No. 09-525 DEC 2 - 2009

In The
# Supreme Court of the United States

JANUS CAPITAL GROUP, INC., *et al.*,

*Petitioners,*

v.

FIRST DERIVATIVE TRADERS,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The petition addresses the liability, under section 10(b) of the Securities Exchange Act of 1934, of a mutual fund administrator/investment advisor for misleading statements in mutual fund prospectuses where, consistent with mutual fund industry practice, and as stated in the prospectuses, all fund operations were handled by the administrator, the administrator was involved in preparing and reviewing the prospectuses in question, the administrator filed the prospectuses with the SEC and disseminated them as well, and the misrepresentations at issue herein were statements that described actions purportedly taken by the administrator. The Fourth Circuit, reversing the district court, held that an investor had pled a securities fraud claim against the administrator in the above-described situation.

The questions presented here are:

1. Did the Fourth Circuit err in holding that the investor pled that the administrator, having played a role in drafting the prospectuses, and having disseminated and filed the prospectuses with the SEC, "made" the statements therein?

2. Did the aforementioned holding conflict with rulings by the Fifth, Sixth and Eighth Circuits, even though those rulings involved defendants that did not assist in preparing the allegedly misleading statements?

3. Did the Fourth Circuit err in holding that the investor sufficiently pled investors' reliance on the conduct and statements of the administrator under the foregoing circumstances sufficient to comply with this Court's directives in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), in light of (a) the prospectus representations concerning the administrator's role and (b) standard custom in the mutual fund industry?

4. Did the aforementioned holding conflict with rulings of the Second, Tenth and Eleventh Circuits that (a) pre-date *Stoneridge*, and (b) were in any event expressly harmonized by the Fourth Circuit in its opinion?

5. Does the Fourth Circuit open the door to 10(b) liability on the part of a wide array of peripheral "service providers" to issuers of securities, even though the investors must also establish the administrators' scienter as a predicate to recovery, the misrepresentations concerned the administrator's own conduct, and the Fourth Circuit ruling was expressly predicated on (a) the administrator's role in making and disseminating the statements and (b) the communication of that role to the public?

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## INTRODUCTION

Petitioner-defendants incorrectly contend that the Fourth Circuit ruling evidenced a conflict among the circuits. Nothing in the circuit court opinions to which petitioners cite suggests that one does not "make" a statement by participating in its preparation, filing and dissemination. In fact, the Fourth Circuit expressly provided a detailed explanation of how its ruling is consistent with other circuits' requirements. App. 19a-27a.[1]

Subsequent to the rulings to which petitioners cite as evidence of a conflict, this Court, in *Stoneridge* addressed the standards for 10(b) primary liability. This Court made it clear that liability can exist absent statements that are directly attributed to the defendant, as "conduct itself can be deceptive" and therefore it would be "erroneous" "to suggest that there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5." 555 U.S. at 158.

The Fourth Circuit's ruling was in accord with *Stoneridge*. Respondent-plaintiff was found to have stated a claim against petitioner Janus Capital Management LLC ("JCM"), a mutual fund administrator, because statements in the allegedly misleading mutual fund prospectuses which JCM filed and disseminated and helped to prepare, gave investors reason to believe that the statements were the work of JCM, as did mutual fund industry custom. *See* App. 27a-30a.

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[1] References to "App. ___" are to the appendix attached to the Petition. References to "C.A. App. ___" are to the Joint Appendix filed by the parties on appeal to the Fourth Circuit.

Petitioners also overstate the ramifications of the Fourth Circuit's holding.

Petitioners speak of the chilling impact that this ruling would have upon service providers or professionals who might now face new potential liability for documents that they assist in preparing on behalf of issuers. *See* Pet. 20-22. In fact, the ruling here turned on facts that were unique to the case at bar, or at the very least, have no application to the liability of an independent service provider or professional that assists in preparing a company's SEC filings.

Petitioner JCM was not a mere "service provider." As is often the case with mutual funds, JCM handled all of the Funds' operations, including preparation, filing and dissemination of the Fund prospectuses and prospectuses statements. App. 64a-65a, ¶ 18. The Funds, whose officers were all JCM executives (C.A. App. 143-44), did not perform any operations of their own. *In re Mutual Fund Inv. Litig.*, 384 F. Supp. 2d 845, 853 n.3 (D. Md. 2005). Therefore, investors had every reason to expect that Fund prospectus statements were the handiwork of JCM.

A ruling of liability on the part of JCM here for its preparation, filing, and dissemination of documents that were known to be misleading in their descriptions of JCM's conduct has no impact on accountants, underwriters, or other professionals who provide services for viable issuers and do not control all operations of the issuer.

And, of course, no liability exists in any event for defendants that act innocently, or with something less than the requisite degree of scienter.

## STATEMENT OF THE CASE

This is a proposed class action on behalf of all purchasers of the common stock of petitioner Janus Capital Group Inc. ("JCG") during the period between July 21, 2000 and September 2, 2003 (the "class period"). Claims were asserted against JCG and its wholly-owned subsidiary, petitioner JCM, for violation of section 10(b) of the Securities & Exchange Act of 1934.

### A. The Conduct at Issue

JCM and its predecessors served as investment advisor and administrator of the Janus mutual funds (the "Funds"). The fees that JCM obtains from these activities comprise the vast majority of JCG's revenues. Thus, the success of JCM's Fund operations are of vital importance to JCG and its shareholders.

Shares in the Janus Funds were sold through prospectuses. The prospectuses expressly stated that JCM was charged with control over the "day-to-day management" of the "business affairs" of the Janus Funds as well as their "administrative" and "compliance services" (Janus Mercury Fund 2/25/02 Prospectus at 20). C.A. App. 444. The Funds themselves had no operations of their own. *In re Mutual Funds*, 384 F. Supp. 2d at 852 n.3.[2] JCM's

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[2] *In re Mutual Funds*, is one of several other proceedings brought against, inter alia, petitioners, as a result of certain alleged conduct that also gives rise to the claims herein. By order of the Judicial Panel on Multidistrict Litigation, proceedings in this action were coordinated with, inter alia, *In re Mutual Funds*, and the same district judge presided.

functions included preparation of the prospectuses, *In re Mutual Funds*, 590 F. Supp. 2d 741, 747 (D. Md. 2008), filing the prospectuses with the SEC C.A. App. 484 ¶¶ 21, 26, and disseminating the prospectuses to potential investors. *Id.* at ¶ 21. Furthermore, every one of the Janus Fund trust's 17 officers was a JCM Vice President during the relevant time period. C.A. App. 376-77 (Janus Equity and Income Funds Statement of Additional Information at 62-65).

During the class period, the prospectuses represented that steps were taken to prevent traders from engaging in "market timing" transactions in the Janus Funds because those "Funds are not intended for market timing or excessive trading" and market timing was harmful to the Funds' intended customers (long-term investors) because market timers could "disrupt portfolio investment strategies and increase Fund expenses for all Fund shareholders" (*Ibid.*). The prospectus detailed numerous measures that were employed to deter market timing in the Funds. App. 72a-80a, ¶¶ 40-52.[3]

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[3] In the words of the Fourth Circuit, "[m]arket timing, as it occurred here, refers to the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way the fund values its shares. Some funds, including the Janus funds, use stale prices to calculate the value of the securities held in the fund's portfolio (net asset values (NAVs)), which may not reflect the fair value of the securities as of the time the NAV is calculated. The use of stale prices to calculate the NAV makes a fund vulnerable to time zone arbitrage and other similar strategies; repeated use of such strategies is referred to as 'timing' the fund." App. 5a-6a. Such conduct harms long-term fund holders, whose profit potential is diluted and whose transaction costs are increased.

In fact, in many instances, petitioners secretly and knowingly allowed such transactions. This conduct was revealed publicly on September 3, 2003 when the New York Attorney General ("AG") filed a complaint against a hedge fund engaged in market timing in the Janus Funds. The AG's complaint quoted from internal Janus emails demonstrating knowledge and outright support by JCM and JCG officials of the market timing activity in the Janus Funds. App. 97a-100a, ¶¶ 87-88.

JCG and JCM later admitted to having had secret agreements with twelve (12) different market-timers that allowed hundreds of market-timing trades worth billions of dollars (C.A. App. 483, ¶ 15; *see also* App. 102a-104a, ¶¶ 95-104).[4]

In response to the disclosure of Fund operations that were contrary to public representations, JCG's stock price declined materially.

### B. The Rulings Below

#### 1. *The District Court*

On May 21, 2007, the district court dismissed the action because it found that respondent failed to plead that JCG "ma[d]e material misstatements." App. 49a. The district court did not decide whether or

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[4] Petitioners ultimately agreed to pay $101 million in penalties and to cut fees by $125 million in order to settle allegations brought by the New York and Colorado attorneys general, App. 103, ¶ 101, and over $100 million to settle charges brought by the SEC, App. 104, ¶ 104. The market timing scandal also led to the resignations of several of petitioners' senior executives. App. 103a-104a, ¶¶ 97, 103.

not JCM "made" the prospectus statements, but it dismissed the claims against JCM, because it held that JCM had no "duty" to shareholders of JCG. App. 50a n.5.

### 2. The Fourth Circuit

Respondent appealed the May 21, 2007 order, and the Fourth Circuit reversed and remanded, holding, inter alia, that respondent alleged conduct by JCM that was sufficient for liability to attach under § 10(b). *In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009). App. 31a.[5]

In reaching its decision, the Fourth Circuit applied a two-part inquiry to determine whether claims had been pled against petitioners. Did the complaint plead (1) that petitioners "made" the challenged statements, and if so, (2) that the statements in the prospectuses were sufficiently publicly-attributable to petitioners to hold them responsible? App. 17a.

The Fourth Circuit held that respondent had pled that JCM had "made" the prospectus statements by participating in the drafting and dissemination of the prospectuses. App. 18a.[6]

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[5] Petitioners moved for a rehearing en banc before the Fourth Circuit, and were denied.

[6] As set forth below, additional findings and evidence in SEC proceedings and in related proceedings in the district court further establish JCM's role in preparing the prospectuses (*see, infra*, at Sec. C).

The aforementioned conclusion brought the Fourth Circuit to the second prong of the inquiry, namely whether either JCM or JCG "ma[d]e a misrepresentation that is public and is attributable to th[at] defendant." *Id.*

The Fourth Circuit, after discussing *Stoneridge*, as well as several pre-*Stoneridge* circuit court holdings on the issue, determined that some degree of "public attribution" is required in order to establish the investors' reliance on a defendant's conduct. App. 23a.

Specifically, the Fourth Circuit held that "for the public attribution element of the reliance inquiry we hold that a plaintiff seeking to rely on the fraud on the market presumption must ultimately prove interested investors (and therefore the market at large) would attribute the alleged misleading statement to the defendant." *Id.*

The Fourth Circuit held that respondent had pled that investors relied on JCM's role in making the prospectus statements because "JCM, in its role as investment advisor to the Funds, 'is responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds,'" and "the portfolio managers who make the investment decisions for the funds and the executives to whom they report are all typically employees of the same management company, not the mutual funds themselves." App. 27a. Furthermore, "the district court [had] observed previously in a related action that [the funds themselves were] merely trusts that hold assets belonging to the shareholders of the funds" and "the defendants in that litigation asserted that [the Funds themselves] have no assets separate and apart from those they hold for shareholders." App. 29a (quoting and citing *In re Mut. Funds,* 384 F. Supp. 2d at 853, n.3).[7]

The Fourth Circuit noted that the relationship between JCM and the Funds is typical of mutual fund structures, where generally "a mutual fund does not operate on its own or employ a full time staff". *See* App. 29a.

In light of the foregoing, the Fourth Circuit concluded that investors would have reasonably relied on the fact that JCM prepared the prospectuses for the Funds.[8]

### C. Facts Established in Other Proceedings

The market timing transactions that were first revealed in the AG action and that gave rise to this action, also gave rise to numerous additional litigation, including proceedings by the Securities & Exchange Commission ("SEC") and related private shareholder derivative and securities fraud actions by, inter alia, investors and shareholders in the various Janus

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[7] In fact, often a single prospectus document would be filed by JCM on behalf of more than a dozen different Janus Funds. Ct. App. 393. Surely, the public understood that such documents were prepared by JCM (which ran the operations for all of the affected funds) rather than the Funds themselves.

[8] The Fourth Circuit also ruled that respondent had not pled facts sufficient to have made it apparent to the investing public that JCG also played a role in drafting the prospectuses. Therefore, the Fourth Circuit affirmed dismissal of the 10(b) claims against JCG (App. 32a), but held that respondent had sufficiently pled a claim under section 20(a) of the Exchange Act against JCG as a "control person" of JCM. App. 40a.

Funds. Proceedings in those parallel actions against, inter alia, JCG, JCM and several of their officers provide further evidence of (a) the role played by JCG and JCM in drafting the prospectus statements at issue and (b) JCM's general control of the Funds' operations.

A 2004 SEC cease and desist order against JCM states that "JCM *filed* several registration statements with the Commission containing prospectuses that falsely stated or otherwise represented that JCM did not permit frequent trading or market timing in its mutual funds" and "willfully . . . made an untrue statement of material fact in a . . . document filed or transmitted pursuant to the Investment Company Act." C.A. App. 484, ¶ 26. (emphasis added).

On April 28, 2008, an Administrative Law Judge (ALJ) issued an Initial Decision in connection with the SEC's enforcement proceedings against three employees of JCM. *In re Lammert*, Rel. No. 348, Admin Proc. File No. 3-12386 (the "Initial Decision").[9] The Initial Decision, in its findings of fact, states that it was the legal department of Janus (defined on page 1 of the Initial Decision as JCM) that "had the responsibility for drafting the prospectuses" for the Janus Funds, and those prospectuses "were approved by the Board [of JCM]." (Initial Decision at 15; *see also, id.* at 21, 27). On May 29, 2008 the SEC published notice that the Initial Decision had become final.[10]

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[9] The Initial Decision is available on the SEC's website at http://www.sec.gov/litigation/aljdec/2008/id348cff.pdf.

[10] The Notice That Initial Decision Has Become Final, Rel. No. 8921, Admin. Proc. File No. 3-12386, is available on the SEC's website at http://www.sec.gov/litigation/aljdec/2008/33-8921.pdf.

The district court observed in a suit filed by Janus Fund investors, that the Janus Funds themselves "do not conduct any operating or investment activity on their own." *In re Mut. Funds*, 384 F. Supp. 2d at 853 n.3.[11]

Two summary judgment decisions by the district court in the aforementioned action contain findings that further confirm JCM's role in drafting the prospectuses. Citing to copious deposition testimony, the district court found "ample evidence of substantial involvement by employees of the Janus . . . investment advisers [JCM], including members of their legal department, in the drafting and review of fund prospectuses." *In re Mutual Funds*, 590 F. Supp. 2d at 747. Indeed, petitioners "admit that 'it is undisputed that the Janus legal department drafted and edited certain prospectus language, which was then circulated among JCM and JCG employees for review.'" *Id.*

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[11] For that reason, the district court found (in the companion *In re Mutual Funds* case) that the Funds themselves had no liability for the prospectus misrepresentations, while JCM and JCG had liability. 384 F. Supp. 2d at 872. Thus, absolving JCM would allow for commission of the perfect crime by entities that shared the same officers. Even if the prospectuses were knowingly false or misleading, there would be no liability. The administrator escapes liability for knowing fraud because it prepared, filed and disseminated documents that were issued in the name of the Funds. However, the Funds themselves escape liability, because they played no role in the fraud.

## REASONS FOR DENYING THE PETITION

### A. There Is No Inter-circuit Conflict, and the Fourth Circuit's Ruling Is Consistent with *Stoneridge.*

Petitioners purport to identify two aspects of the Fourth Circuit's ruling that conflict with other circuits.

First, petitioners argue that the Fourth Circuit's determination that JCM "made" the statements (when it prepared, reviewed, filed and disseminated the prospectuses) puts the Fourth Circuit in conflict with the Fifth, Sixth and Eighth Circuits. Pet. at 10-14.

Second, petitioners argue that the Fourth Circuit's ruling that respondent satisfied the public attribution element of the reliance inquiry brings the Fourth Circuit (along with the Ninth Circuit) in conflict with in the Second, Tenth and Eleventh Circuits, which require that the statement be directly attributed to defendant on its face. Pet. at 14-19.

Petitioners are wrong on both counts. The Fourth Circuit's ruling here did not conflict with others. In fact, the Fourth Circuit expressly harmonized its position on the public attribution issue with the Second, Tenth, and Eleventh Circuits App. 20a-23a. More importantly, the Fourth Circuit's ruling was consistent with this Court's opinion in *Stoneridge* - an opinion that post-dates the allegedly conflicting circuit opinions.

### 1. The Fourth Circuit's Holding That Respondent Pled That JCM "Made" a Statement Did Not Conflict With the Fifth, Sixth or Eighth Circuits.

The Fourth Circuit did not create a circuit split when it concluded that respondent pled JCM's primary liability for statements that JCM participated in drafting and then filed with the SEC and disseminated publicly. Nothing in pre-*Stoneridge* authorities that petitioners rely upon suggests a contrary result. Nor for that matter does *Stoneridge*.

An examination of the opinions at issue from the Fifth, Sixth and Eighth Circuits confirms the absence of a conflict.

*In re Charter Commc'ns, Inc., Sec. Litig.*, 443 F.3d 987 (8th Cir. 2006) *aff'd and remanded sub nom. Stoneridge*, is the ruling that this Court reviewed in *Stoneridge*. Section 10(b) claims were asserted by investors in the stock of Charter, a cable television operator that inflated its revenues by entering into sham "round trip" transactions with several suppliers. The suppliers inflated the cost of supplies billed to Charter, and at the same time agreed to purchase advertising time from Charter at a higher than fair value rate. Dismissal was affirmed on grounds that are clearly inapplicable to the case at bar. Notably, in *Charter*, "[p]laintiffs did not allege that [defendants] played any role in preparing or disseminating the fraudulent financial statements and press releases through which Charter published its deception to analysts and investors." *Id.* at 990. Elsewhere, the Eighth circuit confirmed "[n]one of the alleged financial misrepresentations by Charter was made by or even with the approval of the [defendants]." *Id.* at 992.

*Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007) *cert. denied*, was an appeal from an order granting class certification. The underlying fact pattern was similar to Charter. Investors in a corporation's securities (in this case Enron) sued various investment banks that entered into transactions with Enron that "allowed Enron to misstate its financial condition." *Id.* at 377.[12] There was "no allegation that the [defendant] banks ... improperly filed financial reports on Enron's behalf." *Id.* Nor was there any allegation that the defendant banks had overlapping management with Enron; were charged with carrying out all of Enron's operations or that the banks participated in drafting the false Enron financial statements, or disseminated them publicly.[13]

*Fidel v. Farley*, 392 F.3d 220, 235 (6th Cir. 2004) involved 10(b) claims by purchasers of Fruit of the Loom stock against that company's auditor, Ernst & Young, for unaudited financial statements included in Fruit of the Loom's offering documents. The offering documents expressly labeled the financial statements

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[12] Indeed, the *Regents* court noted that *Charter* involved "facts extraordinarily similar to the facts that are present here." *Id.* at 388.

[13] The court in *Regents* even noted that while this Court in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) had "conclusively foreclosed the application of secondary liability under section 10(b), it stated that some secondary actors, such as investment banks and accountants, can be liable as primary violators in some circumstances." *Regents*, 482 F.3d at 386.

as "unaudited". More importantly, the court's holding was expressly predicated on the fact that "Ernst & Young did not assist in the preparation and presentation of this financial information, nor did it ever express an opinion about it. It therefore cannot be held liable for making a false statement...." *Id.*

The Fourth Circuit's ruling is also consistent with this Court's subsequent *Stoneridge* ruling. This Court did not hold that filing, disseminating, reviewing, and assisting in drafting a misleading statement constitute mere aiding and abetting. Rather, in affirming the *Charter* dismissal, this Court noted that the supplier played no role in preparing or disseminating Charter's financial statements, and in its own financial statements, the supplier booked the transactions in accordance with GAAP. *See Stoneridge*, 552 U.S. at 155-56. Moreover, "nothing [suppliers] did made it necessary or inevitable for Charter to record the transaction as it did." *Id.* at 161.

### 2. The Fourth Circuit Did Not "Exacerbate" a Split Among Circuits Prior to *Stoneridge* by Holding That Direct Attribution Is Not Required.

Petitioners incorrectly contend that the Fourth Circuit injected itself into an existing split between the Ninth Circuit, on one hand, and the Second, Tenth, and Eleventh Circuits on the other hand, when it held that direct attribution of the statements to JCM is not needed for 10(b) liability, if the parties' actions and statements had given investors a reason to rely on JCM's conduct in connection with the misrepresentations. *See* Pet. at 14-19.

In fact, the Fourth Circuit expressly harmonized its ruling with the opinions of the circuits with which petitioners claim that it conflicts with regards to the "public attribution" requirement. *See* App. 17a-22a. The Fourth Circuit's opinion is also consistent with *Stoneridge*, which post-dates all of the non-*dicta* authority upon which petitioners rely in their effort to create a conflict.

Far from requiring direct attribution as a predicate for liability, this Court noted in *Stoneridge* that no statements are necessary, so long as the defendants' actions are a necessary part of the fraud, and investors relied on defendants' conduct.

Specifically, this Court noted that it would be "erroneous" if one were "to suggest there must be a specific, oral or written statement before there could be liability under section 10(b) or rule 10b-5." 552 U.S. at 158. The Court confirmed that "conduct itself can be deceptive." *Id.*

This Court's opinion in *Stoneridge* affirming dismissal of claims against Charter's supplier was predicated largely on an analysis of whether or not investors in Charter securities relied in any way on any actions taken by suppliers. Because the defendants in *Stoneridge* played no role in preparing or disseminating Charter's financial statements, 552 U.S. at 155, "[n]o member of the investing public had knowledge, either actual or presumed of respondents' deceptive acts...." *Id.* at 159. Thus, the

Court concluded "[p]etitioner as a result cannot show reliance upon any of respondents' actions, except in an indirect chain...far too remote for liability." *Id.*

The Fourth Circuit's holding was clearly consistent with *Stoneridge.* The Fourth Circuit noted that "[w]hile *Stoneridge* makes clear that the fraud-on-the-market presumption does not apply to transactions that are not publicly disclosed, the holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." App. 32a.

Unlike the respondent in *Stoneridge,* JCM admittedly played a major "role in preparing or disseminating" the Janus Fund prospectuses. *In re Mut. Funds*, 590 F. Supp. 2d at 747; 27a-30a; 64a-65a ¶ 18; C.A. App. 109, 366, 371; Initial Decision at 15.

Furthermore, investors here had every basis to believe that the statements came from JCM, because the Funds have no operations of their own, the prospectuses, which were filed and disseminated by JCM expressly stated that JCM was to handle all operations for the Funds. App. 27a-28a. As the Fourth Circuit noted, this arrangement is typical of the mutual fund industry See App. 29a-30a.

In *Stoneridge,* the Court made it clear that direct attribution is not necessary in order to establish investors' reliance on the actions of a participant in the preparation of the misleading statements. Insofar as pre-*Stoneridge* circuit court opinions required otherwise, they were inconsistent with *Stoneridge*. However, as the Fourth Circuit noted, even those pre-*Stoneridge* circuit courts that have required public attribution appear to allow for liability when investors are given reason to rely on the conduct of unattributed maker of misleading statements. *See* App. 20a-22a, (discussing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001); and *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996)).

In *Wright* (much like in *Fidel, supra*), investors sued a company's auditor for failing to correct inaccurate financial statements for that company that were expressly presented as being "unaudited." Dismissal was affirmed, because the auditor neither directly nor indirectly communicated the misrepresentations to investors. *See* 152 F.3d at 175. As the Fourth Circuit noted "*Wright* did not make clear, however, whether the statement itself must be attributed on its face to the defendant." App. 21a.

In fact, the Fourth Circuit noted that post *Wright,* the Southern District of New York, in *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 334 (S.D.N.Y. 2004) suggested that direct attribution is not required.[14] App. 18a. Moreover, a Second Circuit opinion, post-*Wright,* held that "plaintiffs may adequately plead reliance against corporate officers for statements appearing in analyst reports not directly

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[14] While petitioners takes the Fourth Circuit to task for relying on pre-*Stoneridge* caselaw, Pet. at 13, petitioners' efforts to concoct an inter-circuit conflict rely exclusively on pre-*Stoneridge* holdings.

attributed to the officers." App. 26a (discussing *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000)).[15]

Petitioners are wrong to contend that the Second Circuit's pre-*Stoneridge* opinion in *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147 (2d Cir. 2007) dispels the Fourth Circuit analysis of *Wright*. Pet. at 16. *Lattenzio*, like *Wright* and *Fidel*, involves a suit by investors in a public company (in this case Warnaco Corp.) against an auditor (Deloitte & Touche), as a result of misrepresentations in the company's quarterly statements. *See Lattanzio*, 476 F.3d at 150. The quarterly reports at issue "were not audited by Deloitte & Touche" (*Id.* at 152), "did not contain an audit opinion by Deloitte and were not attributed to Deloitte when they were disseminated." *Id.* at 154. Nor for that matter, was there an allegation that Deloitte filed the misleading statements, prepared them, that those statements described actions by Deloitte or that Deloitte disseminated the statements. The only auditor involvement was a "review" of the statements. *Id.* at 152. The Second Circuit's pre-*Stoneridge* inquiry turned on whether the auditor's "review" of an unaudited statement made by others can constitute "making" a statement. *See id.* at 155. Insofar as that court required attribution, it just required that "the public's understanding [of the accountant's role] ... [be] based on the accountant's articulated statement." *Id.* As there was no public

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[15] The Fourth Circuit, citing these and other opinions, noted that "a number of courts, even in circuits that have adopted a direct attribution requirement, have concluded that in certain circumstances auditors and corporate officers may be responsible for statements issued by the corporation's analysts that were not directly attributed to the auditors or officers." App. 24a.

proclamation concerning the role Deloitte might have played in drafting or even reviewing Warnaco's public statements, *Lattanzio* is quite different from the case at bar.[16]

The Fourth Circuit also recognized that the Tenth Circuit's *Anixter* opinion did not require direct attribution on the face of the document as a predicate for liability. The court in *Anixter* concluded that "[a]n accountant's false and misleading representations in connection with the purchase or sale of any security, if made with the proper state of mind and if relied upon by those purchasing or selling a security, can constitute a primary violation." *See* App. 22a (quoting *Anixter*, 77 F.3d at 1226.)[17]

The Fourth Circuit's opinion does not conflict with *Ziemba* either. Plaintiffs there sued a law firm that made no false statements directly, but allegedly played a role in drafting, reviewing and editing fraudulent statements by its client. *Ziemba*, 256 F.3d

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[16] Moreover, the holding in *Lattenzio* was based on certain circumstances unique to the relationship between an independent auditor and a public corporation. Specifically, the court noted that "the importance plaintiffs place on an accountant's *review* of *interim* financial statements is further eroded by the numerous duties and requirements associated with an accountant's *audit* of *annual* financials. Clearly, Congress knows how to impose duties on accountants and expose them to liability when it wants to do so." 476 F.3d at 156 (emphasis in original).

[17] *Anixter* did not concern pleading standards on a motion to dismiss. The decision came post-trial, and concerned a jury instruction concerning aiding and abetting, which, post-*Central Bank*, was no longer a viable theory. The court, in remanding, noted that the defendant who was the subject of the "aiding and abetting" jury instruction (an auditor), could in fact be held primarily liable for his actions. *See id.* 77 F.3d at 1227.

at 1202. There was nothing in the client's filings that gave investors any reason to believe that the law firm was the source of the information. The information did not concern the law firm's conduct; there was no reason to believe that the client itself had no operations; and there is no evidence that the law firm disseminated these misrepresentations with knowledge that they were misleading. The court held that primary liability should not attach "to those who were never identified to investors as having played a role in the misrepresentations." *Id.* Importantly, the court still recognized that a disclosure duty might exist even where the defendant itself does not speak, depending on:

> the relationship between the plaintiff and the defendant, the parties' relative access to the information to be disclosed, the benefit derived by the defendant from the purchase or sale, *defendant's awareness of plaintiff's reliance on defendant in making its investment decision, and defendant's role in initiating the purchase or sale.*

*Id.* (quoting *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986)) (emphasis added).

The opinion in *SEC v. Wolfson*, 539 F.3d 1249 (10th Cir. 2008) is, as petitioners acknowledge, *dicta* insofar as liability in private 10(b) actions was concerned. The court merely observed that in some circuits, as reflected in the *Ziemba* and *Wright* opinions, courts require some degree of attribution as a pre-requisite for 10(b) liability in a private action. *See* 539 F.3d at 1258. Importantly, the court noted in this *dicta* discussion that even *Wright* and *Anixter* did not require that the alleged violator directly communicate misrepresentations to the investors for primary liability to attach, *id.* at 1259 n.15.[18]

### B. The Ruling Does Not Have the Far Reaching Ramifications That Petitioners Contend.

Petitioners overstate the potential ramifications of the Fourth Circuit's ruling. The ruling would not, as petitioners contend, open the door to potential fraud liability on the part of all sorts of peripheral service providers to public corporations.

Although petitioners seek to cast JCM in the role of a mere "service provider" for the Janus Funds, the record tells a very different story. JCM did not merely provide services for the Janus Funds, rather JCM handled all of those Funds' operations. App. 27a-30a. These operations included, but were not limited to, drafting, reviewing and filing the Fund prospectuses. *In re Mut. Funds*, 590 F. Supp. 2d at 747; C.A. App. 484, ¶¶ 21, 26. JCM also distributed and disseminated the prospectuses. C.A. App. 484, ¶ 21; App. 30a. *Contra Stoneridge*, 552 U.S. at 155 ("Respondents had no role in preparing or disseminating Charter's financial statements.").

JCM did so with knowledge of the market timing arrangements that rendered the JCM-prepared prospectuses misleading. App. 9a-10a; App. 97a-100a, ¶¶ 87-88.

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[18] The *Wolfson* court made no mention whatsoever of this Court's ruling in *Stoneridge*.

There was also a considerable overlap in the management structure of JCM and the Funds, as all of the Fund officers were also JCM officers. C.A. App. 376-77.

And, of course, the misleading statements related to JCM's own conduct as the administrator of the Funds. C.A. App. 484 ¶¶ 20-22.

As the Fourth Circuit noted, this structure (wherein the fund itself has no operations of its own) is typical of mutual funds, so that most investors familiar with mutual funds have an expectation that the actual running of the Fund and preparing of the relevant documents is accomplished by the Fund manager, not the Fund itself. App. 29a-31a. As such, the latter is generally understood in the marketplace to be a shell without operation.

Thus, the Fourth Circuit's opinion does not change the existing body of authority that holds that in most ordinary situations, outside professionals and service providers are not responsible to investors for misleading statements in an issuer's public filings. Simply put, a holding that finds potential liability in the foregoing situation has little or no bearing on the exposure of ordinary service providers or professionals, even those who might assist in the drafting of publicly filed documents, for the following reasons:

- Generally, there is nothing in the public statements of the issuer that gives investors any reason to believe that the service provider is "making" those statements - certainly not representation in the public statements that the service provider is performing *all* of the issuer's operations.

- Those service providers generally do not have overlapping management with the issuer.
- The documents prepared by the service providers are not describing the operations and conduct of the service providers.
- There is rarely evidence that the service provider knows of the false or misleading nature of these documents.

Even before the Fourth Circuit's ruling, other courts had found the potential for liability on the part of professionals or service providers - even professionals and service providers that did not control all of the operations of the issuer and do not have interlocking management with the issuer - when the nature of the relationship was such that investors would have reasonably expected that these outsiders played a role in the statements at issue. *See Global Crossing, supra,* 322 F. Supp. 2d at 334; *In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 166 (D. Mass. 2002) (both discussed by Fourth Circuit at 24a-25a).

There is at least one other reason why the questions raised herein are of little or no potential far reaching import and that, even assuming arguendo, the Fourth Circuit misapplied *Stoneridge*. Specifically, Senator Arlen Specter (D-Pa.) introduced the "Liability for Aiding and Abetting Securities Violations Act of 2009" S.1551, 111th Cong., on July 30, 2009, which has been referred to the Committee on the Judiciary where hearings to consider the bill were held on September 17, 2009.

The stated purpose of the bill is to "amend section 20 of the Securities Exchange Act of 1934 to allow for a private civil action against a person that provides substantial assistance in violation of such act.". S.1551. Considering this potential legislation, it would be an imprudent use of this Court's limited resources to expand upon the guidance it provided in *Stoneridge* when Congress is contemplating a statutory solution that would obviate petitioners' otherwise-imagined conflict among the circuits.

## CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their petition. Therefore, respondent respectfully requests that the petition be denied.

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Respectfully Submitted,

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