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No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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At least five courts of appeals—including the Fourth Circuit below—have acknowledged a circuit split on the second question presented: Whether, in a private Rule 10b-5 action, a secondary actor can be held liable for statements made by another company and not directly attributed to the defendant at the time. Pet. App. 19a; *see also*, *e.g.*, *SEC* v. *Tambone*, 597 F.3d 436, 447 (1st Cir. 2010) (en banc); *SEC* v. *Wolfson*, 539 F.3d 1249, 1258–59 (10th Cir. 2008); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998).

Since the petition was filed, the Second Circuit compounded this split by expressly rejecting the Fourth Circuit's reasoning that attribution may be implied based on what "interested investors" allegedly would know. *Compare PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010), *with* Pet. App. 23a–24a. Indeed, Judge Parker, concurring in *PIMCO*, explained that the conflict warrants this Court's resolution "[i]n light of the importance of the existence, *vel non*, of an attribution requirement to the securities laws, the bar, and the securities industry." 603 F.3d at 162.

The Acting Solicitor General argues, however, that the Court need not resolve the conflict in *this* case because investment advisers purportedly have a closer relationship to their issuer clients than do other secondary actors, such as accountants, lawyers, and bankers. U.S. Br. 20–22 & n.10. In other words, the government guesses that the market is more likely to imply attribution for some secondary actors than for others. *Id.* at 20 (arguing that "investors rely on the role of a mutual fund's investment adviser" (internal quotation omitted)). But the Second Circuit rejected implied attribution for *all* secondary actors—defined as "parties who are not employed by the issuing firm" (603 F.3d at 148 n.1)—including investment advisers. Thus, the government merely endorses the minority side of the conflict, which is hardly a reason for this Court to avoid resolving it.

The government's attempts at misdirection cannot obscure one simple fact: If this case had been brought in the Second Circuit, the dismissal would have been affirmed, whereas it was reversed by the Fourth Circuit. Investors, issuers, service providers, and courts are not well-served by such divergent application of federal law to participants in the national securities markets.

The petition for a writ of certiorari should be granted.

I. THE COURTS OF APPEALS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

It is telling that the government devotes less than five pages to discussing the real, and outcome-determinative, conflicts among the circuits on the two questions presented. *See* U.S. Br. 17–22. The government's efforts to wish away these conflicts fail.

A. THE CIRCUITS ARE DIVIDED ON WHEN A NON-ISSUER "MAKES" A STATEMENT

Like lead plaintiff, the government denies that there is a circuit split on the "making" question because "[e]ach of the cases petitioners cite dealt with secondary actors that, unlike JCM, did not manage an issuer and had no role in preparing or disseminating the relevant misrepresentations." U.S. Br. 18. This is a distinction without a difference: The prohibition on aiding-and-abetting liability announced in *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), and *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), is just that—a prohibition on aiding-and-abetting liability. *See* Reply Br. 2–4.

Other courts of appeals have recognized that the *amount* of a secondary actor's participation in another's misstatement does not transform the secondary actor into a "maker" of that misstatement. *See* Pet. 10–14. To claim, as the government does, that some secondary actors are so involved with their clients as to be deemed primary violators is simply to say that aiding-and-abetting liability should be imposed in some circumstances. That the SEC disagrees with *Central Bank* and *Stoneridge* is no reason for this Court to refuse to police the line drawn in those decisions. Indeed, Congress itself recently declined to revisit the prohibition on private aiding-and-abetting liability. *See* Marcia Coyle, *Supreme Court Decisions Survive Senate Action on Financial Reform*, Nat'l L.J., May 21, 2010.

The need for this Court's review is even greater given the recent decisions in *PIMCO* and *Tambone*. In *PIMCO*, the Second Circuit easily brushed aside *In re Global Crossing, Ltd. Securities Litigation*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004), which was the *sole* "authority" cited by the Fourth Circuit below. Pet. App. 18a; *see also PIMCO*, 603 F.3d at 154. The Second Circuit likewise rejected the liability theory on which the government now attempts to salvage the Fourth Circuit's decision, holding that it could not "impose liability on secondary actors ... for their role in drafting and editing false documents on behalf of an issuing firm" without a "radical departure from our precedents." *Id.* at 156.

Similarly in *Tambone*, the en banc First Circuit rejected the SEC's theory—recycled in the government's brief here (U.S. Br. 11)—that dissemination of a statement constitutes "making" that statement under Rule 10b-5. 597 F.3d at 442. The government in *Tambone* did not even pursue what has become its primary argument in this Court—namely, that the defendants could have "made" the relevant statement based on their "participat[ion] in the drafting process"—even though the SEC had raised that theory before the district court. *Id.* at 440–41. Both theories run smack into the unassailable observation that "[i]f *Central Bank*'s carefully drawn circumscription of the private right of action is not to be hollowed—and we do not think that it should be—courts must be vigilant to ensure that secondary violations are not shoehorned into the category reserved for primary violations." *Id.* at 446.

PIMCO and *Tambone* unambiguously rejected the SEC's arguments as attempts to "impose primary liability ... for conduct that constitutes, at most, aiding and abetting (a secondary violation)." 597 F.3d at 446. The government now attempts to portray the decision below as consistent with settled law, but it misrepresents what is settled as to the "making" question. While the government evidently agrees with the Fourth Circuit's decision below, that decision conflicts with *Central Bank*, *Stoneridge*, and the decisions of every other court of appeals to have addressed the issue.

B. THE CIRCUITS ARE DIVIDED ON THE ATTRIBUTION REQUIREMENT

The government dismisses as a "purported split" (U.S. Br. 21 n.9) the open and acknowledged disagreement among the courts of appeals over whether direct attribution is a prerequisite to a finding of reliance in a private Rule 10b-5 action. Yet *every* recent case to address this issue—including the decision below—has recognized the circuit split. *See* Pet. App. 19a ("The courts of appeal have diverged over the degree of attribution required to plead reliance"); *see also, e.g., Tambone*, 597 F.3d at 447 ("Two divergent strains of authority have evolved"). That split has only deepened with the Second Circuit's decision in *PIMCO*, as Judge Parker emphasized. *See* 603 F.3d at 161–62.

PIMCO addressed "whether ... a corporation's outside counsel can be liable for false statements that those attorneys allegedly create, but which are not attributed to the law firm or its attorneys at the time the statements were disseminated." 603 F.3d at 148. The Second Circuit held that "a secondary actor can be held liable in a private damages action brought pursuant to Rule 10b-5(b) only for false statements attributed to the secondary-actor defendant at the time of dissemination." *Ibid.* (footnote omitted). "Absent attribution," the court reasoned, "plaintiffs cannot show that they relied on defendants' *own* false statements, and participation in the creation of those statements amounts, at most, to aiding and abetting securities fraud." *Ibid.*

PIMCO emphatically rejected the Fourth Circuit's conclusion below that "a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant.*" Pet. App. 23a–24a (emphasis added). Although the Fourth Circuit thought it sufficient that "interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statement" (*id.* at 24a), the Second Circuit held otherwise:

> [S]econdary actors can be liable in a private action under Rule 10b-5 for only those statements that are explicitly attributed to them. The mere identification of a secondary actor as being involved in a transaction, *or the public's understanding that a secondary actor is at work behind the scenes*[,] are alone insufficient. To be cognizable, a plaintiff's claim against a secondary actor must be based on that actor's own articulated statement, or on statements made by another that have been *explicitly* adopted by the secondary actor.

603 F.3d at 155 (first emphasis added; internal quotations omitted).

Although *PIMCO* is squarely, and obviously, at odds with the decision below, the government asserts that "[t]here is ... no reason to conclude that the Second Circuit would apply an attribution requirement to a claim against an investment adviser." U.S. Br. 20. This speculation, however, is destroyed by the *PIMCO* decision itself, which noted that "[w]e use the term 'secondary actor' to refer to lawyers ... , accountants, *or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud.*" 603 F.3d at 148 n.1 (emphasis added). This definition plainly includes investment advisers, which are not—and indeed cannot be—"employed by" the funds they advise. *See* Part II, *infra*.

There is therefore no basis for distinguishing this case from *PIMCO*. In both cases, the allegedly false statements were contained in offering documents issued by a different company that did not employ the named defendants. *Compare* Pet. App. 17a–18a *with* 603 F.3d at 149–50. Yet the cases were decided differently solely because of the courts of appeals' conflicting views on the attribution requirement. The dismissal of the *PIMCO* complaint was affirmed *because* the alleged misstatements were not attributed to the law firm. *Id.* at 155. The dismissal of the complaint here, however, was reversed *even though* the statements were not attributed to the investment adviser. Pet. App. 17a (noting that "the individual fund prospectuses are unattributed on their face"). The two decisions cannot be reconciled.

In light of the clear and dispositive conflict among the courts of appeals on the attribution requirement, this Court's review is warranted.

II. An Investment Adviser Is No Less A Service Provider Than A Lawyer Or Accountant

On both questions presented, the government's efforts to dissuade this Court from resolving the circuit splits turn on a simple but fundamentally misguided distinction: The principal defendant here is an investment adviser, whereas the conflicting decisions involved attorneys, accountants, or banks. The government labels such service providers "outsiders," arguing that investment advisers by contrast are "essentially ... insiders." U.S. Br. 8–9. That distinction is every bit as nonsensical as it appears.

In a "prospectus liability" case—that is, where the Rule 10b-5 claim is premised on alleged misstatements in the prospectus, registration statement, or other offering documents—the universe of primary actors is limited to the issuer and its employees. All others involved in the offering, including the range of advisers—investment advisers, financial advisers, legal advisers, and so forth—are secondary actors. Thus, the lower courts have correctly (and unanimously) applied the prohibition on aiding-and-abetting liability to *all* persons and entities other than the issuer and its employees. *See PIMCO*, 603 F.3d at 148 n.1.

Unlike the government's current (and, before now, entirely unheard-of) argument, these appellate decisions are entirely consistent with this Court's precedents. In *Central Bank*, this Court rejected aiding-and-abetting liability for "those who provide services to participants in the securities business." 511 U.S. at 188. The Court reiterated in *Stoneridge* that this includes "[a]ll secondary actors." 552 U.S. at 166. In neither decision did the Court recognize an exception for investment advisers or any other class of service providers.

Unsurprisingly, the government is unable to cite a single case, from any court, holding that an investment adviser is analogous to a "corporate insider" of the mutual fund. The *sole* authority that the government musters is a footnote in a 33-year-old SEC administrative decision. U.S. Br. 9 (citing *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977)). Not only was this decision set aside on appeal (*see Steadman* v. *SEC*, 603 F.2d 1126, 1143 (5th Cir. 1979)), it is irrelevant: *Steadman* involved aiding-and-abetting liability, which *Central Bank* and

Stoneridge foreclose in the context of private Rule 10b-5 suits.

The issue in *Steadman* was whether an investment adviser "aided and abetted violations" of Section 17(a) of the Investment Company Act by causing several of the mutual funds it advised to buy and sell securities with a foreign fund to which it was also the adviser. 46 S.E.C. at 919–20. The SEC reasoned that the investment adviser's "controlling influence" over the foreign fund (*id.* at 920 n.81) was sufficient to render the foreign fund an "affiliated person of an affiliated person [*i.e.*, the adviser]" of the mutual funds. *Id.* at 920. *Steadman* is thus secondary liability squared: Not only did the SEC impose only aiding-and-abetting liability, it did so on the theory that the investment adviser controlled the fund it advised.

The nearest analogue in the private securities context is control-person liability under Section 20(a) of the Exchange Act. While it is certainly possible that, in an appropriate case, an investment adviser (or any other service provider) could exercise sufficient control over an issuer to be liable as a control person, in *this* case lead plaintiff has never pleaded that JCM or JCG are control persons *of the Janus Funds*. *See* Pet. App. 115a–116a; *see also* C.A. Reply Br. 22 n.10 (conceding that "replead[ing]" would be required "to add section 20(a) 'Control Person' claims against JCG and JCM for their role in controlling the activities of the funds"). The government has no license to rewrite the operative pleadings to fit its liability theory *du jour*.

It is no answer to say (as the government does) that some investment advisers are intimately involved in their clients' businesses. The same can be said for many lawyers, bankers, and consultants. These service providers remain, however, service providers: In each case, the defendant is not the issuing company or an employee of the issuing company but rather a separate company that is connected only by contract to the issuer. The "closeness" of the relationship (*i.e.*, the extent of services contracted out to the service provider) is irrelevant to the Rule 10b-5 analysis.*

It is bizarre that the government would claim that investment advisers to mutual funds are "essentially ... corporate insider[s]" under the securities laws (U.S. Br. 9) without ever acknowledging that Congress has passed two statutes dealing with the securities-law aspects of this particular industry. The Investment Company Act of 1940 and the Investment Advisers Act of 1940 together include 89 sections and comprise almost 100 pages of the United States Code. *See* 15 U.S.C. §§ 80a-1 *et seq.*, 80b-1 *et seq.* The 1940 Acts contain liability provisions specifically tailored to investment advisers (*id.* §§ 80a-35(a), 80b-6), rendering it unnecessary to distort primary liability under Section 10(b) to reach them. Moreover, *nothing* in the 1940 Acts, which comprehensively regulate the fund-adviser relation-

* This is true both in general and in this particular case. While the Janus Funds have delegated certain management functions to JCM, those functions do *not* include preparation or filing of the prospectus and other offering documents—for which the Funds expressly remain responsible. *See* C.A. J.A. 366; *see also*, *e.g.*, 15 U.S.C. § 80a-24(a). JCM is thus indisputably a secondary actor with respect to the activity challenged in this lawsuit (prospectus disclosure) regardless of the extent of its involvement in *other* aspects of the Funds' operations.

ship, makes the investment adviser a "corporate insider" of the mutual funds it advises.

The government's blatant disregard for the corporate form is impermissible. *See United States* v. *Bestfoods*, 524 U.S. 51, 63–64 (1998). The investment adviser and the funds must by law be separate legal entities, with separate boards of directors, and the 1940 Acts contain numerous provisions to ensure that they remain independent. *See, e.g.*, 15 U.S.C. § 80a-10(a) (limiting the percentage of the fund's board that can be affiliated with the investment adviser). The relationship between these separate companies is not that of employer and employee, but rather is governed by a written contract that must, by law, be approved by the independent directors of the funds and their shareholders. *Id.* § 80a-15(a). This Court has therefore emphasized the statutorily required *independence* between funds and their adviser. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422–23 (2010). Independence is the antithesis of "insiderness."

* * *

This Court has enforced the prohibition against secondary liability in private Rule 10b-5 actions to reduce the uncertainty faced by non-issuer participants in our securities markets. *Central Bank*, 511 U.S. at 189–90. That approach requires a bright line between primary actors (issuers and their employees) and secondary actors (everyone else, including all contractual service providers). The government's naked effort to blur that line with respect to one type of service provider—investment advisers—has no basis in any statutory or decisional authority, and is misguided as a matter of federal policy. The government cannot paper over clear conflicts among the courts of appeals by inventing a flimsy distinction that was not litigated by the parties or addressed by the lower courts.

The government thinks the decision below was "correc[t]." U.S. Br. 8. That is decidedly a minority view, but one the government is free to advance on the merits. Given the manifest, and manifold, circuit splits exacerbated by the Fourth Circuit's decision, however, the government has offered no reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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