing a fund’s opera-

74. *See id.* at 628 & n.3, 629.

75. *See generally In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009).

76. *Id.* at 121.

77. *Id.* at 124.

78. *Id.* (emphasis added). JCM and JCG were also responsible for the dissemination of the Janus fund prospectuses. *Id.* This point alludes to the Ninth Circuit’s approach addressed in Part II(B)(2).

79. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 125 (emphasis added).

tions and providing necessary decision-making.⁸⁰ “Unlike most business organizations . . . mutual funds are typically organized and operated by an investment adviser that is responsible for the day-to-day operations of the fund.”⁸¹ Despite that the investment adviser is separate and distinct from the fund it advises, its primary responsibility and loyalty nevertheless are to its shareholders—First Derivative here.⁸²

Likewise, it entails that differences exist between a direct investor and a mutual fund investor. Whereas an ordinary investor is solely responsible for researching and staying up to date with a company in which it directly invests, “a mutual fund investor stands in a disadvantaged position in terms of identifying information probative of problems affecting his or her investments.”⁸³ This is so for two reasons: (1) a fund passes the research element of staying abreast of the varying underlying companies to the fund adviser; and (2) the investor may not know exactly where his or her money is invested.

Specifically, as an investment adviser to the Funds, JCM was “responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds and furnishe[d] advice and recommendations concerning the funds’ investments, as well as administrative, compliance and accounting services for the funds.”⁸⁴ The complaint alleged that the defendant wrote and represented its policy against market timing and publicly issued false and misleading statements.⁸⁵ In addition to practically running the Funds, the portfolio managers and the executives to whom they reported were all employees of the same company.⁸⁶ For instance, “under the heading

80. *Id.* at 125–26. The court went on to note that “[t]o the interested investor familiar with the organizational structure of mutual funds, plaintiffs’ allegations here would have been readily known or ascertainable. Such an investor would understand that [a] mutual fund does not operate on its own or employ a full time staff.” *Id.* at 126 (quoting Clifford E. Kirsch, Sutherland Asbill & Brennan LLP, *Mutual Fund Organizational Structure Powerpoint Presentation*, in *NURS & BOLTS OF FIN. PRODS.* 359 (Practising Law Institute 2005)) (internal quotation marks omitted). Consequently, “[m]ost of the operations of a mutual fund are carried out by service providers.” *Id.* at 126 (quoting Bibb L. Strench & Kathryn L. Quirk, *The Advisory Relationship/Portfolio Management*, in *THE ABCS OF MUTUAL FUNDS* 207 (Practising Law Institute 2006)) (internal quotation marks omitted).

81. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 126.

82. *Id.*

83. *See, e.g., In re Merck & Co. Sec., Derivative & “ERISA” Litig.*, 483 F. Supp. 2d 407, 423 (D.N.J. 2007), *rev’d*, 543 F.3d 150 (3d Cir. 2008), *aff’d sub nom. Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010).

84. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 125 (internal quotation marks omitted).

85. *See id.* at 121.

86. *See id.* at 125–26.

'Management of the Fund,' the February 25, 2002, prospectus for the Janus Mercury Fund lists only . . . JCM."⁸⁷

This, along with JCM's listed involvement in the prospectus at issue, led the Fourth Circuit to believe that interested investors would easily recognize JCM's role with regard to both the fund and the prospectus dissemination.⁸⁸ Grappling with the nettlesome attribution test, the court reasoned that "although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM helped draft the misleading prospectuses."⁸⁹ Thus, despite *Stoneridge's* factual concern that investors could not attribute the actions of secondary actors and policy concern that such a legal principle is "consistent with the narrow dimensions we must give to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law,"⁹⁰ the Fourth Circuit found that the plaintiff had sufficiently plead reliance.⁹¹

The court subsequently found that the defendants made their representations public by issuing the prospectuses for Janus, thereby making them available to the investing public via SEC filings, and by disseminating the information over the JCG website.⁹² The court held that when misleading statements are indisputably public, the inquiry then turns on whether the investing public would have attributed the statement to the secondary actor—JCM.⁹³ Thus, given JCM's unique investment adviser role, the control that it exerted over the Funds, and the public nature of the representations, the Fourth Circuit concluded that First Derivative had sufficiently plead reliance to support a claim under § 10(b), in spite of the fact that JCM technically did not make the statement.⁹⁴

87. *Id.* at 126.

88. *Id.* at 127.

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

90. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 155, 166–67 (2008).

91. *See In re Mut. Funds Inv. Litig.*, 566 F.3d at 128.

92. *Id.* at 121. The court found that reliance was sufficiently plead with respect to only JCM. *Id.* at 128. "Although JCG, like JCM, played a role in the dissemination of the fund prospectuses on the Janus website, this fact, taken by itself, is insufficient in this case for [the court] to infer that interested investors would believe JCG had prepared or approved the Janus fund prospectuses." *Id.*

93. *Id.* at 127.

94. *Id.* at 128.

B. *The Supreme Court Decision*

1. The Majority's Decision: Making the Statement

In contrast to the Fourth Circuit, the Supreme Court focused its inquiry on whether JCM simply made the alleged misstatements under the plain language of Rule 10b-5.⁹⁵ First Derivative urged that JCM's role as an investment adviser should guide the Court's decision, given JCM's "well-recognized and uniquely close relationship" between itself and the mutual fund.⁹⁶ Specifically, First Derivative suggested "that an investment adviser should generally be understood to be the 'maker' of the statements by its client mutual fund, like a playwright whose lines are delivered by an actor."⁹⁷ First Derivative contended that JCM, as adviser, commissioned the actions of their affiliated brokers and maintained practical control over the market timing practices and thus was responsible for the Funds' actions.⁹⁸ Similarly, the SEC, in averring that the Court should hold Janus Capital liable, urged the Court to adopt a definition of "make" that closely aligned with the verb "create," as in "to cause to exist, appear, or occur."⁹⁹

Justice Thomas, writing for the Court, declined to adopt either interpretation.¹⁰⁰ Thomas held that "[f]or 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."¹⁰¹ Further, the Court held that "[o]ne who prepares or publishes a statement on behalf of another is not its maker."¹⁰² Regarding attribution, the Court stated that attribution within a statement "is strong evidence that a statement was made by—and only by—the party to whom it is attributed."¹⁰³ The Court analogized First

95. See *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301 (2011).

96. *Id.* at 2304.

97. *Id.*

98. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 126–27 ("According to the complaint, JCM in its role as investment advisor to the Janus funds is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds and furnishes advice and recommendations concerning the funds' investments, as well as administrative, compliance and accounting services for the funds." (internal quotations omitted)).

99. *Janus*, 131 S. Ct. at 2303. Thus, the argument follows that a statement's maker could be a corporate officer whose participation in the statement's publication is so vital that "interested investors would have inferred that either or both defendants *played a substantial role in drafting or approving* the allegedly misleading prospectuses." *In re Mut. Funds Inv. Litig.*, 566 F.3d at 124 (emphasis added); see *id.* at 127–29; see also *supra* note 71 and accompanying text.

100. *Janus*, 131 S. Ct. at 2303–04.

101. *Id.* at 2302 (emphasis added).

102. *Id.*

103. *Id.*

Derivative's argument that their intricate role in managing the Fund should generate liability, as speechwriter and a speaker,¹⁰⁴ concluding that "[e]ven when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it."¹⁰⁵

Thus, despite finding that "all of the officers of Janus Investment Fund were also officers of JCM," the Court focused on the Funds' status as a "separate legal entity" in finding that JCM did not possess ultimate authority over the statement.¹⁰⁶ The Court recognized that "[o]nly Janus Investment Fund—not JCM—bears the statutory obligation to file the prospectuses with the SEC."¹⁰⁷ Regarding the information itself, the Court held that nothing "on the face of the prospectuses indicate[d] that any statements therein came from JCM rather than Janus Investment Fund—a legally independent entity with its own board of trustees."¹⁰⁸ Despite the fact that the "Janus Management employees drafted and reviewed the Fund prospectuses, including language about 'market timing,'"¹⁰⁹ the Court apportioned the liability to the Fund itself, whose SEC reporting requirements exhibited their ultimate authority over the statement.¹¹⁰

The Court abrogated any case law suggesting that a party, solely by virtue of its participation in the fraudulent statement, could be held liable against a private plaintiff under § 10(b).¹¹¹ Indeed, the Court rejected a rule that "would permit private plaintiffs to sue a person who *provides* the false or misleading information that another person then puts into the statement."¹¹² Reminiscent of the deference exhibited in *Central Bank* and *Stoneridge*, Justice Thomas noted that despite the "significant influence" that JCM maintained over the funds, a standard that would take such factors into consideration would be "the responsibility of Congress and not the courts."¹¹³

104. *Id.*

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

106. *Id.* at 2299.

107. *Id.* at 2304.

108. *Id.* at 2305.

109. *Id.* at 2312 (Breyer, J., dissenting).

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

111. *See, e.g.,* *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *Dannenberg v. Painewebber Inc. (In re Software Toolworks Inc. Sec. Litig.)*, 50 F.3d 615, 628–29 (9th Cir. 1994). "Such suits—against entities that contribute 'substantial assistance' to the making of a statement but do not actually make it—may be brought by the SEC but not by private parties." *Janus*, 131 S. Ct. at 2301 (citation omitted).

112. *Janus*, 131 S. Ct. at 2303 (emphasis added) (internal quotation marks omitted).

113. *Id.* at 2304.

2. The *Janus* Dissent

Authoring a vocal dissent, Justice Breyer took issue with both the Court's strained reading of the word "make" and its failure to take JCM's unique role as an investment adviser into account.¹¹⁴ Regarding Justice Thomas's semantics, Justice Breyer urged that "[t]he English language does not impose upon the word 'make' boundaries of the kind the majority finds determinative."¹¹⁵ The dissent eschewed the rhadamanthine approach, noting that "control, participation, and relevant audience, help determine who 'makes' a statement and to whom that statement may properly be 'attributed.'"¹¹⁶ To wit, "[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."¹¹⁷ With this in mind, the dissent cited multiple cases that make it clear that traditionally auxiliary actors, such as corporate officers, lawyers, accountants, and the like have been held liable under § 10(b).¹¹⁸ The dissent emphasized that these secondary or ancillary actors did not maintain ultimate authority over their statements.¹¹⁹

Indeed, the dissent was alert to a possible inconsistent result with the majority's rule. If, as here, the Funds' board asserts "ultimate authority" over the statement, then "[w]hat is to happen when guilty management writes a prospectus (for the board) containing materially false statements and fools both the board and public into believing they are true?"¹²⁰ Justice Breyer noted that in such a scenario, technically no one could be found to have made the statement.¹²¹

The dissent likewise disagreed with the majority's decision to ignore JCM's control and participation in determining whether they could be held liable under § 10(b).¹²² Regarding the day-to-day management, business advice, as well as "administrative, compliance and accounting services for the funds," the dissent noted the propinquity within which the Fund and JCM operated.¹²³ Observing that JCM drafted, re-

114. *Id.* at 2306 (Breyer, J., dissenting).

115. *Id.* at 2307.

116. *Id.*

117. *Janus*, 131 S. Ct. at 2307 (Breyer, J., dissenting).

118. *See, e.g.*, *SEC v. Wolfson*, 539 F.3d 1249, 1261 (10th Cir. 2008); *McConville v. SEC*, 465 F.3d 780, 786 (7th Cir. 2006); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224 (10th Cir. 1996).

119. *See Janus*, 131 S. Ct. at 2311.

120. *Id.* at 2310.

121. *Id.*

122. *Id.* at 2312.

123. *Id.*

viewed, and disseminated the Fund prospectuses, including the language regarding the market timing, the dissent concluded that “Janus Management’s involvement in preparing and writing the relevant statements could hardly have been greater.”¹²⁴ Alluding to the majority’s holding, the dissent concluded by observing that the current rule would allow a company’s board of directors to evade liability simply by enlisting an unwitting company manager to perpetrate the fraud.¹²⁵

IV. CRITIQUES AND DEVELOPMENTS FOLLOWING *JANUS*

A. *Criticism*

The *Janus* decision is not without its detractors.¹²⁶ The decision essentially held that a mutual fund advisory firm could not have made the fraudulent statement, “even though it allegedly created the lie in question—because the prospectus in which the lie appeared was filed by and in the name of the mutual fund, not the adviser or its publicly-held parent company.”¹²⁷ The Court’s strained reading of the term has been derided for its failure to incorporate SEC comments or to acknowledge the original rule’s intent, all in the name of judicial deference.¹²⁸ In fact, one scholar questioned whether Justice Thomas “refuse[d] to defer to the SEC’s reading of the word make because no deference is owed *regarding the private right of action*,” questioning if the Court was construing whether the narrow dimensions apply to the rule or to the right.¹²⁹ In any event, the Court refused to yield any deference to the SEC over the interpretation of the word make, despite that the SEC promulgated the rule in the first place.¹³⁰

The Court appears to have shunned any meaningful attribution analysis in favor of a formalistic semantic exercise.¹³¹ This is espe-

124. *Janus*, 131 S. Ct. at 2312.

125. *Id.*

126. See, e.g., Ann Carrns, *Supreme Court Ruling in Janus Case Limits Shareholder Suits*, N.Y. TIMES (June 13, 2011, 3:18 PM), <http://bucks.blogs.nytimes.com/2011/06/13/supreme-court-ruling-in-janus-case-limits-shareholder-suits/#>; Brent Kendall, *Janus Found Not Liable for Funds’ Prospectuses*, WALL ST. J. (June 14, 2011), <http://online.wsj.com/article/SB10001424052702303848104576383453742250090.html>; Floyd Norris, *A Novel Way to Sidestep Investor Suits*, N.Y. TIMES (Dec. 2, 2010), http://www.nytimes.com/2010/12/03/business/03norris.html?_r=1.

127. See Langevoort, *supra* note 33, at 1.

128. *Id.* at 6 (“Note what the Court does not do—ask what a reasonable person would think the SEC meant to accomplish with its chosen language. Any sense of original intent is ignored, and the interpretation comes to turn heavily on policy (confining private litigation) that could not have existed at the time the SEC’s words were written . . .”).

129. *Id.* at 5 (quoting *Janus*, 131 S. Ct. at 2303 n.8) (internal quotation marks omitted).

130. See generally *Janus*, 131 S. Ct. 2296. The SEC adopted Rule 10b-5 in 1942. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 172 (1994).

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

cially puzzling in light of the evidence demonstrating that the investors would have directly attributed the statements to the investment adviser.¹³² Specifically, provided that “Janus Management’s involvement in preparing and writing the relevant statements could hardly have been greater,”¹³³ as well as that “Janus Management employees drafted and reviewed the Fund prospectuses, including language about ‘market timing,’”¹³⁴ and that “under the heading, ‘Management of the Fund,’ the February 25, 2002, prospectus for the Janus Mercury Fund list[ed] only . . . JCM,”¹³⁵ the Court nevertheless refused to utilize a meaningful attribution analysis.¹³⁶ Had the Court done so, it might have reasoned, provided all of the information in support, that the investors *did* attribute the statements to JCM, and thus, the truly culpable party would have been held liable.¹³⁷

In a New York Times article, Professor Mercer Bullard observed that “[t]he decision may mean that fund shareholders who suffer losses as a result of a misleading prospectus will not be able to reach the responsible person—[JCM].”¹³⁸ Professor Bullard was particularly skeptical of the Court’s decision in light of a previous decision finding that mutual fund managers “exercised de facto control over its funds.”¹³⁹ Indeed, in a Wall Street Journal article, Professor William Birdthistle commented, “[e]veryone knows the fund is an empty marionette. It doesn’t do anything. . . . [Investors are] left with a circumstance where no one is responsible.”¹⁴⁰ An argument in favor of holding the Fund’s investment adviser liable is particularly appropriate in light of the fact that mutual fund investors “stand[] in a disadvantaged position in terms of identifying information probative of problems affecting his or her investments.”¹⁴¹ Thus, *Janus* seems only to frustrate mutual fund investors’ means of recourse even further.

Methodology aside, the decision’s potential impact has generated even more scrutiny, specifically for its deference to the corporate

132. See *supra* notes 84–88 and accompanying text. See generally *In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009).

133. *Janus*, 131 S. Ct. at 2312 (Breyer, J., dissenting).

134. *Id.*

135. *In re Mut. Funds Inv. Litig.*, 566 F.3d at 126.

136. See generally *Janus*, 131 S. Ct. 2296.

137. *Id.* at 2311–12 (Breyer, J., dissenting).

138. Carrns, *supra* note 126 (internal quotation marks omitted).

139. *Id.*

140. Kendall, *supra* note 126.

141. *In re Merck & Co. Sec., Derivative & “ERISA” Litig.*, 483 F. Supp. 2d 407, 423 (D.N.J. 2007).

form.¹⁴² According to Professor Birdthistle, so long as investment managers “perpetuate their malfeasance through a business trust,” the managers will be legally insulated.¹⁴³ Again, Justice Breyer echoed these very same dangers.¹⁴⁴ In any event, it is highly likely that secondary actors will continue to exact corporate malfeasance behind the scenes, only now quite possibly outside of *Janus*’s circumscribed § 10(b) parameters, leaving the onus on private plaintiffs to elude its rigid barriers and strictures.

B. Application

1. Corporate Officers

Criticism notwithstanding, courts have applied *Janus* relatively consistently in determining whether traditional secondary actors—non-executive corporate officers and related corporate entities—are liable in light of *Janus*. In *Hawaii Ironworkers Annuity Trust Fund v. Cole*, former shareholders of a corporation brought suit against three former officers of the corporation on the grounds that the officers colluded in falsifying financial information.¹⁴⁵ The defendants, according to the complaint, acted in response to a directive by the CEO and CFO in conducting the alleged malfeasance.¹⁴⁶ The defendants moved to dismiss on the ground that, “because they never made any statements to the investing public, no one could have relied on any statements by them.”¹⁴⁷ The defendants argued that, at most, they were liable as aiders and abettors, which, as proven in *Central Bank*, would shield them from private liability under § 10(b).¹⁴⁸ The court denied the motion to dismiss, but in light of *Janus*, the defendants moved to reconsider.¹⁴⁹ The plaintiff asserted that *Janus* did not apply, because “[i]n essence, *Janus* involve[d] a secondary actor and thus *Janus* does not analyze whether corporate executives can be liable.”¹⁵⁰ Undeterred, the court held that the plaintiffs mischaracterized the standard and granted the defendants’ motion to dismiss in finding that

142. See *Janus*, 131 S. Ct. at 2312 (Breyer, J., dissenting) (discussing the possibility of guilty management but an innocent board in eluding private liability).

143. Norris, *supra* note 126.

144. *Janus*, 131 S. Ct. at 2305–12.

145. See *Haw. Ironworkers Annuity Trust Fund v. Cole*, No. 3:10CV371, 2011 WL 3862206, at *1 (N.D. Ohio Sept. 1, 2011).

146. *Id.* at *4.

147. *Id.* at *1.

148. *Id.*

149. *Id.* at *3.

150. *Cole*, 2011 WL 3862206, at *3 (internal quotation marks omitted).

the officers, in acting as puppets for the CEO and CFO, necessarily did not “have ultimate authority over the content of the statement.”¹⁵¹

Likewise, in *In re Coinstar Inc.*, a district court was faced with a complaint brought, *inter alia*, against three corporate officers under § 10(b).¹⁵² In a case surrounding misleading statements pertaining to the corporation’s earnings, the defendants argued that the three corporate officers should be dismissed from the action because they did not make any of the allegedly misleading statements.¹⁵³ In granting the motion to dismiss against the three officers, the court found that “engag[ing] in the preparation, creation, development, and dissemination of . . . false financial guidance” was not enough to generate primary liability in light of *Janus*’s ultimate authority test.¹⁵⁴

In circumscribing reliable and useful guidelines for determining who has ultimate authority over a statement, the court in *Kerr v. Exobox Technologies Corp.* weighed the role that control over a company played in private § 10(b) litigation.¹⁵⁵ In that case, the plaintiffs asserted that the defendant owned near or in excess of 90% of Exobox and thus was in control of the corporation.¹⁵⁶ However, the court rejected the argument, holding that “just because a person or entity may ‘control’ the company filing the document does not mean that the control person can be liable under 10b-5 for *making the statements*.”¹⁵⁷ Essentially, controlling the company does not equate to controlling the statements; the court held that despite the demonstrative executive power, the plaintiff failed to show that the defendant had “ultimate control over the *statements*.”¹⁵⁸

However, where a corporate officer makes statements pursuant to his responsibility and authority to act on behalf of the corporation, signs SEC forms, and reports as an executive vice president, he may

151. *Id.* at *5.

152. See *In re Coinstar Inc. Sec. Litig.*, No. C11-133 MJP, 2011 WL 4712206, at *1 (W.D. Wash. Oct. 6, 2011).

153. *Id.* at *10.

154. *Id.* at *10–11 (internal quotation marks omitted).

155. *Kerr v. Exobox Techs. Corp.*, No. H-10-4221, 2012 WL 201872, at *11–12 (S.D. Tex. Jan. 23, 2012).

156. *Id.* at *6–7.

157. *Id.* at *11 (emphasis added). The plaintiffs’ argument conflated the *Janus* controlling-the-statement standard with control person liability under § 20(a) of the Exchange Act. However, the *Janus* Court rejected the argument that plaintiffs asserted here, distinguishing liability under § 10b-5 from liability under § 20(a). *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2304 (2011) (declining to “read into Rule 10b-5 a theory of liability similar to—but broader in application than—what Congress has already created expressly elsewhere” (citation omitted)).

158. *Kerr*, 2012 WL 201872, at *11 (emphasis added) (internal quotation marks omitted).

be said to have made the statement under *Janus*.¹⁵⁹ In that case, the court was persuaded by the fact that the corporate officer made statements in his capacity as an agent of the corporation, not of some other independent legal entity such as JCM.¹⁶⁰ Similarly, where CEO's and CFO's fraudulently sign Sarbanes–Oxley certifications, courts will find that the officers have ultimate authority over the statements.¹⁶¹ In light of *Janus*'s holding that “attribution within a statement . . . is strong evidence that a statement was made by . . . the party to whom it is attributed,” one court held that where a corporate officer's name was emboldened and prominently placed on the first page of the “Official Statements,” the statement is sufficiently attributable to plead that the named person made the statement.¹⁶²

In *SEC v. Mercury Interactive, LLC*, the court refused to allow a claim against a corporate officer where she was alleged to have merely been involved in *preparing* allegedly fraudulent annual and quarterly financial reports.¹⁶³ However, where the same officer was alleged to have both *prepared and signed* false and misleading proxy statements, the court was willing to consider her the maker of such statements.¹⁶⁴

Interestingly, one court held that *Janus* applies to a defendant's omissions, despite that the defendant technically did not make the statement at issue.¹⁶⁵ In *Lopes v. Viera*, the plaintiffs alleged that the defendant induced them to invest into a corporation on the premise that the corporation “would manufacture cheese for which there was a ready market.”¹⁶⁶ At issue was the defendant's failure to disclose his former role as a corporate officer of a criminally and civilly investigated company.¹⁶⁷ The plaintiffs alleged that they were rushed into committing to invest in the corporation based upon a draft offering memorandum that did not contain language regarding the defendant's history.¹⁶⁸ The defendant argued that he cannot be held liable under

159. Compare *In re Merck & Co. Sec., Derivative & “ERISA” Litig.*, MDL No. 1658 (SRC), 2011 WL 3444199, at *25 (D.N.J. Aug. 8, 2011), with *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681 (9th Cir. 2011) (holding SEC filing authority *not* sufficient to show ultimate authority).

160. *In re Merck & Co. Sec., Derivative & “ERISA” Litig.*, 2011 WL 3444199, at *25.

161. Local 738 I.B. of T., No. 87 C 8478, 1988 U.S. Dist. LEXIS 5725, at *3 (N.D. Ill. June 7, 1988).

162. *In re Allstate Life Ins. Co. Litig.*, No. CV-09-8162-PCT-GMS, 2012 WL 176497, at *5 (D. Ariz. Jan. 23, 2012). On the other hand, see *SEC v. Daifotis*, No. C 11-00137 WHA, 2011 WL 3295139 (N.D. Cal. Aug. 1, 2011), where a picture of a corporate officer on the alleged statement was insufficient to prove he was the “maker” of the statements.

163. See No. 5:07-CV-02822-WHA, 2011 WL 5871020, at *1 (N.D. Cal. Nov. 22, 2011).

164. *Id.* at *2.

165. *Lopes v. Viera*, No. 1:06-CV-01243 JLT, 2012 WL 691665, at *1 (E.D. Cal. Mar. 2, 2012).

166. *Id.*

167. *Id.* at *5.

168. *Id.*

Janus, since he was not technically the maker of the statement.¹⁶⁹ The court responded with two arguments.¹⁷⁰ First, because the defendant was the maker of the offering statement and the rest of the statement can be attributed to him, the material omission and its attendant liability can be attributed to him as well.¹⁷¹ Second, the court turned to scheme liability to answer the claim that *Janus* did not address misrepresentations by omission.¹⁷² Under Rule 10b-5(a), a defendant who uses a “device, scheme, or artifice to defraud” may be held liable in a suit by a private plaintiff.¹⁷³ In addition to the omission or misrepresentation, the court found that the defendant had committed various financial improprieties sufficient to establish a “device, scheme, or artifice to defraud.”¹⁷⁴

2. Entities

As in *Janus*, multiple courts have demarcated the boundaries within which affiliated or auxiliary entities may be held liable for statements made under § 10(b).¹⁷⁵ In a class action before the Southern District of New York, the plaintiffs sued to recover funds lost in an investment with Optimal Strategic U.S. Equity Fund, which in turn invested all of its assets with Bernie Madoff.¹⁷⁶ The plaintiffs alleged that defendant OIS maintained ultimate authority over the allegedly misleading statements articulated in “Explanatory Memoranda,” which was issued by Optimal Multiadvisors, the primary actor.¹⁷⁷ The plaintiffs

169. *Id.* Technically, the defendant cannot have ultimate authority over the statement, nor can the absence of a statement be attributed to him.

170. *See Lopes*, 2012 WL 691665, at *6.

171. *Id.*

172. *Id.* Briefly, scheme liability, first addressed by the Court in *Central Bank*, is a theory by which all actors in a fraudulent scheme may be held liable for the conduct of the greater. In *Central Bank*, the Court weighed whether to hold liable “any person or entity . . . who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5.” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). On the basis of this statement, “plaintiffs have been creative in finding ways to characterize the behavior of secondary actors as not amounting to merely aiding and abetting, but as active involvement as a primary participant in the securities fraud.” Taavi Annus, *Scheme Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 72 Mo. L. REV. 855, 858 (2007). The scheme liability door appeared to close, however, in *Stoneridge*, where the Court held that the secondary actors themselves needed to satisfy all of the 10(b) elements for liability. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008).

173. 17 C.F.R. § 240.10b-5(a) (2012).

174. *Lopes*, 2012 WL 691665, at *6.

175. *See supra* notes 172–74 and accompanying text; *see infra* notes 176–86 and accompanying text.

176. *See In re Optimal U.S. Litig.*, No. 10 Civ. 4095(SAS), 2011 WL 4908745, at *1 (S.D.N.Y. Oct. 14, 2011).

177. *Id.*

argued that OIS owned 100% of the voting shares of Multiadvisors, retained appointment and removal power over Multiadvisors, and that OIS's CEO was a director of Multiadvisors.¹⁷⁸ Nevertheless, the court refocused the inquiry to whether OIS maintained ultimate authority over the "Explanatory Memoranda"—the statements—rather than authority over the corporation itself.¹⁷⁹ As such, the court found that despite the control over the entity, OIS did not maintain control over the *statements* and summarily granted the defendant's motion to dismiss.¹⁸⁰

In a case before the Ninth Circuit, BP Exploration Alaska (BPXA) was held *not* to have ultimate authority over allegedly fraudulent SEC filings on behalf of a trust, despite that it was authorized to make the filings for the trust.¹⁸¹ The case was a class action arising out of the August 2006 shutdown of the oil facilities in Prudhoe Bay, Alaska.¹⁸² Harkening back to what is now the superannuated substantial participation test, the plaintiffs failed to allege that BPXA actually participated in and had authority over the trust's filing process, violating the substantial participation attribution test.¹⁸³ Of course, the court also found the plaintiffs to have insufficiently satisfied *Janus*.¹⁸⁴ The court held that while BPXA "bore a statutory obligation to file with the SEC," without an allegation that BPXA made the statements within the filings or had ultimate authority over the statements, it could not find for the plaintiff.¹⁸⁵

Contrastingly, in one case, the Southern District of New York found that a legally distinct entity could be held liable under *Janus*.¹⁸⁶ There, the plaintiffs brought a § 10b-5 action claiming that one corporation, EnergySolutions (ES), issued an IPO with materially false statements.¹⁸⁷ The plaintiffs also named ES's sole shareholder, ENV Holdings, Inc. (ENV), who moved to dismiss, noting that, as in *Janus*,

178. *Id.* at *4.

179. *Id.* at *5.

180. *Id.*

181. See *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681 (9th Cir. 2011).

182. *Id.* at 684.

183. *Id.* at 693 n.8; see *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000) ("[S]ubstantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might not lead to the actor's actual making of the statements."); see also *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144 (2d Cir. 2010).

184. *Reese*, 643 F.3d at 693 n.8.

185. *Id.*

186. See *City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395 (S.D.N.Y. 2011).

187. *Id.* at 400-01.

“ENV and ES are legally distinct entities despite having the same individuals in key positions.”¹⁸⁸ However, key differences, such as the disclosure in the registration statement that ES was wholly owned by ENV and that ENV would “have the ability to effectively *control* all [of ES’s] matters requiring stockholder approval, including . . . the determination of the outcome of any corporate transaction,” were adjudged to be material differences.¹⁸⁹ In finding that ENV made the statements in the IPO, the court differentiated the case from *Janus* by highlighting that “the Registration Statements made clear that [ENV] controlled the actions of ES—including its sale of stock,” and thus ENV maintained “ultimate authority” over “the content of the message, the underlying subject matter of the message, and the ultimate decision of whether to communicate the message.”¹⁹⁰

3. SEC Enforcement Claims

The Court’s broad interpretation of antifraud liability, however, has not since been extended to SEC enforcement actions, insofar as § 10(b) is not the defining instrument.¹⁹¹ *United States SEC v. Stoker* is instructive.¹⁹² There, the SEC brought an action under § 17(a),¹⁹³ the Securities Act of 1933’s comparable antifraud provision, against a broker–dealer’s director in connection with his role in structuring and marketing a synthetic collateralized debt obligation (CDO).¹⁹⁴ Despite the nearly parallel wording between § 17(a) and § 10(b), in this case, Judge Jed Rakoff observed that “there are significant difference [sic] between the language of 17(a) and the language of 10b-5 that dictate different results.”¹⁹⁵ Whereas in *Janus* one is liable for making the untrue statement, § 17(a)(2), unlike Rule 10b-5, prohibits a defendant from obtaining money “by means of” an untrue statement.¹⁹⁶ Here, the court found that the defendant could be held liable “under 17(a)(2), though not under 10b-5, if, he obtains money or property *by use* of a false statement, whether prepared by himself or by an-

188. *Id.* at 417.

189. *Id.* (emphasis added) (internal quotation marks omitted).

190. *Id.* at 418.

191. *See, e.g.*, U.S. SEC v. Sentinel Mgmt. Grp., Inc., No. 07 C 4684, 2012 WL 1079961, at *15 (N.D. Ill. Mar. 30, 2012); SEC v. Pentagon Capital Mgmt. PLC, 844 F. Supp. 2d 377, 421–23 (S.D.N.Y. 2012); SEC v. Mercury Interactive, LLC, No. 5:07-cv-02822-WHA, 2011 WL 5871020, at *3 (N.D. Cal. Nov. 22, 2011); SEC v. Daifotis, No. C 11-00137 WHA, 2011 WL 3295139 (N.D. Cal. Aug. 1, 2011).

192. 865 F. Supp. 2d 457 (S.D.N.Y. 2012).

193. 15 U.S.C. § 77q(a) (2006).

194. *Stoker*, 865 F. Supp. 2d at 458.

195. *Id.* at 464–65.

196. *Id.* at 465.

other.”¹⁹⁷ Obviating the need to address the relevant policy concerns articulated in *Stoneridge*,¹⁹⁸ the court found that with no private right of action implied under § 17(a), the court was free to disregard the Court’s narrow interpretation in *Janus* and read § 17(a) more broadly.¹⁹⁹

V. CONCLUSION

In an admittedly small sample size, it seems that the *Janus* test evaluating who qualifies to make a statement is being consistently followed, though corporate officers and separate entities can still be held liable. The test, in line with *Central Bank* and *Stoneridge*, is noteworthy for its deference to corporate forms and the Court’s general unwillingness to broach what it deems the province of the legislature. As the landscape continues to grow, cases distinguishing between control over a statement and control over a company, cases involving an omission of a statement rather than a made statement, and cases involving a sham corporation through which the board makes statements should gain significant attention in demarcating the outer boundaries of private § 10(b) liability in light of *Janus*.

197. *Id.*

198. See *In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009).

199. *Stoker*, 865 F. Supp. 2d at 465 (“By contrast, Section 17(a) . . . prohibits a defendant from obtaining money ‘by means of’ an untrue statement. Although ‘to make a statement’ is the equivalent of ‘to state,’ to obtain money ‘by means of’ a statement plainly covers a broader range of activity. Thus, the emphasis of the *Janus* Court on the word ‘make’ serves, if anything, to highlight the importance of the difference in language between the two provisions.”).