UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	**ADMINISTRATIVE PROCEEDING**
JOHN P. FLANNERY	)	**File No. 3-14081**
AND JAMES D. HOPKINS	)	
	)	
Respondents.	)	
	)	

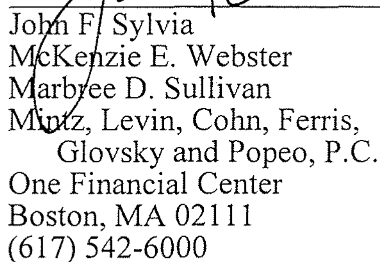
RESPONDENT JAMES D. HOPKINS' MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY DISPOSITION

Pursuant to 17 C.F.R. § 201.250(a), the Respondent James D. Hopkins respectfully requests that the Hearing Officer allow him to file the accompanying Motion for Summary Disposition and Memorandum in Support. In support of this motion, Mr. Hopkins states that the Motion for Summary Disposition is warranted to avoid an unnecessary trial because there is no legal or factual basis for the charges against him.

Respectfully Submitted,

JAMES D. HOPKINS

By his attorneys,



John F. Sylvia
McKenzie E. Webster
Marbree D. Sullivan
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000

Dated: December 23, 2010

5273703v.1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	
	)	**ADMINISTRATIVE PROCEEDING**
JOHN P. FLANNERY	)	**File No. 3-14081**
AND JAMES D. HOPKINS	)	
	)	
Respondents.	)	
	)	

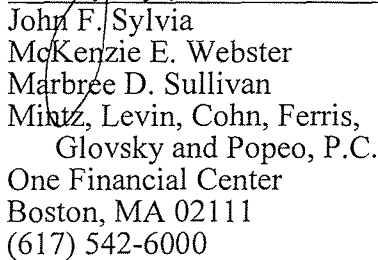
RESPONDENT JAMES D. HOPKINS' MOTION FOR SUMMARY DISPOSITION

Pursuant to 17 C.F.R. § 201.250, the Respondent James D. Hopkins respectfully requests that the Hearing Officer grant this Motion for Summary Disposition. As set forth more fully in the accompanying memorandum, there is no legal or factual basis for the charges lodged by the SEC. Even if one assumes that certain documents distributed by Mr. Hopkins' employer in 2006 and 2007 did contain material misstatements or omissions (which is itself a deeply dubious assumption), Mr. Hopkins (1) did not "make" those misstatements or omissions within the meaning of Rule 10b-5, and (2) did not "obtain money or property by means of" their dissemination as is required to prove a violation of Section 17(a)(2).

Respectfully Submitted,

JAMES D. HOPKINS

By his attorneys,



John F. Sylvia
McKenzie E. Webster
Marbree D. Sullivan
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000

Dated: December 23, 2010

5273643v.1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

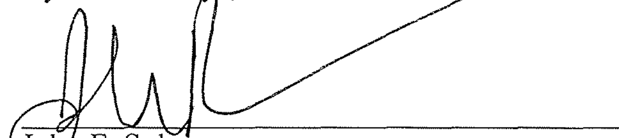
In the Matter of	)	
	)	**ADMINISTRATIVE PROCEEDING**
JOHN P. FLANNERY	)	**File No. 3-14081**
AND JAMES D. HOPKINS	)	
	)	
Respondents.	)	
	)	

MEMORANDUM IN SUPPORT OF RESPONDENT JAMES D. HOPKINS' MOTION FOR SUMMARY DISPOSITION

Respectfully Submitted,

JAMES D. HOPKINS

By his attorneys,



John F. Sylvia
McKenzie E. Webster
Marbree D. Sullivan
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000

Dated: December 23, 2010

TABLE OF CONTENTS

Page

I. Background 1

A. Limited Duration Bond Fund 1

B. Mr. Hopkins' Role As A Product Engineer. 2

C. Specific Charges Against Mr. Hopkins 4

II. Legal Standards 4

III. The Character Of The Charges Against Mr. Hopkins. 5

IV. Mr. Hopkins Is Entitled To Summary Disposition Of The Charge Brought Under Section 10(b) Of The Exchange Act And Rule 10b-5(b). 6

A. Charges Under Rule 10b-5(b) Require Proof That The Defendant Actually Made The Allegedly-Actionable Misstatements 7

B. The SEC Contends – As It Did In *Tambone* – That Mr. Hopkins "Made" The Alleged Statements And Omissions By Virtue Of His Supposed "Use" And "Authorship" Of The Documents At Issue 10

C. Allegations And Evidence That Mr. Hopkins "Used" The Documents At Issue Fail As A Matter Of Law To Create A Genuine Issue Of Material Fact 12

D. Allegations And Evidence That Mr. Hopkins "Authored" The Documents At Issue Fail As A Matter Of Law To Create A Genuine Issue Of Material Fact 14

1. As A Matter Of Law, Even Dispositive Proof Of "Authorship" Would Not Establish Primary Liability For Statements A Defendant Drafted For Others To "Make." 15

2. The SEC Cannot Establish That Mr. Hopkins "Authored" The Allegedly-Misleading Statements In The Documents At Issue, Or That He Caused The Existence Of The Allegedly-Misleading Omissions From Them. 19

V. Mr. Hopkins Is Entitled To Summary Disposition Of The Charge Brought Under Section 17(a) Of The Securities Act. 24

VI. Conclusion 26

TABLE OF AUTHORITIES

Cases

Central Bank of Denver v. First Interstate Bank of Denver,
511 U.S. 164 (1994) 7
Cochran v. Quest Software, 328 F.3d 1 (1st Cir. 2003) 11
In re Comverse Tech., Inc., SEC Release No. 400,
AP File No. 3-13828, 2010 WL 2886397 (July 22, 2010) 5, 13
In re CVS Caremark Corp., SEC Release No. 8815,
90 SEC Docket 2689, 2007 WL 1880048 (June 29, 2007) 24
Janus Capital Group Inc. v. First Derivative Traders,
Petition for a Writ of Certiorari, 2009 WL 3614467 (Oct. 30, 2009) 17
Mississippi Public Employees' Ret. Sys. v. Boston Scientific Corp.,
523 F.3d 75 (1st Cir. 2008) 21
Sanchez v. Triple-S Mgmt. Corp.,
492 F.3d 1 (1st Cir. 2007) 11
SEC v. Forman,
No. 07-11151, 2010 WL 2367372 (D. Mass., June 9, 2010) 25
SEC v. Hopper, No. Civ. A. H-04-1054,
2006 WL 778640 (S.D. Tex. Mar. 24, 2006) 25
SEC v. Tambone,
550 F.3d 106 (1st Cir. 2008) 25
SEC v. Tambone,
597 F.3d 436 (1st Cir. 2010) 7, 8, 9, 10, 11, 12, 14, 20, 22
SEC v.Tambone,
473 F. Supp. 2d 162 (D.Mass. 2006) 8, 19
Shapiro v. Cantor,
123 F.3d 717 (2d Cir. 1997) 10

Statutes

15 U.S.C. § 77q(a)(2), and (2) 6
15 U.S.C. §§ 77i(a), 78y(a)(1) 5
15 U.S.C. §§ 80a-42, 80b-13 5

Rules

Fed. R. Civ. P. 56(c)(2) 5
Fed. R. Civ. P. 9(b) 8, 11

Regulations

17 C.F.R. § 201.250(a) 5
17 C.F.R. § 201.250(b) 4, 5
17 C.F.R. § 240.10b-5(b) 6, 7, 9

Respondent James D. Hopkins submits this memorandum in support of his motion for summary disposition of all the charges asserted against him in this matter. As the Hearing Officer will see, there is no legal or factual basis for those charges. Even if one assumes that certain documents distributed by his employer in 2006 and 2007 did contain material misstatements or omissions (which is itself a deeply dubious assumption), Mr. Hopkins (1) did not "make" those misstatements or omissions within the meaning of Rule 10b-5, and (2) did not "obtain money or property by means of" their dissemination as is required to prove a violation of Section 17(a)(2).

I. Background

A. Limited Duration Bond Fund

In 2002, State Street Global Advisors ("SSgA") established two essentially identical funds that were together referred to as Limited Duration Bond Fund ("LDBF" or the "Fund"). As described in its fact sheet, LDBF was an active fixed income fund that invested in a variety of securities including collateralized mortgage obligations, adjustable rate mortgages, fixed rate mortgages, corporate bonds, and asset backed securities. As also described in the fact sheet, the Fund utilized a variety of forms of leverage including futures, options, and swaps. Since its inception, LDBF was considered a relatively low risk fund, often described as an "enhanced cash fund," because the vast majority of the securities held by the fund were of a very high credit quality (mostly "AAA" or "AA") and the fund had no interest rate risk. Significantly, prior to the subprime crisis that played out in the late summer and early fall of 2007, no one internal to SSgA, or external questioned the credit worthiness and stability of these high quality asset backed securities (securities which were both prime and subprime). Thus, not surprisingly, through June 2007, LDBF's portfolio managers continued to manage the Fund consistent with

the broader marketplace's understanding of the stability of these securities, maintaining the portfolio's high average credit quality and staying within SSgA's conservative risk budget for the Fund. While the Fund was leveraged, it was primarily leveraged in the area of these same high credit quality securities so the levered position was not considered to have increased the risk in the Fund.

Then, in the summer of 2007, an unprecedented liquidity crisis rattled the markets due to the unanticipated collapse of the residential mortgage markets, and SSgA's funds (in tandem with the market sector as a whole) experienced dramatic underperformance. During this period, those high quality subprime asset backed securities which were viewed by the marketplace to carry little risk, suffered significant volatility and underperformance. As the markets seized up in July and August, SSgA devoted extensive time and resources to regularly communicating with its clients regarding the ongoing and unanticipated events in the market and the effect the unprecedented conditions were having on LDBF. This effort and these communications were spearheaded by SSgA's portfolio managers, legal department, and executives, and all information about the LDBF, its exposures and its performance, was carefully monitored and controlled by these departments. Mr. Hopkins' role during this period was to take direction from all of these departments and communicate the information to clients in the most efficient and transparent manner possible.

B. Mr. Hopkins' Role As A Product Engineer.

During the relevant time period, Mr. Hopkins was employed at SSgA as a fixed income product engineer, a mid-level employment position in the fixed income space. As a Product Engineer, Mr. Hopkins' primary role was to facilitate the distribution of information to clients about SSgA's fixed income products. As such, he served as a conduit between the portfolio

managers and the client-facing personnel. On a day-to-day basis, he answered questions from SSgA's client relationship managers and kept them apprised of the status of the fixed income funds he was responsible for, including LDBF. Thus, as a Product Engineer, Mr. Hopkins managed neither clients, nor funds, and there were many aspects of the business that Mr. Hopkins did not control or have the authority to change. Notably, Mr. Hopkins (a) did not have input into investment decisions or have a portfolio manager's knowledge of or perspective into any fund's strategies; (b) did not control the use or distribution of marketing materials; (c) lacked authority to intervene in, or direct client relationships and trading decisions; and (d) did not have authority to dictate what SSgA's written communications to clients should or should not include.

When it came to providing information to clients, in other words, Mr. Hopkins was essentially a messenger. His job was to package the information provided to him by the investment team into one of several different formats, and then to distribute the material - most often to client-facing personnel, but sometimes to clients themselves - under the supervision of the relationship manager. Hopkins could (and sometimes did) voice an opinion about content but he was never the final arbiter. The source of the information was almost always the portfolio managers, with the risk group, and legal, having a say about content as well. Importantly, Mr. Hopkins' integrity, professionalism, and conscientious attention to his work and clients, were not only recognized, but lauded by his co-workers and his supervisor during this critical time. His performance reports for this period were replete with references to the fact that he worked diligently throughout this entire period to obtain accurate and relevant information from the investment team so that he could adequately inform the relationship managers and clients themselves. Further attesting to his character, Mr. Hopkins was recognized by SSgA for his significant charitable contributions to the Boston community when he was awarded State Street's

Chairman's Community Service Award for his unparalleled commitment to charitable causes, including his distinguished role as President of the Ronald McDonald House, a home away from home for cancer patients. It is within the context of Mr. Hopkins' limited role and authority as a product engineer, coupled with his impeccable professional and personal reputation for integrity, that the SEC's allegations must be considered.

C. Specific Charges Against Mr. Hopkins

The specific charges against Mr. Hopkins revolve around four documents: (1) fact sheets used to introduce investors to the Fund; (2) PowerPoint slides used in presentations to investors; (3) a letter that State Street – not Mr. Hopkins – sent to certain investors in March 2007, explaining the reasons for the Fund's recent underperformance; and (4) another letter that State Street – again, not Mr. Hopkins – sent to some investors in late July 2007. The Commission alleges that the fact sheets and presentation slides contained affirmative misstatements about the Fund, and that the two letters, while truthful in content, omitted additional information that was needed in order to make the letters not misleading.[1/] The Commission claims that Mr. Hopkins is liable as a primary violator for these statements and omissions because he "used or was responsible for drafting and/or updating" the fact sheets and presentation slides, and because he played some role in drafting the two letters. Even assuming, *arguendo*, that the SEC has accurately characterized Mr. Hopkins' role and involvement, these allegations are not sufficient as a matter of law to make him liable for a violation of Section 10(b) or Section 17(a).

II. Legal Standards

Motions for summary disposition in a proceeding like this one are governed by 17 C.F.R. § 201.250(b). The standard is virtually identical to the standard for granting summary judgment

---

[1/] Additional facts relevant to the resolution of the motion are stated and supported by citations to the pleadings and evidence in the following sections of this memorandum.

under Fed. R. Civ. P. 56(c)(2). The regulation provides that the hearing officer may grant the motion "if there is no genuine issue with regard to any material fact and the party making the motion is entitled to a summary disposition as a matter of law." 17 C.F.R. § 201.250(b). "The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted pursuant to § 201.323." 17 C.F.R. § 201.250(a).

However, "[a] factual dispute between the parties will not defeat a motion for summary disposition unless it is both genuine and material. Once the moving party has carried its burden, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. The opposing party must set forth specific facts showing a genuine issue for a hearing and a determination made as to whether there is a genuine issue for resolution at a hearing." *In re Comverse Tech., Inc.*, SEC Release No. 400, AP File No. 3-13828, 2010 WL 2886397, at *1 (July 22, 2010) (internal citations and quotation marks omitted).

Because Mr. Hopkins resides in Massachusetts (Complaint, ¶ 7), an appeal from the Commission's final order in this matter will lie to the United States Court of Appeals for the First Circuit. 15 U.S.C. §§ 77i(a), 78y(a)(1); 15 U.S.C. §§ 80a-42, 80b-13. Consequently, insofar as relevant precedent exists in the First Circuit, Mr. Hopkins will argue for the application of that decisional law.

III. The Character Of The Charges Against Mr. Hopkins.

It is important to establish at the outset what this proceeding is and is not about. First, this is *not* an aiding and abetting case. The Order Instituting Administrative And Cease-And-Desist Proceedings Pursuant To Section 8A Of The Securities Act Of 1933, Section 21C Of The Securities Exchange Act Of 1934, Section 203(f) Of The Investment Advisers Act Of 1940, And

Section 9(b) Of The Investment Company Act Of 1940 (which Mr. Hopkins will, for the sake of brevity, refer to in this motion as "the Complaint") alleged only "primary violations" of both Section 17 of the Securities Act and Section 10(b) of the Exchange Act. (Complaint, ¶s 42-44)

Second, although the charges were characterized somewhat loosely in Paragraphs 42-44 of the Complaint, their substantive contours are made clear by the facts actually pled in that document. Mr. Hopkins has been accused of committing primary violations only (1) by making certain specific statements (Complaint, ¶s 13-15, 16-17, 18-21), or (2) by omitting material facts needed in order to make specific statements he supposedly made not misleading. (Complaint, ¶s 22-23, 32-35)

The claims against Mr. Hopkins, therefore, arise and must be analyzed under (1) Section 17(a)(2) of the Securities Act, which makes it unlawful "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," 15 U.S.C. § 77q(a)(2), and (2) Rule 10b-5(b), which makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

IV. Mr. Hopkins Is Entitled To Summary Disposition Of The Charge Brought Under Section 10(b) Of The Exchange Act And Rule 10b-5(b).

Mr. Hopkins is entitled to summary disposition of the Section 10(b) charge based on the interplay of three factors: (1) the nature of the factual allegations, which assert that Mr. Hopkins committed primary violations by *making* untrue statements or material omissions, (2) the state of the law in the First Circuit, under which a statement or omission cannot be imputed to a defendant unless he or she *actually made* it, and (3) the state of the record, which establishes that

Mr. Hopkins did *not* "make" the allegedly-actionable misstatements or omissions within the meaning of the rule.

A. Charges Under Rule 10b-5(b) Require Proof That The Defendant Actually Made The Allegedly-Actionable Misstatements.

The Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) established that private plaintiffs can sue only for "primary" violations of Section 10(b) and Rule 10b-5. Consequently, "[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 [i.e., aiding and abetting] violations are not shoehorned into the category reserved for primary violations." *SEC v. Tambone*, 597 F.3d 436, 446 (1st Cir. 2010) (en banc). As the *Tambone* decision itself illustrates, this vigilance must be maintained in both private lawsuits and enforcement actions initiated by the SEC.

In cases involving the application of Rule 10b-5(b), the distinction between primary and secondary is marked, in the first instance, by the explicit statutory instruction to punish only a defendant who "make[s] an untrue statement" or omits information necessary to render a statement that he or she "made . . . not misleading." 17 C.F.R. § 240.10b-5(b). The *Tambone* decision demonstrates that this "maker" requirement is essential to the proof of any charge or claim that the defendant has committed a primary violation of the rule.

The defendants in *Tambone* were senior executives of a registered broker-dealer known as Columbia Distributor. 597 F.3d at 438. Columbia Distributor underwrote and distributed a complex of mutual funds known as Columbia Funds. *Id.* at 439. Among other things, "Columbia Distributor sold shares in the Columbia Funds and disseminated their prospectuses to investors." *Id.*

The enforcement action against Tambone and his co-defendant, Hussey, concerned alleged misrepresentations in several of the Columbia Funds' prospectuses. These documents said that the Funds did not permit the practice known as "market timing." *Id.* In fact, the SEC alleged, Columbia Funds had allowed "certain preferred customers to engage in market timing forays in at least sixteen different Columbia Funds. . . ." *Id.*

The SEC argued that Tambone and Hussey had "made" the statements in the prospectuses for two reasons, asserting what Mr. Hopkins will refer to as an "authorship" theory and a "use" theory, respectively. First, in its amended complaint, the SEC contended that Tambone and Hussey had "made" the alleged misrepresentations in the prospectuses, within the meaning of Rule 10b-5(b), because they had "participat[ed] in the drafting process that went into the development of the market timing language." *Id.* As the District Court described it:

> The new complaint contains two paragraphs that do allege involvement with drafting a prospectus by both Tambone and Hussey. In paragraphs 36 and 37 of the new complaint the defendants are alleged to have exchanged e-mails with in-house counsel for Columbia Advisors regarding draft language on market timing for the fall 2001 prospectus. Those allegations are particularized in that they allege specific activity on approximate dates by Tambone and Hussey.

SEC v.Tambone, 473 F. Supp. 2d 162, 166 (D.Mass. 2006).

The District Court rejected this "authorship" theory, ruling that the allegations of involvement in the drafting process were insufficient as a matter of law to satisfy the "particularity" requirement for pleading fraud claims under Fed. R. Civ. P. 9(b). The amended complaint had failed "to identify the substance of the comments made by either Tambone or Hussey in those e-mails, and, furthermore, fail[ed] to allege that any of the language reviewed or proposed by either defendant was ever actually incorporated into the fall 2001 prospectus." *Id.* At bottom, then, the flaw in the SEC's "authorship" theory was that its complaint lacked "a specific allegation linking either defendant to a statement in a particular prospectus." *Id.*

The SEC dropped the "authorship" theory on appeal, electing instead to stake its claim on the argument that Tambone and Hussey had "made" the offending statements by "using the prospectuses in their sales efforts, allowing the prospectuses to be disseminated and referring clients to them for information." 597 F.3d at 440. But the First Circuit rejected this alternative "use" theory as well. Sitting en banc, it reasoned, first, that the presence of the word "make" in Rule 10b-5(b) reflected a "deliberate word choice" that "virtually leaps off the page." *Id.* at 443. Although Rule 10b-5(b) was modeled on Section 17(a)(2) of the Securities Act, the drafters of the rule had chosen *not* to mimic the statute "with respect to the types of conduct that may render a person liable for a false statement." *Id.* at 444. Where Section 17(a)(2) makes it unlawful "to obtain money or property *by means of* any untrue statement of a material fact," Rule 10b-5(b) is narrower, and only makes it unlawful "to *make* any untrue statement of a material fact." *Id.* (emphasis added).[2/]

"The import of this eschewal," the First Circuit said, "is clear: although section 17(a)(2) may fairly be read to cover the 'use' of an untrue statement to obtain money or property, Rule 10b-5(b) is more narrowly crafted and its reach does not extend that far." *Id.* To the court, it was "self-evident . . . that if the SEC intended to prohibit more than just the actual making of a false statement in Rule 10b-5(b), then it would not have employed the solitary verb 'make' in the text of the rule." *Id.* at 445.

The First Circuit had an additional reason to apply the rule as written: the Supreme Court's mandate to enforce a clear distinction between primary and secondary violations. The en banc panel in *Tambone* agreed with the Second Circuit that "[i]f *Central Bank* is to have any real

---

2/ Although Rule 10b-5(b) is narrower than Section 17(a)(2) in this respect, it is *broader* than its statutory model in another way. Under Rule 10b-5(b) it is unlawful to "make" a materially misleading statement or omission, whether or not the act bestows a pecuniary benefit on the speaker. Section 17(a)(2), on the other hand, makes it unlawful only to "obtain money or property" by means of a misleading statement or omission. This requirement disposes of the charges against Mr. Hopkins under the Securities Act. *See* Section V, below.

meaning, a defendant must *actually make* a false or misleading statement in order to be held liable [as a primary violator] under section 10(b). Anything short of such conduct is merely aiding and abetting." *Id.* at 447 (*quoting Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997)) (emphasis added). Every recognized judicial test for distinguishing between primary and secondary violations focuses "on the *actual role* that a defendant played in creating, composing, or causing the existence of an untrue statement of material fact." *Id.* (emphasis added). Given the uncontested inadequacy of the SEC's allegations that Tambone and Hussey had been involved in drafting the allegedly actionable statements, the Commission's "attempt to impute statements to persons who may not have had any role in their creation, composition or preparation [fell] well short" of any acceptable benchmark. *Id.*

B. The SEC Contends – As It Did In *Tambone* – That Mr. Hopkins "Made" The Alleged Statements And Omissions By Virtue Of His Supposed "Use" And "Authorship" Of The Documents At Issue.

It is useful to bear in mind here that the Complaint followed, rather than preceded, both (1) the First Circuit's decision in *Tambone*, and (2) complete discovery. The SEC's investigation of SSgA lasted over two years, during which time the Commission subpoenaed and reviewed millions of documents, emails, and electronic records. The SEC also took over 50 days of investigative testimony from former and current SSgA employees and several third parties. Mr. Hopkins himself testified four times; each time he was fully responsive, cooperative and forthcoming. For several years before it issued the Complaint, moreover, the SEC had in its possession all of Mr. Hopkins' work e-mails, hard copy documents, and shared drive documents.

If evidence existed to show that Mr. Hopkins actually made the statements and omissions at issue, therefore, the SEC would not only have it now, but it would have possessed the evidence back when it drafted the Complaint. Although that document may not have been strictly

subject to the particularity requirements of Fed. R. Civ. P. 9(b), the SEC's burden in opposing this motion is comparable – indeed, effectively identical – to the burden it would have in opposing a motion for summary judgment filed in federal court. Consequently, Rule 9(b) and its application in *Tambone* come squarely into play here because if the record, as it is reflected in the Complaint, would not enable the Commission to satisfy even the lesser pleading requirement, it *must* be insufficient to satisfy the greater burden of coming forward with sufficient evidence to justify a trial. *See, e.g., Sanchez v. Triple-S Mgmt. Corp.*, 492 F.3d 1, 11 (1st Cir. 2007) (affirming grant of summary judgment to defendant where fraud claims failed even to satisfy the particularity requirements of Rule 9(b)); *cf. Cochran v. Quest Software*, 328 F.3d 1, 7 n.2 (1st Cir. 2003) (noting that the "standards applicable at the summary judgment stage are far more demanding" on non-moving plaintiffs than the pleading requirements imposed by Rule 12(b)(6)).

The allegations against Mr. Hopkins are remarkably similar in approach to the allegations that the SEC made against the defendants in *Tambone*, and are inadequate as a matter of law for remarkably similar reasons. The Complaint here repeatedly invokes the refrain that Mr. Hopkins either "used or was responsible for drafting and/or updating" the documents that contained the alleged misstatements of material fact. (*See, e.g.*, Complaint, ¶s 18, 19, 20). This catchphrase is primarily notable for its lack of detail. It says precious little about the actual nature of Mr. Hopkins' supposed involvement. It does, however, serve to make clear that – like the complaint against Tambone and Hussey – the SEC's complaint against Mr. Hopkins is predicated on theories of "use" and "authorship," that is, on the notion that he committed primary violations of Rule 10b-5(b) either by (1) "participating in the drafting process that went into the development of" the offending statements, or (2) "using [the documents in his] sales efforts, allowing [them] to be disseminated and referring clients to them for information."

597 F.3d at 440. Because the evidentiary support for these theories here is no better than (and to a large extent, is worse than) the allegational support for them in *Tambone*, the Section 10(b) charge against Mr. Hopkins – like the primary-violation charge against Tambone and Hussey – fails as a matter of law.

C. Allegations And Evidence That Mr. Hopkins "Used" The Documents At Issue Fail As A Matter Of Law To Create A Genuine Issue Of Material Fact.

The evidence that Mr. Hopkins "used" the documents at issue is a hit-or-miss – and mostly "miss" – affair. Insofar as it concerns Mr. Hopkins at all, the Complaint revolves around four documents: (1) "fact sheets" that State Street may have provided to potential investors for informational purposes (Complaint, ¶s 13-14, 18-20), (2) PowerPoint slides shown in presentations to investors and potential investors (Complaint, ¶s 15-21), (3) a letter that State Street sent "to some investors in the Fund and the related funds in early March 2007" (Complaint, ¶s 22-23), and (4) a five-paragraph "investor letter" from State Street dated July 26, 2007 (Complaint, ¶s 32-35).

With respect to the two letters, there is no evidence of "use" at all. State Street may have sent them to "some investors," as the SEC alleges (Complaint, ¶22), but Mr. Hopkins did not. He didn't sign the letters or disseminate them. His "use" of those documents, therefore, did not rise to even the (legally-inadequate) level of involvement on which the Commission predicated its failed charges in *Tambone*.

With respect to the fact sheets and presentation slides, the record is murky at best. The Complaint *alleges* that Mr. Hopkins "used" the documents, but the evidence to support the assertion of "use" is far from clear. The Complaint provides only one specific example of Mr. Hopkins "using" either type of document: an allegedly-misleading presentation slide. According to the Commission, "on or around May 8, 2007" Mr. Hopkins made a presentation "to a hospital

that was invested in a passive commodities strategy that invested its cash in the Fund." (Complaint, ¶16) In the course of this presentation, he supposedly "used" a chart that "was false or misleading for several reasons." (Complaint, ¶17)[3/]

The Complaint, however, does not say *how* Mr. Hopkins "used" the offending chart, and the record does not indicate that it will be able to demonstrate that he in fact "used" the slide in any way at all on the date alleged. First, it is clear that Mr. Hopkins did not "use" the slide in the way that the defendants "used" the offending prospectuses in *Tambone* – i.e., by disseminating it to investors. The record here shows that Mr. Hopkins did *not* disseminate the presentation slides to the investors who attended the May 2007 meeting; they were distributed in advance, rather, by another State Street employee named Amanda Williams. *Sylvia Aff.*, Ex. B.

Notes of the meeting, recorded soon after it occurred by Ms. Williams, indicate moreover that the presentation was very brief ("we only had 15 minutes"), that Ms. Williams spoke for the first five minutes, that Mr. Hopkins only got three minutes into his presentation before he was interrupted with questions from the audience, and that he spent the remaining seven or so minutes allotted to him discussing specific issues raised by the investors. *Sylvia Aff.*, Ex. A. Whether Mr. Hopkins even showed the offending slide to the investors, therefore, is strictly a matter of speculation. *See In re Comverse Tech., Inc.*, 2010 WL 2886397, at *1 ("Once the moving party has carried its burden, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts").

If this allegation is the best that the Commission can do in the way of proof – and it is, after all, the factual centerpiece around which the SEC chose to arrange its theory that Mr. Hopkins committed a primary violation by "using" misleading slides in investor presentations –

[3/] The meeting in question actually took place on May 10, 2007. The "hospital" that attended the presentation was National Jewish Medical and Research Center. *See* Affidavit of John F. Sylvia, Esq. in Support of Respondent James D. Hopkins' Motion for Summary Disposition ("*Sylvia Aff.*"), Exs. A, B.

then its evidentiary insufficiency casts grave doubt on the SEC's ability to prove what it has alleged. But the hearing officer can give the Commission the benefit of the doubt here without changing the outcome of this motion. In this hearing, the First Circuit's word is the law, and *Tambone* says that an individual defendant does not "make" a statement contained in a document even when he or she "uses" it in the manner that the Commission has (however vaguely) here asserted. Even if Mr. Hopkins personally showed the slide at issue to the investors at the May 2007 presentation – indeed, even if he had showed the slide repeatedly to investors, repeatedly distributed the Fund's fact sheet, and personally disseminated the March and July 2007 letters to investors in the Fund – *Tambone* says that he would not, by doing so, have "made" any of the statements in those documents. It is clear as a matter of law, therefore, that the Rule 10b-5 charge against Mr. Hopkins cannot rest on the allegations of "use."

D. Allegations And Evidence That Mr. Hopkins "Authored" The Documents At Issue Fail As A Matter Of Law To Create A Genuine Issue Of Material Fact.

This leaves the theory that Mr. Hopkins "made" the statements or omissions in the documents at issue because he was "responsible for drafting and/or revising" them, as the Complaint repeatedly (if unspecifically) alleges. This claim fails as a matter of law as well, for two reasons. First, the theory is legally untenable: the First Circuit must and will reject the notion that an individual can become liable for the statements contained in a document when he merely drafts those statements for others to "make." Second, even if "authorship" alone was a viable theoretical basis for imposing primary liability, the record here is as deficient as the Complaint was in *Tambone*. The SEC has not shown, and cannot show, that Mr. Hopkins "actually made" – that is, that he "caus[ed] the existence" – of any of the statements or omissions at issue. *Tambone*, 597 F.3d at 447.

1. As A Matter Of Law, Even Dispositive Proof Of "Authorship" Would Not Establish Primary Liability For Statements A Defendant Drafted For Others To "Make."

When the First Circuit in *Tambone* gave a common-sense construction to the word "make," it acted in the only context that the Court, in that case, needed to address: Whether an individual defendant (call him "Mr. X") "makes" the statements in a document issued by his employer when Mr. X merely disseminates the document to investors. The First Circuit's textual focus was buttressed, moreover, by its obligation to maintain the distinction between primary and secondary violations of Rule 10b-5. Mr. X's dissemination of documents on behalf of his employer may *help* the company to make the statements therein, but holding Mr. X primarily liable for rendering such assistance would blur the line drawn by *Central Bank*, a line that must be drawn clearly even in enforcement cases brought by the SEC.

Because the SEC dropped its alternative, "authorship" theory of liability on appeal in *Tambone*, the First Circuit did not have to decide whether Mr. X "makes" the statements in a document issued by his employer when Mr. X has drafted, or played some role in drafting, the document. There is no plausible reason, however, to think that the First Circuit would not apply the same analytical approach to that theory – i.e., that it would not continue to give the word "make" its natural meaning, and continue to interpret Rule 10b-5(b) in light of *Central Bank's* injunction to maintain the distinction between primary and secondary liability. This tribunal must conclude, therefore, that if presented with the "authorship" theory by this case, the First Circuit will decline to impose primary liability on a defendant whose only *alleged* involvement was his putative responsibility "for drafting and/or updating" statements to be "made" by others.

The "authorship" issue was very recently argued before the Supreme Court in *Janus Capital Group Inc. v. First Derivative Traders*, No. 09-525 (December 7, 2010). *Sylvia Aff.*, Ex.

C. As Justice Scalia put it at the argument, the "authorship" issue can be encapsulated as follows: "If someone writes a speech for me, one can say he *drafted* the speech, but I *make* the speech." *Sylvia Aff.*, Ex. C., p. 31 (emphasis added).

In some situations, the fact that somebody has "created" something might qualify him as the party who "makes" it: "If you're talking about making heaven and earth, yes, ["make'] means to create. . . ." *Sylvia Aff.*, Ex. C., p. 31. But in the particular context to which Rule 10b-5(b) applies – the "making" of statements and omissions from statements – creator-status is manifestly insufficient: ". . . but if you're talking about making a representation, that means presenting the representation to someone, not . . . drafting it for someone else to make." *Sylvia Aff.*, Ex. C., p. 31. Thus, as Justice Scalia put it, "I would not say I'm making a speech [even] indirectly if I have drafted the speech." Rather, "[t]he person for whom I drafted the speech is making the speech." *Sylvia Aff.*, Ex. C., p. 52.

Justice Scalia's remarks focused on the meaning of the word "make" – that is, on the same specific definitional limitation that the First Circuit had identified in *Tambone*. Justice Alito, on the other hand, emphasized the complementary aspect of the analysis that motivated the en banc decision in *Tambone*: the interpretive restraints imposed by *Central Bank's* command to respect the distinction between primary violations and aiding-and-abetting liability in cases brought under Section 10(b). After counsel for the plaintiff-respondents explained that lawyers for companies which issue securities would not be primarily liable for drafting language in a prospectus where the lawyers were merely "reacting on information provided by the company" *id.* at 37, and that the SEC could proceed against them only as aiders and abettors even if they knew that the information they had included in the document was false, *id.* at 38, Justice Alito observed that "[t]he distinction you're drawing is between making the statement and assisting in

making the statement." *Id.* at 42. "[A]iding and abetting," he explained, "is assisting in making these statements . . . as in something you want to take place. . . ." *Id.* at 43.

In the face of these observations – which essentially stated both parts of the rationale used by the First Circuit in *Tambone* – even counsel for the plaintiff-respondents in *Janus Capital Group* had to concede that primary liability would *not* attach to defendants who have merely drafted statements for others to "make." Positing a classic "boiler room" situation, in which salesmen deliver a script representing that the company has sold "a thousand tons of oil instead of only a ton," Justice Breyer asked whether a subordinate could be held primarily liable for drafting the script if "four people told him to go do something like that, but he's the guy who wrote it." *Id.* at 52-53. In response, counsel for the plaintiff-respondents agreed that "he obviously isn't liable." *Id.* at 53.

To be sure, *Janus Capital Group* concerned a claim against a "secondary actor" – a management company that provided advisory and administrative services to the entity that issued the allegedly-misleading prospectuses. *See Janus Capital Group Inc. v. First Derivative Traders*, Petition for a Writ of Certiorari, 2009 WL 3614467, at *2 (Oct. 30, 2009). That, however, is a distinction without a difference. As *Tambone* illustrates, there is only one "maker" requirement in Rule 10b-5(b), and it applies equally to claims against corporate insiders (like Tambone, Hussey and Mr. Hopkins) and secondary actors (like the defendant in *Janus Capital Group*).

The logic advanced by the petitioners in *Janus*, therefore, is effectively identical to the logic employed by the First Circuit in *Tambone*, and it precludes the SEC's charges against Mr. Hopkins. Even if the Hearing Officer pushes the inferential process past the limits of plausibility, the worst that can be assumed here is that Mr. Hopkins drafted representations later "made" by others. With respect to some of the documents at issue (but not others), he may at most have (1)

taken information that was provided to him by the portfolio managers and other State Street employees with primary knowledge (which he lacked), and (2) transcribed that information into a format that he hoped would be acceptable to those who possessed the authority and discretion to determine whether and how it should be included in the documents at issue, and whether and how the documents should be disseminated.

Even if one assumes that Mr. Hopkins played so substantial a draftsman's role, and even if it is assumed as well that he knew the statements he had drafted were materially misleading or misleadingly incomplete, the dispositive fact thus remains that Mr. Hopkins was at most like Justice Scalia's hypothetical speechwriter, who drafts representations for inclusion in a politician's speech, and not at all like the speechgiver who actually "makes" the statements.

The analogy is precise with respect to the two letters mentioned in the Complaint. Even if Mr. Hopkins drafted those letters exactly as they were later transmitted, he indisputably drafted them for somebody else's letterhead and signature.

The distinction drawn by Justice Scalia is equally dispositive of the allegations about the fact sheets and presentation slides. Even if Mr. Hopkins drafted those documents exactly as State Street later used them, he did not "make" the statements contained therein. They were not his statements to make. With respect to these documents, Mr. Hopkins may not be precisely like the speechwriter who drafts remarks for another individual to deliver, but he *is* just like the copywriter who composes text for statements to be "made" by his corporate employer in its advertisements.

There is, moreover, no principled distinction to be drawn between the speechwriter-speechmaker scenario and the copywriter-advertiser relationship. In both situations, the person who drafts the documents (the speechwriter or the copywriter) does not "make" the

representations contained in them. He can, rather, plausibly be accused only of having *assisted* the politician or the advertiser in making them. Under Rule 10b-5(b), therefore, his role in the creation of the document *might* qualify him as an aider-and-abettor, but he cannot be held liable for a primary violation of Rule 10b-5(b). Consequently, because the SEC elected not to charge Mr. Hopkins as an aider-and-abettor, but only as a primary violator, the Section 10(b) claim against him cannot possibly stand.

2. The SEC Cannot Establish That Mr. Hopkins "Authored" The Allegedly-Misleading Statements In The Documents At Issue, Or That He Caused The Existence Of The Allegedly-Misleading Omissions From Them.

Even if a defendant could hypothetically commit a primary violation of Rule 10b-5(b) by virtue of his responsibility "for drafting and/or updating" documents containing material misstatements (or omitting material information), the charges against Mr. Hopkins would fail for lack of evidence that specifically links him to any particular misstatements or omissions. *Cf. Tambone*, 473 F. Supp. 2d at 166. On this record, the Commission cannot show that Mr. Hopkins "actually made" any of the alleged misstatements in, or omissions from, the fact sheets, presentation slides, or letters at issue.

The Fact Sheet. First, there is clear and dispositive evidence that Mr. Hopkins did *not* "draft and/or update" the relevant portions of the LDBF's fact sheet. The Complaint alleges that in 2006 and 2007, the fact sheet falsely represented that the Fund had "better sector diversification" and "higher average credit quality" than typical money market funds. (Complaint, ¶s 13-14) The Complaint quotes the narrative portion of the fact sheet as the source of the alleged misrepresentation. (Complaint, ¶13)

The record shows, however, that Mr. Hopkins did not draft that narrative. Mr. Flannery testified that "[t]he narrative description . . . was one that was driven by legal, and I believe

taking – taken from the fund declaration or paraphrasing the fund declaration." *Sylvia Aff.*, Ex. D, at 820. Asked specifically whether anyone in product engineering was involved in drafting the narrative for the fact sheets, Mr. Flannery reiterated that his "understanding was that . . . the descriptive text on the fact sheets was . . . put in place by legal at some point, maybe several years ago." *Id.*[4/]

The Presentation Slides. The Commission will be similarly unable to establish Mr. Hopkins as the "author" of the "Typical Portfolio Exposures and Characteristics" slide that Mr. Hopkins may have used (but probably did not use) at the presentation he attended on May 10, 2007. (Complaint, ¶s 16-17) There is no evidence that Mr. Hopkins drafted this slide. He testified without contradiction, rather, that when preparing for a presentation he would obtain the relevant slides from State Street's presentation group, or ask that group to compile a slide deck for him to use. *Sylvia Aff.*, Ex. E at 38-39. He might then note more recent detailed information on the slide, so that it would be available for him to convey at the presentation, but he played no role in drafting or updating the slide itself: this was all done by the presentations group. *Id.* at 272-73, 697-98. Even if Mr. Hopkins displayed the allegedly misleading slide at the May 2007 presentation, therefore, he did so in exactly the manner addressed by the First Circuit in *Tambone*: as one who "merely uses a statement created entirely by others." 597 F.3d at 443.

The March 2007 Letter. Mr. Hopkins *did* play a role in drafting the March 2007 letter. The LDBF and certain other State Street funds had underperformed their benchmarks in February of that year, and the cause of the underperformance had been identified as recent activity in the BBB tranche of the ABX Index, in which the Fund had a modest position. Mr. Hopkins wrote an internal report explaining the recent events. Later, he was instructed to rework

[4/] Mr. Flannery's testimony is particularly significant on this issue because at the time the LDBF fact sheet was likely created he had been the head of product engineering for several years.

the internal document into a "client-friendly" (i.e., plainer-English) version, suitable for investors. Once again, Mr. Hopkins carried out his assignment. *Sylvia Aff.*, Ex. F.

It *can* be said, therefore, that Mr. Hopkins *was* "responsible for drafting" the statements in the March 2007 letter. Those statements, however, are not the basis of the charge. There is no evidence (and no allegation) that anything Mr. Hopkins said in the letter was false or misleading. The Fund *had* underperformed in January, and activity in the BBB tranche of the ABX Index *had* driven the underperformance, despite the Fund's modest position in that investment. Mr. Hopkins' historical account was perfectly accurate and complete.

The basis of the charge, according to the Complaint, is that investors could have been misled, not by what the March 2007 letter said, but by what it did not say. According to the Commission, although it accurately discussed the Fund's recent performance as a result of its position in the ABX Index, the letter did not disclose the extent of the Fund's position "in subprime bonds and other subprime derivative investments." (Complaint, ¶22) The SEC claims that this was a materially misleading omission in light of the problems that arose later in 2007 in the subprime market, and the effect of those subsequent events on the value of the Fund.

There are any number of flaws in this theory. It is, for one thing, a "classic" example of "fraud by hindsight," which occurs when a plaintiff asserts that "the fact that something turned out badly must mean defendant earlier knew that it would turn out badly." *Mississippi Public Employees' Ret. Sys. v. Boston Scientific Corp.*, 523 F.3d 75, 91 (1st Cir. 2008).

The notion that the "omitted" information was material in March 2007 – or that anyone would have acted with scienter by omitting it – is belied here by the Complaint itself, which alleges that when the problems in the subprime market became apparent to State Street, the company's internal advisory groups quickly recommended to their clients that they withdraw

from the exposed funds (including the LDBF). This recommendation, and the ensuing exodus of internal investors, however, did not come until late July 2007 – and as the Complaint tacitly acknowledges, Mr. Hopkins had nothing to do with it. (Complaint, ¶s 25-30) The Commission, meanwhile, has no evidence that four months earlier, back in March 2007 when the letter was drafted and posted, anybody at State Street knew or had any reason to know that the Fund's position in the subprime market would eventually expose it to material loss.

But the Hearing Officer need not attend to those weaknesses in order to grant summary disposition to Mr. Hopkins on this aspect of the Rule 10b-5 charge. Mr. Hopkins cannot, as a matter of law, be primarily liable under an "authorship" theory for the alleged omission from the March 2007 letter because there is no evidence that Mr. Hopkins in any way "caus[ed] the existence" of that omission. *Tambone*, 597 F.3d at 447. The *contents* of the letter had two relevant characteristics: (1) they were completely true and accurate, and (2) they were narrowly historical in focus. When he drafted the internal alert, and when he revised that document into the letter, Mr. Hopkins gave a truthful and accurate account of what *had* caused the *past* underperformance of the Fund because that is exactly what he had been asked to do.

It was, moreover, *all* that he had been asked to do. The statements in the internal alert and the client letter, which Mr. Hopkins drafted, were deliberately and exclusively *retrospective* in scope; indeed, Mr. Hopkins was careful to point out, in both documents, that "[t]his is not meant to be the final missive on this matter." *Sylvia Aff.*, Ex. F, G. The alleged omission from the letter, on the other hand, was entirely *prospective.* The omitted information was material at the time, according to the Commission's tenuous theory, because of the effect that it *might* have on the Fund's *future* performance.

Mr. Hopkins cannot be deemed to have "actually made" the allegedly-actionable omission, therefore, because there is absolutely no evidence in the record to suggest that he was responsible for determining the scope of the letter. An actionable omission occurred here only when (and only if) *somebody* at State Street decided not to include a description of the Fund's exposure to the subprime market in the letter, even though that person knew the omitted information was necessary to make the letter not misleading. Whether anybody made such a decision, and whether anybody acted with such knowledge, is a matter of speculation. It is crystal clear, however, that Mr. Hopkins was not that person. He drafted the account he was asked to draft, and left out nothing of material value. He was not the "author" of the alleged omission and cannot possibly be held liable for "making" it.

The July 2007 Letter. The allegation that Mr. Hopkins is liable for the July 2007 letter to investors suffers from the same disability: the claim is that the letter misled investors by omission of the Fund's concentration in subprime bonds (Complaint, ¶s 31-35), but the SEC cannot establish that Mr. Hopkins caused the existence of, or otherwise bore responsibility for, the omission.

Indeed, any suggestion to that effect would be ridiculous. In his supplemental Wells submission, Mr. Hopkins explained to the Commission that the drafting history of the July 2007 letter could be reconstructed, and that Mr. Hopkins was mostly absent from all but the preliminary stage of that process. A copy of the supplemental Wells submission with the exhibits thereto, is attached as Exhibit H to the Affidavit of John F. Sylvia, and Mr. Hopkins refers the Hearing Officer to it for details. Suffice it to say here that, while Mr. Hopkins again drafted the internal alert from which the July 2007 letter was adapted, he was only minimally involved in the adaptation process. Before it was finished, the July 2007 letter went through numerous iterations.

The final product contained input from dozens of people, it was vetted by the company's lawyers at several points, and was even reviewed and edited by the chief executive officer. Mr. Hopkins played a minor role in reviewing the letter (as did dozens of other mid-level employees), but he was not in any way responsible for its contents, charged with verifying its accuracy, or even given an opportunity to review the final product. If *Tambone* was a case of blaming the messenger, then imputing "authorship" and liability to Mr. Hopkins under these circumstances would be a case of blaming a mere bystander.

V. Mr. Hopkins Is Entitled To Summary Disposition Of The Charge Brought Under Section 17(a) Of The Securities Act.

Section 17(a)(2) may be *broader* than Rule 10b-5(b) in that the Securities Act does not require a defendant to "make" the alleged misstatements or omissions in order to incur primary liability, but only requires him to do something "by means of" such acts. But the statute is also *narrower* than the rule because of what it requires the defendant to have done "by means of" his or her behavior. An individual commits an unlawful act under Section 17(a)(2) only if he has "obtain[ed] money or property" through the actionable statements or omissions.

There is no genuine issue about this dispositive fact. The Commission cannot show that Mr. Hopkins obtained any money or property when he "used or was responsible for drafting and/or revising" the documents in question. This is not a case like *In re CVS Caremark Corp.*, SEC Release No. 8815, 90 SEC Docket 2689, 2007 WL 1880048, at *5-6 (June 29, 2007), where the Commission could assert (1) that the defendants' year-end bonuses were tied to the financial results that they had caused their employer to materially overstate, such that their alleged omissions had "caused each to receive a higher bonus than he otherwise would have," and (2) that one of the defendants had received an additional, discretionary bonus that was "explicitly tied" to his work on the transaction that he had caused the company to misreport.

Nor is this a case like *SEC v. Hopper*, No. Civ. A. H-04-1054, 2006 WL 778640, at *12 (S.D. Tex. Mar. 24, 2006), where the Commission had a factual basis for alleging that the "dramatic increase" in a defendant's bonus was correlated with the "dramatic boosts" in her employer's trading volume and revenue, and where it was "reasonable to infer that those inflated trading volumes and revenues factored into the calculation of her bonuses, and hence, that [defendant] obtained all or part of those bonuses at least indirectly by means of [her] violation of §17(a)(2)." *See also SEC v. Tambone*, 550 F.3d 106, 112 (1st Cir. 2008) (reversing dismissal of Section 17(a)(2) claim where SEC had alleged that "more than half of the total compensation that defendants received each year consisted of commissions" from sales of mutual funds, and claim was that defendants had obtained money by means of omissions from fund prospectuses where, if the omitted information had been disclosed, investors might have been deterred from buying into the funds).

This case, rather, is much like *SEC v. Forman*, No. 07-11151, 2010 WL 2367372 (D. Mass., June 9, 2010), in which the District Court granted summary judgment on a Section 17(a)(2) claim against the controller of a corporation who had allegedly drafted and filed misleading financial statements on the company's behalf. *Id.* at *4. Although the SEC had evidence that all of the company's employees had received a 3% bonus, and that its executives had received a bonus "tied to [its] financial performance," *id.* at *8, the claim was doomed by the lack of "evidence that the employee bonus was tied to company performance or that [the defendant] was an executive within the meaning of the bonus plan." *Id.*

The Section 17(a)(2) claim against Mr. Hopkins is similarly deficient. The SEC has no evidence, and its Complaint does not even allege, that any of Mr. Hopkins' compensation depended on either the performance of the Fund or the amount of investments made in it. The

SEC cannot produce any such evidence because neither Mr. Hopkins' salary nor his bonus were linked to the Fund. Unlike a portfolio manager or a client relationship manager, a product engineer's compensation consisted solely of a base salary and a bonus tied solely to the attainment of personal professional goals – none of which were dependent upon a specific fund or a fund's performance. Accordingly, the SEC cannot show that Mr. Hopkins obtained *any* money or property when he "used or was responsible for drafting and/or revising" the documents in question, thus its Section 17(a)(2) claim wholly fails on that basis. *Id.*

Indeed, the Commission has no evidence to suggest that *anybody* – e.g., State Street or SSgA – obtained any money or property by means of Mr. Hopkins' alleged violations. With the exception of National Jewish Medical and Research Center, to which Mr. Hopkins allegedly helped make the presentation described in Paragraphs 16 and 17 of the Complaint, the Commission apparently cannot identify any investors or potential investors affected by his conduct. It is clear, however, that State Street did not obtain money or property from that entity "by means of" anything Mr. Hopkins said or did at the meeting in May 2007, because National Jewish Medical and Research Center made no additional investments in the Fund after the meeting took place. *Sylvia Aff.*, Ex. I, J.

VI. CONCLUSION

Wherefore, for all of the foregoing reasons, Respondent James D. Hopkins moves to dismiss all of the charges against him in this matter.

5267223v.2

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	)	**ADMINISTRATIVE PROCEEDING**
	)	**File No. 3-14081**
JOHN P. FLANNERY AND JAMES D. HOPKINS	)	
	)	
Respondents.	)	

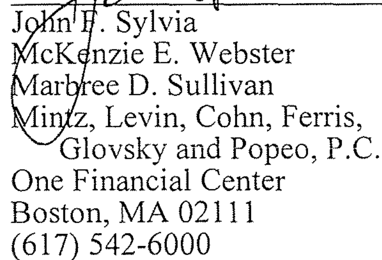
RESPONDENT JAMES D. HOPKINS' MOTION FOR ORAL ARGUMENT

Pursuant to 17 C.F.R. § 201.451, the Respondent James D. Hopkins respectfully requests the Hearing Officer schedule oral argument regarding his Motion for Summary Disposition.

Respectfully Submitted,

JAMES D. HOPKINS

By his attorneys,



John F. Sylvia
McKenzie E. Webster
Marbree D. Sullivan
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000

Dated: December 23, 2010

5274082v.1

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of JOHN P. FLANNERY, AND JAMES D. HOPKINS Respondents.	ADMINISTRATIVE PROCEEDING File No. 3-14081

AFFIDAVIT OF JOHN F. SYLVIA, ESQ. IN SUPPORT OF RESPONDENT JAMES D. HOPKINS' MOTION FOR SUMMARY DISPOSITION

I, John F. Sylvia, hereby state and depose as follows:

1. I am an attorney admitted to practice in Massachusetts. I am a Member of the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., counsel for Respondent James D. Hopkins in this action. I am submitting this affidavit, based upon my own personal knowledge, in support of Respondent James D. Hopkins' Motion For Summary Disposition in this action.

2. Attached as Exhibit A is a true and accurate copy of an SSgA Onyx | Client Relationship Management entry regarding National Jewish Medical & Research Center with an Activity Date of 5/10/2007 and an Activity ID of ████, as produced from the SEC's investigative file.

3. Attached as Exhibit B is a true and accurate copy of an e-mail exchange between Amanda Williams at SSgA and Ryan Lennie at Yanni Partners beginning on April 16, 2007 with the subject line "Hi" and concluding on May 8, 2007 with the subject line "National Jewish Meeting," as produced from the SEC's investigative file.

4. Attached as Exhibit C is a true and accurate copy of the transcript of oral

argument before the United States Supreme Court in *Janus Capital Group Inc. v. First Derivative Traders*. No. 09-525 (December 7, 2010), as available on the website for the Supreme Court at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-525.pdf.

5. Attached as Exhibit D is a true and accurate copy of an excerpt of the transcript of the testimony of John Patrick Flannery before the United States Securities and Exchange Commission (Mar. 2, 2010), as produced from the SEC's investigative file.

6. Attached as Exhibit E is a true and accurate copy of an excerpt of the transcript of the testimony of James D. Hopkins before the United States Securities and Exchange Commission (Feb. 2, 2009; Feb. 3, 2009; Apr. 27, 2010), as produced from the SEC's investigative file.

7. Attached as Exhibit F is a true and accurate copy of an e-mail from Jim Hopkins at SSgA to Penny Darcey and others at SSgA dated March 6, 2007 with the subject line "ABX Letter" and the document attached thereto, as produced from the SEC's investigative file.

8. Attached as Exhibit G is a true and accurate copy of an e-mail exchange between Jim Hopkins at SSgA and Mark Dacey at SSgA dated March 2, 2007 ending with the subject line "Re: Fw: CAR Alert!," as produced from the SEC's investigative file.

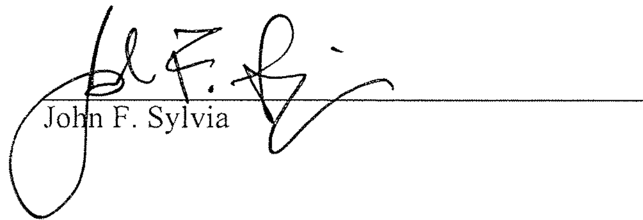
9. Attached as Exhibit H is a true and accurate copy of Jim Hopkins' Supplemental Wells Submission in the Matter of State Street Global Advisors, File No. B-02320, delivered to Ms. Sandra Bailey, Assistant Director, Division of Enforcement, SEC, Boston Regional Office on July 9, 2010 along with exhibits.

10. Attached as Exhibit I is a true and accurate copy of an SSgA Participant Record Keeping System, Transaction Activity Report for National Jewish Medical & Research Center Board Designated Funds for the period of September 1, 2006 to March 1, 2008, as produced

from the SEC's investigative file.

11. Attached as Exhibit J is a true and accurate copy of an SSgA Participant Record Keeping System, Transaction Activity Report for National Jewish Medical & Research Center Ritter Endowment for the period of September 1, 2006 to March 1, 2008, as produced from the SEC's investigative file.

Signed under the penalties of perjury this 23rd day of December 2010.



John F. Sylvia

5265596v.1

Activities By Company

Printed on: 04/13/2008

FOIA Confidential Treatment Requested by SSgA Funds Management, Inc. SSgA-SEC 026472

B

From: Amanda_Williams@ssga.com
Sent: Tuesday, May 08, 2007 1:33 PM
To: Ryan Lennie
Subject: RE: National Jewish Meeting

Hi Ryan,

Here you are.

(See attached file: National Jewish Medical and Research Center 5.01.07 Final.ppt)

I wanted to ask you about the Board since this is our first time presenting to them. Do you have about 10 minutes to talk today? If not, can you please help me understand the Board by answering the following questions?

How sophisticated is the Board?
How many board members are there?
Who is the chairman and who are some of the outspoken members?
Are we going to be in a large room?
Will the presentation be on-screen?

Is there anything else I should know about the Board?

Thank you in advance for your response and I look forward to seeing you Thursday.

Kind Regards,

Amanda
=============
Amanda Williams
SSgA
Tel: 415-836-9838
Fax: 415-836-9802
amanda_williams@ssga.com

Please visit us at http://www.ssga.com

Confidentiality Notice: The information contained in the email is intended for the confidential use of the above-named recipient. If the reader of this message is not the intended recipient or person responsible for delivering it to the intended recipient, you are hereby notified that you have received this communication in error, and that any review, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this in error, please notify the sender immediately and destroy this message.

"Ryan Lennie"
<Lennie@yannipart
ners.com> To
<Amanda_Williams@ssga.com>
05/08/2007 10:23 cc
AM
Subject

RE: National Jewish Meeting

Amanda,

Can you send an electronic copy of the presentation you will be using at National Jewish on Thursday? Thanks,

Ryan

Ryan Lennie
Consulting Analyst
Yanni Partners, Inc.
(412) 232-3171, Fax 412-232-1027
lennie@yannipartners.com
http://www.yannipartners.com

The information in this communication may be CONFIDENTIAL. It is intended only for the use of the person to whom it is properly addressed. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately, and delete any copies of the communication and/or its contents from your files. Unless otherwise expressly noted, the contents of this communication do not constitute securities or investment advice, nor are they to be construed as an opinion regarding the appropriateness of any investment. Any views expressed in this message are those of the individual sender, except where the sender specifically states them to be the views of Yanni Partners, Inc. Computer viruses may be transmitted by e-mail. The recipient should check this e-mail and any attachments for the presence of viruses. Yanni Partners, Inc. accepts no liability for any damage caused by any virus transmitted by this e-mail.

-----Original Message-----
From: Amanda_Williams@ssga.com [mailto:Amanda_Williams@ssga.com]
Sent: Friday, May 04, 2007 9:13 PM
To: Ryan Lennie
Subject: Re: National Jewish Meeting

Ryan,

Thank you very much. I hope you enjoy your weekend as well.

Amanda Williams
SSgA

Tel: 415-836-9838
Fax: 415-836-9802

Sent from my wireless Blackberry

----- Original Message -----
From: "Ryan Lennie" [Lennie@yannipartners.com]
Sent: 05/04/2007 05:00 PM
To: <Amanda_Williams@ssga.com>
Cc: "David Hammerstein" <Hammerstein@yannipartners.com>
Subject: RE: National Jewish Meeting

Please see the attached agenda for next Thursday's meeting. Feel free to call with any questions. Thanks, and have a great weekend.

Ryan

Ryan Lennie
Consulting Analyst
Yanni Partners, Inc.
(412) 232-3171, Fax 412-232-1027
lennie@yannipartners.com
http://www.yannipartners.com

The information in this communication may be CONFIDENTIAL. It is intended only for the use of the person to whom it is properly addressed. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately, and delete any copies of the communication and/or its contents from your files. Unless otherwise expressly noted, the contents of this communication do not constitute securities or investment advice, nor are they to be construed as an opinion regarding the appropriateness of any investment. Any views expressed in this message are those of the individual sender, except where the sender specifically states them to be the views of Yanni Partners, Inc. Computer viruses may be transmitted by e-mail. The recipient should check this e-mail and any attachments for the presence of viruses. Yanni Partners, Inc. accepts no liability for any damage caused by any virus transmitted by this e-mail.

-----Original Message-----
From: Ryan Lennie
Sent: Friday, May 04, 2007 3:31 PM
To: 'Amanda_Williams@ssga.com'
Subject: RE: National Jewish Meeting

Amanda,

The agenda has been confirmed, but unfortunately we will not have a copy until Monday. I can tell you that the meeting will be held on the National Jewish campus in Denver (you can find some information at www.njc.org), and it will start at 9:30 am local time. We expect the meeting to conclude around 11:30. I will forward the full agenda on Monday, which will state the exact time slot for the SSgA presentation

and give the building and room location for the meeting. Please let me know if there is anything else I can provide this afternoon, otherwise I will follow up on Monday.

Thanks,

Ryan

Ryan Lennie
Consulting Analyst
Yanni Partners, Inc.
(412) 232-3171, Fax 412-232-1027
lennie@yannipartners.com
http://www.yannipartners.com

The information in this communication may be CONFIDENTIAL. It is intended only for the use of the person to whom it is properly addressed. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately, and delete any copies of the communication and/or its contents from your files. Unless otherwise expressly noted, the contents of this communication do not constitute securities or investment advice, nor are they to be construed as an opinion regarding the appropriateness of any investment. Any views expressed in this message are those of the individual sender, except where the sender specifically states them to be the views of Yanni Partners, Inc. Computer viruses may be transmitted by e-mail. The recipient should check this e-mail and any attachments for the presence of viruses. Yanni Partners, Inc. accepts no liability for any damage caused by any virus transmitted by this e-mail.

-----Original Message-----
From: Amanda_Williams@ssga.com [mailto:Amanda_Williams@ssga.com]
Sent: Friday, May 04, 2007 1:19 PM
To: Ryan Lennie
Subject: National Jewish Meeting

Hi Ryan,

I hope this finds you well. I wanted to ask if an agenda was available yet. Also, can you please let me know where the meeting will be held.

Thank you very much in advance for your response and I look forward to meeting you in person next week.

Kind Regards,

Amanda

==============

Amanda Williams
SSgA
Tel: 415-836-9838
Fax: 415-836-9802
amanda_williams@ssga.com

Please visit us at http://www.ssga.com

Confidentiality Notice: The information contained in the email is intended for the confidential use of the above-named recipient. If the reader of this message is not the intended recipient or person responsible for delivering it to the intended recipient, you are hereby notified that you have received this communication in error, and that any review, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this in error, please notify the sender immediately and destroy this message.

"Ryan Lennie"
<Lennie@yannipartners.com>
04/16/2007 12:20 PM

To: <Amanda_Williams@ssga.com>

cc

Subject: RE: Hi

Amanda,

I was able to confirm with David Hammerstein (who will be attending from YP) that the meeting will start at 9:30 am (Denver time). National Jewish is inviting two of their current managers in to present, and each will be given approximately 45 minutes. We will send an agenda for the meeting soon, but you can expect the your presentation to start at either 10 am or 10:45 (those times are not confirmed, just an estimate at this point). If you have any additional questions don't hesitate to contact me. We appreciate you and Jim making arrangements to attend the meeting.

Best,

Ryan

Ryan Lennie
Consulting Analyst
Yanni Partners, Inc.
(412) 232-3171, Fax 412-232-1027
lennie@yannipartners.com
http://www.yannipartners.com

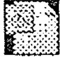
The information in this communication may be CONFIDENTIAL. It is intended only for the use of the person to whom it is properly addressed. If you are not the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately, and delete any copies of the communication and/or its contents from your files. Unless otherwise expressly noted, the contents of this communication do not constitute securities or investment advice, nor are they to be construed as an opinion regarding the appropriateness of any investment. Any views expressed in this message are those of the individual sender, except where the sender specifically states them to be the views of Yanni Partners, Inc. Computer viruses may be transmitted by e-mail. The recipient should check this e-mail and any attachments for the presence of viruses. Yanni Partners, Inc. accepts no liability for any damage caused by any virus transmitted by this e-mail.

-----Original Message-----
From: Amanda_Williams@ssga.com [mailto:Amanda_Williams@ssga.com]
Sent: Monday, April 16, 2007 3:08 PM
To: Ryan Lennie
Subject: Hi

==============
Amanda Williams
SSgA
Tel: 415-836-9838
Fax: 415-836-9802
amanda_williams@ssga.com

Please visit us at http://www.ssga.com

Confidentiality Notice: The information contained in the email is intended for the confidential use of the above-named recipient. If the reader of this message is not the intended recipient or person responsible for delivering it to the intended recipient, you are hereby notified that you have received this communication in error, and that any review, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this in error, please notify the sender immediately and destroy this message.



National Jewish
Medical and Re...

SEC-Yanni-002471

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - x
3 JANUS CAPITAL GROUP, INC., ET AL.,:
4 Petitioners : No. 09-525
5 v. :
6 FIRST DERIVATIVE TRADERS :
7 - x
8 Washington, D.C.
9 Tuesday, December 7, 2010
10
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:01 a.m.
14 APPEARANCES:
15 MARK A. PERRY, ESQ., Washington, D.C.; on behalf of
16 Petitioners.
17 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
18 Respondent.
19 CURTIS E. GANNON, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting Respondent.
23
24
25

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 MARK A. PERRY, ESQ.

4 On behalf of the Petitioners 3

5 ORAL ARGUMENT OF

6 DAVID C. FREDERICK, ESQ.

7 On behalf of the Respondent 28

8 ORAL ARGUMENT OF

9 CURTIS E. GANNON, ESQ.

10 On behalf of the United States, as

11 amicus curiae, supporting Respondent 48

12 REBUTTAL ARGUMENT OF

13 MARK A. PERRY, ESQ.

14 On behalf of the Petitioners 58

15

16

17

18

19

20

21

22

23

24

25

1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case 09-525, Janus

5 Capital Group v. First Derivative Traders.

6 Mr. Perry.

7 ORAL ARGUMENT OF MARK A. PERRY

8 ON BEHALF OF THE PETITIONERS

9 MR. PERRY: Mr. Chief Justice, and may it

10 please the Court:

11 Affirming the judgment below would authorize

12 private securities fraud class actions against every

13 service provider that participates in the drafting of a

14 public company's prospectus. It is therefore nothing

15 less than a frontal assault on this Court's decisions in

16 Central Bank and Stoneridge.

17 In those cases, Your Honors, this Court held

18 that service providers may not be sued primarily in

19 private class actions and left that matter for Congress

20 to resolve. And Congress did respond, not once, not

21 twice, but three times, to those decisions.

22 First, in the PSLRA, the Congress authorized

23 a Federal action, a government action, only against

24 aiders and abettors, leaving the question of private

25 class actions for this Court's resolution.

1 JUSTICE SOTOMAYOR: Counsel, is -- who is
2 the violator alleged here? Not in the complaint, but in
3 the briefs? As I read the briefs, they claim that Janus
4 itself did not make the false statement, that the two
5 appellants did, that they are the actual speakers
6 because they were talking about their activities, and
7 they used Janus as a conduit to deceive the market.
8 That's, I think, what they're alleging.
9 MR. PERRY: Justice Sotomayor, the challenge
10 statements appear in the prospectuses for the Janus
11 Funds, separate legal entities not parties to this
12 lawsuit.
13 JUSTICE SOTOMAYOR: So how do we sustain the
14 intermediary cases when the company, through market
15 analysts, divulges misleading statements? We don't talk
16 about the market analysts' falsity; we talk about the
17 company's falsity, because the market analysts didn't
18 have scienter.
19 MR. PERRY: Your Honor, the company --
20 excuse me -- the conduit or analyst cases fall under two
21 categories, neither of which is met here.
22 First, they are a scheme between the
23 company -- orchestrated by the company to distribute its
24 information through the analysts to the market, and they
25 are brought under 10b-5(a) as scheme cases. That is

1 most of the analyst cases. There is no 10b-5(a) claim
2 in this case. This is only a 10b-5(b)-making claim.
3 Second, those few cases, the analyst cases
4 that are brought under (b), involve an admission; that
5 is, the company has failed to correct a statement made
6 by an analyst where there is a duty to do so. There is
7 no omission claim in this case because there is no
8 duty --
9 JUSTICE SOTOMAYOR: Well, what's the
10 difference between an omission or a commission if a
11 company purposely divulges a falsehood to an analyst,
12 knowing it's going to be distributed and told? So who
13 is making the false statement, the analyst or the
14 company?
15 MR. PERRY: Your Honor, the company makes
16 the statement to the market. Under basic, the analyst
17 is the market. It is the ears of the market that takes
18 the information.
19 JUSTICE SOTOMAYOR: So why isn't -- why
20 aren't the two appellants, on their theory, on -- we can
21 talk about whether the complaint does or does not
22 adequately allege their theory. That's a different
23 issue. I accept that.
24 But under their theory, why isn't the
25 appellants the primary violator, not even a secondary?

1 Because they -- they claim, I think -- and I'm going to
2 find out from them -- that Janus had no scienter, that
3 it didn't make the false statements, that all of this
4 was done in secret by the appellants, so they were the
5 only violator.
6 MR. PERRY: Your Honor, the analyst cases,
7 the issuer speaks to the market directly. Here, there
8 is an intervening legal entity, the Janus Funds.
9 Scienter or no scienter, that is a separate
10 corporation --
11 JUSTICE SOTOMAYOR: Do you mean to say to me
12 that puppets become a legal defense for someone who
13 intentionally manipulates the market information?
14 MR. PERRY: Justice Sotomayor, the Congress
15 has drafted two statutes that deal with puppets.
16 Section 20(b), which these plaintiffs have not invoked,
17 makes it unlawful for one party to do indirectly what it
18 would not be permitted to do directly. That's the
19 puppet statute, the ventriloquist dummy statute.
20 JUSTICE SOTOMAYOR: That's the control
21 person statute?
22 MR. PERRY: No. There is also 20(a), which
23 is the control person statute, also not invoked by these
24 plaintiffs.
25 Those are forms of secondary liability, Your

1 Honor. In fact, the Court's questions go to the
2 distinction between primary and secondary liability.
3 JUSTICE SOTOMAYOR: But I -- but if Janus
4 had no scienter, if its board of directors did not know
5 that the statements were false, they had no way of
6 knowing, because as I understand the complaint, and this
7 is alleged, the deal was secret. So Janus itself could
8 not be a primary violator. Who is?
9 MR. PERRY: Justice Sotomayor, our position
10 is nobody had scienter, and every adjudicator to look at
11 these facts -- Judge Mott in the district court, the ALJ
12 of the SEC, has found that there was no scienter
13 anywhere up and down the line. So the fact that
14 somebody didn't have scienter doesn't answer the problem
15 here. The question --
16 JUSTICE GINSBURG: Well, somebody deviated
17 from what was the announced policy -- that there was to
18 be no market timers investing in this -- in these Janus
19 Funds. Somebody made the decision that certain hedge
20 funds would be allowed to engage in that activity. Who
21 was that somebody?
22 MR. PERRY: The advisor personnel made the
23 determination, Justice Ginsburg, that the policy was
24 discretionary, that when it said we may refuse trades,
25 the Funds may refuse trades, that there are

1 discretion --

2 JUSTICE GINSBURG: Well, the statement

3 that's alleged to have been -- the conduct that is

4 alleged to have been in opposition to the announced

5 policy, that is attributable squarely to -- this is the

6 entity called JCM?

7 MR. PERRY: That's correct, Your Honor.

8 JUSTICE GINSBURG: So it made the decision

9 that violated the policy?

10 MR. PERRY: That's correct, Your Honor. And

11 the SEC --

12 JUSTICE GINSBURG: Nonetheless, it's not a

13 primary actor?

14 MR. PERRY: Not as to these plaintiffs, Your

15 Honor.

16 JUSTICE KENNEDY: But can -- can -- can we

17 discuss the case, and -- and -- and perhaps you don't

18 think so. Can't we discuss this case, must we not

19 discuss this case, on the theory that JCM's scienter,

20 JCM's knowledge of a false statement, is a given in the

21 case?

22 Now, maybe you'll be able to prove

23 otherwise. You say that they're not liable anyway.

24 MR. PERRY: Justice Kennedy, you're exactly

25 right. That is the theory pleaded in the complaint.

1 JUSTICE KENNEDY: And it seems to me that's
2 what the argument here is mostly about.
3 MR. PERRY: And the question that is before
4 this Court, we would submit, is whether, scienter or no
5 scienter, JCM can be held liable for the statements in
6 another company's prospectus. This Court has never
7 held --
8 JUSTICE SOTOMAYOR: Even though there was no
9 scheme with another actor? Even though it was the only
10 violator, which is a fair reading of the complaint?
11 MR. PERRY: They chose not to bring a scheme
12 case. And remember, there is a second set of investors
13 here: The fund investors. The SEC brought an action,
14 secured $100 million on behalf of them. There was a
15 series of private litigation that has been resolved,
16 brought by those investors.
17 These investors did not purchase the
18 securities offered by the -- the prospectus they
19 challenge. And again, there's a fundamental disconnect
20 between the defendant in the case and the challenge --
21 JUSTICE KENNEDY: But once again -- once
22 again, if the complainants in the case, the plaintiffs
23 in the case -- hypothetical case, not this case,
24 hypothetical case -- were injured shareholders the Fund,
25 I take it you say still they could not sue JCM?

1 MR. PERRY: Your Honor, for different
2 reasons. They can sue JCM for -- for an omission,
3 because there's a duty that runs from JCM the Fund.
4 That was the theory advanced in that separate lawsuit
5 accepted by the district court, which has since been
6 resolved.
7 They can't -- these plaintiffs can't bring
8 an omission case, because there is no duty that runs
9 from JCM out to the JCG shareholders. The district
10 court held that. They didn't appeal that to the Fourth
11 Circuit. They didn't present that in their cert
12 petition. So they can't bring that omissions case.
13 Any wrongdoing in this case -- Justice
14 Ginsburg, to finish my answer to your question, the
15 policy says funds are not intended for market timing.
16 The advisor allowed 12 traders to trade frequently. The
17 only wrongdoing, if there is any wrongdoing, was the
18 failure of the advisor to disclose to the trustees the
19 deviation from the policy. That is a State law breach
20 of contract. It may be a breach of fiduciary duty.
21 JUSTICE KAGAN: Well, Mr. Perry, who wrote
22 the relevant statements?
23 MR. PERRY: Your Honor, the Fund made the
24 statements to the public. They were drafted --
25 JUSTICE KAGAN: I understand that they were

1 in the Fund's prospectus, but who wrote them?

2 MR. PERRY: They were drafted by lawyers for

3 the Fund, lawyers representing the Fund.

4 JUSTICE KAGAN: Who paid those lawyers?

5 MR. PERRY: The advisor paid the lawyers'

6 salaries.

7 JUSTICE KAGAN: So JCM paid the lawyers?

8 MR. PERRY: Correct, Your Honor.

9 JUSTICE KAGAN: And so it was JCM's lawyers

10 who wrote the prospectus, including the relevant

11 statements here, the asserted misrepresentations?

12 MR. PERRY: I -- I disagree with that,

13 Justice Kagan. They don't allege that in the complaint,

14 and the facts show that the lawyers --

15 JUSTICE KAGAN: Well, suppose the complaint

16 had alleged that. Suppose the complaint had simply

17 said: JCM's lawyers authored the relevant statements in

18 the prospectus.

19 MR. PERRY: One would have to --

20 JUSTICE KAGAN: Would that be enough to

21 survive a motion to dismiss?

22 MR. PERRY: No, Your Honor. One would have

23 to further look at who those lawyers were representing.

24 The truth in the real world is --

25 JUSTICE KAGAN: They're paid by JCM.

1 MR. PERRY: Every prospectus is written by
2 lawyers, Justice Kagan. Lawyers write prospectuses.
3 JUSTICE KAGAN: These are in-house counsel
4 for the investment advisor.
5 MR. PERRY: In-house counsel, outside
6 counsel, once they draft materials and present them to
7 their client, it becomes the client's statement when
8 adopted by the client.
9 The board of trustees the Funds has to
10 review every policy, is responsible for every policy
11 drafted, by inside counsel, outside counsel,
12 consultants. It's not unusual for companies to retain
13 outside service providers to provide any number of
14 policies: Employment policies, investment policies,
15 anything else.
16 JUSTICE GINSBURG: Mr. Perry, you -- you
17 said that it was the Fund's lawyers who drafted the
18 prospectus, but in fact, it was JCM's lawyers, the
19 lawyers -- they were in-house lawyers for JCM. And they
20 served -- served the Fund in doing this prospectus, but
21 they were on the payroll of JCM, and they were JCM's
22 legal department.
23 MR. PERRY: Your Honor, like all lawyers,
24 they wear multiple hats. I represent multiple clients.
25 These lawyers represent multiple clients.

1 JUSTICE GINSBURG: I thought they were
2 in-house lawyers?
3 MR. PERRY: They are in-house lawyers at
4 JCM, but they also represent the Funds, and the SEC has
5 specifically recognized in the context of investment
6 companies that where an advisor counsel is representing
7 the Funds, his client or her client, for those purposes,
8 is the Funds. And here, these lawyers are very careful
9 to separate who their -- their clients are for various
10 purposes.
11 JUSTICE KENNEDY: Well, let's say that JCM's
12 principal officers and managers wrote the statement.
13 You still say there's nobody?
14 MR. PERRY: Absolutely, Justice Kennedy,
15 because when the statement is adopted by the issuer, it
16 becomes the issuer's statement. Only an issuer can make
17 the statement.
18 JUSTICE KENNEDY: Yes. It's not
19 attributable, at least publicly, to JCM.
20 MR. PERRY: That's --
21 JUSTICE KENNEDY: Is there an alternate
22 theory that JCM is really the day-to-day managers in
23 day-to-day active control of the Fund, and therefore, it
24 should be chargeable as if it and the Fund are the same
25 for purposes of making the statement?

1 MR. PERRY: Your Honor --

2 JUSTICE KENNEDY: And we would say that

3 that's different from, say, an outside law firm or an

4 auditor?

5 MR. PERRY: Your Honor, the word "control"

6 appears more than a hundred times in the briefs on the

7 plaintiff's side of this case in this Court, and the

8 Congress has dealt with control. Section 20(a) provides

9 a separate cause of action against those who control

10 another entity.

11 JUSTICE SOTOMAYOR: Except that I, as I read

12 your brief, and you can correct me if I'm wrong, you

13 were arguing that since there was an independent board

14 of directors, presumably because there are two

15 corporate -- different corporate funds -- two different

16 corporate forms, that there couldn't be control person

17 liability under 20(a). You seem that -- I thought,

18 reading your brief, that's what you were alleging.

19 So you can't have your cake and eat it, too.

20 Either the independence of the board makes no difference

21 or it does, so which is your position?

22 MR. PERRY: Our position, Your Honor, is

23 that the Congress has dealt with the situation where you

24 have two separate companies and to make a claim against

25 the second company, you have to prove control. Whether

1 or not they could in this case, none of us knows,
2 because they never brought that claim. They
3 represented to the district court --
4 JUSTICE SOTOMAYOR: Under what theory would
5 you defend an allegation that the investment manager who
6 had control over the everyday affairs of the company,
7 drafted or helped draft the prospectus, hired the
8 lawyers who helped draft it, wouldn't be a control
9 person? How would you defend that?
10 MR. PERRY: Your Honor, the investment
11 company, the mutual funds, are separately owned,
12 separately governed.
13 JUSTICE SOTOMAYOR: Exactly. So you --
14 you're -- if they can't be control persons because
15 they're separate companies, then how do they escape
16 being primary violators?
17 MR. PERRY: Well, Your Honor, then -- then
18 we're just saying that the investment advisor is a
19 service provider like every other service provider.
20 They are like the --
21 JUSTICE SOTOMAYOR: But it's not in this
22 case, because the allegation is that it -- not the
23 company, that it chose to deceive the market.
24 MR. PERRY: Your Honor, with respect, the
25 allegation is that the advisor wrote a certain policy,

1 but the very document cited for that in the complaint
2 says that the trustees are responsible for the policies
3 of the funds. The trustees, when they adopt them, it
4 becomes the corporate policies of them. I mean, on the
5 plaintiff's --
6 JUSTICE KAGAN: Mr. Perry, does the Fund
7 have employees?
8 MR. PERRY: Yes, Your Honor. The Fund
9 has --
10 JUSTICE KAGAN: Who are the Fund's
11 employees?
12 MR. PERRY: Are the officers of the Fund,
13 the chief executive officer, the chief financial
14 officer --
15 JUSTICE KAGAN: Are all of the employees
16 also employees of JCM?
17 MR. PERRY: Not the president, Your Honor,
18 but the others are joint -- serve in joint capacities.
19 JUSTICE KAGAN: And could you just run
20 through a little bit how one of these prospectuses
21 gets -- gets issues eventually? The JCM lawyers start
22 the process by drafting, and then what happens?
23 MR. PERRY: The lawyers representing the
24 trusts, both in-house and external, draft the underlying
25 document --

1 JUSTICE KAGAN: Well, here, I believe there
2 was a statement in your interrogatories that it's JCM's
3 lawyers, in-house lawyers, who drafted the relevant
4 statement.
5 MR. PERRY: The particular prospectus,
6 answered in that prospectus. That's exactly right.
7 JUSTICE KAGAN: And then what happens?
8 MR. PERRY: They are presented to the board
9 of trustees, which holds a meeting. The board of
10 trustees is -- the Funds are represented by outside
11 counsel and the independent trustees are represented by
12 outside counsel.
13 JUSTICE KAGAN: Was there any change to
14 these statements made by the board of trustees?
15 MR. PERRY: These particular statements?
16 JUSTICE KAGAN: Yes.
17 MR. PERRY: Yes, Your Honor. There were
18 changes to the market timing policy throughout the class
19 period. In fact, earlier in the class period there was
20 a disclosure that market timing might be permitted
21 pursuant to a -- a written contract. That was revised
22 later.
23 The trustees asked multiple questions. They
24 were back and forth with their lawyers. Outside counsel
25 was always involved, and there were other consultants

1 involved periodically as well.

2 CHIEF JUSTICE ROBERTS: Does the outside

3 counsel you're talking about represent the Fund only?

4 MR. PERRY: There is two separate sets of

5 outside counsel. One law firm represents only the Fund.

6 It does not represent the advisor; only represents the

7 Funds, Your Honor. There's a second law firm in this

8 case that represents the independent trustees.

9 Six of the seven trustees determined that to

10 secure their independence, because the chairman of the

11 board at that time was an interested person under the

12 statute, they have a separate law firm. There are two

13 law firms that have nothing to do with the advisors.

14 JUSTICE GINSBURG: But the law firm that --

15 the lawyers who drafted the prospectus were in-house

16 counsel for JCM on JCM's payroll?

17 MR. PERRY: They were paid by JCM, and at

18 the time they drafted, they were representing the Funds,

19 again, as allowed by the SEC, as disclosed in the

20 documents --

21 JUSTICE GINSBURG: But they weren't the

22 independent outside lawyers who were representing the

23 board or the Fund; they were the in-house counsel?

24 MR. PERRY: Those outside counsel reviewed

25 every policy. In fact, if you look at the --

1 JUSTICE GINSBURG: I guess my question was
2 simply: The drafters of the prospectus were the
3 in-house counsel for JCM?
4 MR. PERRY: The -- the paragraph being
5 challenged in this case, that's correct, Your Honor.
6 The interrogatory response doesn't speak more broadly
7 than that, but I agree with that.
8 CHIEF JUSTICE ROBERTS: I suppose if the
9 lawyers for the trust did an inadequate job of reviewing
10 the JCM drafts, they would be subject to a malpractice
11 action by the trust?
12 MR. PERRY: Correct, Your Honor. And then
13 the trust, of course, has contractual and other rights
14 against the advisor that it has enforced, you know, in
15 this very case. The trustees made a claim against the
16 advisor for all of this underlying conduct. Except --
17 JUSTICE BREYER: What happens if the
18 president of the oil company, knowing that the statement
19 is false, says: We have discovered 42 trillion barrels
20 of oil in Yucatan. He writes it on a piece of paper; he
21 gives it to the board of trustees; they think it's true
22 and they issue it. Joe Smith buys stock and later loses
23 money.
24 Can Joe Smith sue the president of Yucatan,
25 of the oil company, for having made an untrue statement

1 of material fact?

2 MR. PERRY: If he's an authorized agent of

3 the same company that issued the statement?

4 JUSTICE BREYER: What he is -- he didn't

5 issue it. What he did was he gave it to the board of

6 trustees, who issued it.

7 MR. PERRY: If the board of trustees of his

8 company, so that the statement --

9 JUSTICE BREYER: He's the president of the

10 company.

11 MR. PERRY: And the distinction here,

12 Justice Breyer, is --

13 JUSTICE BREYER: No, no. I'm asking what

14 happens. Is there recovery?

15 MR. PERRY: If he is an authorized agent, he

16 may be sued as --

17 JUSTICE BREYER: He is running the business,

18 the daily affairs, of the company. Of course the

19 president of a company is an authorized agent of the

20 company, and so, yes.

21 MR. PERRY: He may be subject to liability,

22 then.

23 JUSTICE BREYER: Now, if he is subject to

24 liability, why isn't your firm, your client, subject to

25 liability, who, after all, run every affair of the Fund?

1 MR. PERRY: Your Honor, they run the
2 management of the Fund. The investment of --
3 JUSTICE BREYER: Yes, that's what a
4 president does. The president of a company manages the
5 company. And if the president is liable, why isn't the
6 group of people who do everything for the company -- why
7 aren't they liable?
8 MR. PERRY: Because the corporate form has
9 meaning in the Federal law and in State law, and
10 where --
11 JUSTICE BREYER: No, you have to explain it
12 to me more.
13 I'm not being difficult. I understand this
14 less well than you think I do, and I want to know.
15 That's an obvious, naive question, and I would like an
16 answer that anyone could understand.
17 MR. PERRY: The answer is, Your Honor:
18 These funds are managed -- governed, excuse me, is a
19 better word -- by the trustees. That is disclosed in
20 these documents. In fact, the documents say -- it's at
21 page 258A of the Joint Appendix -- the trustees are
22 responsible for all the policies.
23 They have outsourced, if you will, certain
24 functions, operational functions: Which stock to buy,
25 which stock to sell, which transfer agent to hire.

1 Those are functions that could be kept in house, but
2 could be --
3 JUSTICE BREYER: I get it. In other words,
4 you're saying on the papers here, it's -- it's the
5 trustees that manage everything.
6 MR. PERRY: That govern everything.
7 JUSTICE BREYER: That govern everything, and
8 these are like helpers?
9 MR. PERRY: Well, they're -- they're --
10 JUSTICE BREYER: They do a lot as helpers.
11 Now, let me suggest to you, if that's one possible
12 distinction, what about this distinction: That the
13 managers of a Fund, even though they are outsourced
14 people brought in, are liable as principals, not aiders
15 or abettors, if -- following criminal law here, if --
16 they are principals if they get the false statement to
17 the public through a conduit, the conduit being an
18 entity or person that is unaware of the falsity of the
19 statement?
20 That's LaFave on criminal law. What is --
21 what about that?
22 MR. PERRY: Three answers. First, as dealt
23 with in section 20(b), which is the ventriloquist dummy
24 statute that these plaintiffs didn't invoke.
25 Second, the Congress looked at this very

1 question in 1938 and 1939, when there were proposals to
2 merge the management, the advisor function, with the
3 funds, to make them one unitary entity. In the
4 Investment Company Act of 1940 and the Investment
5 Advisors Act of 1940 the Congress elected not do that.
6 As this Court has recognized, it chose not
7 to require compulsorily internalization of the
8 management function. It allowed this separate entity.
9 And therefore, when you have separate companies, under
10 State law -- again, my client is a Delaware limited
11 liability corporation. The Funds are Massachusetts
12 business trusts. They have nothing in common. There's
13 no joint ownership, no joint governance --
14 CHIEF JUSTICE ROBERTS: Could you --
15 JUSTICE SOTOMAYOR: You're -- you're not
16 suggesting, are you, that they did this for purposes of
17 protecting your client from lawsuit?
18 MR. PERRY: Absolutely not.
19 JUSTICE SOTOMAYOR: When it -- no, they did
20 it for a business reason, that having separate entities
21 was economically more useful for the market, correct?
22 MR. PERRY: And every fund, or virtually
23 every fund in -- in the United States, is set up this
24 way. And again --
25 JUSTICE SOTOMAYOR: So -- but that doesn't

1 answer Justice Breyer's question, now.

2 MR. PERRY: My third --

3 JUSTICE SOTOMAYOR: Assuming that they

4 didn't do it for that reason, what does it mean?

5 MR. PERRY: My third answer is that

6 extensive regulatory involvement in the two acts enacted

7 in 1940 specifically to regulate this industry, that

8 Congress never made the decision to hold the advisor

9 liable for the Fund's conduct.

10 In fact, no statute says that, and the SEC

11 has never taken that position. There is no case cited

12 in any of the briefs -- they have 234 pages, 138 cases.

13 Not one holds an investment advisor liable for

14 statements of the fund's prospectuses.

15 JUSTICE KENNEDY: Just -- just to clarify

16 Justice Breyer's hypothetical. In your -- in the

17 hypothetical you gave where the president gives an

18 innocent board of directors false information and the

19 prospectus goes out, is the company liable because their

20 agent -- is the company liable under 10b-5?

21 MR. PERRY: The company may be sued under

22 10b-5. It has got to meet all the elements.

23 JUSTICE KENNEDY: Yes.

24 MR. PERRY: But yes, it is an authorized

25 agent making a statement on behalf of the company.

1 JUSTICE KENNEDY: So what you're saying is
2 that the -- the agency relation that the president of
3 the company holds is different that than the agency
4 relation that JCM holds?
5 MR. PERRY: Absolutely right, Your Honor,
6 and that's a distinction --
7 JUSTICE KENNEDY: Why is that?
8 MR. PERRY: It's grounded in State law, and
9 it differs between one company and two companies. Where
10 Congress has looked at issuers, for example --
11 JUSTICE SCALIA: Well, but is JCM an agent?
12 Are you acknowledging that they're an agent of -- of the
13 Fund?
14 MR. PERRY: You know, for certain purposes,
15 Justice Scalia, they are an agent.
16 JUSTICE SCALIA: What -- what purposes are
17 that? For purposes of -- at issue here?
18 MR. PERRY: No, Your Honor, for -- not for
19 drafting a prospectus. For carrying out the investment
20 function. They are laid out in the contract --
21 JUSTICE SCALIA: Okay --
22 MR. PERRY: It's attached as an appendix to
23 our brief, which sets forth the things that JCM is an
24 agent for investment operations, not an agent
25 specifically for registering the Fund's securities for

1 sales, complying with the Federal securities laws,
2 preparing and issuing the prospectus. All those things,
3 by contrast --
4 JUSTICE KENNEDY: So even though they did
5 those things, they acted in excess of their authority?
6 MR. PERRY: They did not do those things,
7 Your Honor.
8 JUSTICE KENNEDY: But that's the allegation.
9 MR. PERRY: No, it's not the allegation.
10 JUSTICE KENNEDY: Well, suppose it were
11 proved that they did do those things. Suppose it were
12 proven that they did 100 percent of prospectus work.
13 The only thing that the Fund did was to mail it.
14 MR. PERRY: I don't know how to respond to
15 that, Justice Kennedy, since it's so far beyond what
16 they could possibly prove here. What happened here --
17 JUSTICE GINSBURG: Well, this case -- this
18 case went off on -- in the district court, it was -- was
19 it 12b-6?
20 MR. PERRY: Yes, Your Honor.
21 JUSTICE GINSBURG: Okay. And all that the
22 Fourth Circuit said is, it goes beyond; it has to go
23 further. And the -- the impression that I got from the
24 Fourth Circuit's opinion is -- and it could be reduced
25 to a very simple statement. They say: JCM was in the

1 driver's seat. It was running the show. And if that
2 can be proved, they thought that they would have a good
3 case under --
4 MR. PERRY: And, Your Honor, no court, no
5 case from this Court or any court of appeals has ever
6 held that the driver's seat exception, the central bank,
7 exists. And that is an expansion.
8 The second issue in the case, of course,
9 which is attribution: Even if there is making by JCM,
10 none of these statements were attributed to JCM. The
11 prospectus is very clear that at issue --
12 JUSTICE GINSBURG: But that was -- I mean,
13 before you started out with statements that sounded like
14 the sky is falling because lawyers would no longer be
15 safe, banks would no longer be safe -- but the Fourth
16 Circuit was -- was a much narrower view. Its view was,
17 this -- JCM was the manager. It was controlling
18 everything.
19 MR. PERRY: Justice Ginsburg, the Fourth
20 Circuit's view was the manager helps the Fund. That --
21 nobody even defends the Fourth Circuit's ruling. The
22 government now comes in with a theory that they admit,
23 on page 22 of the government's brief, does apply to
24 every lawyer, every accountant, every --
25 JUSTICE SCALIA: I thought that the question

1 on which we granted cert was very clear: whether the
2 Fourth Circuit erred in concluding that a service
3 provider can be held primarily liable in the private
4 securities fraud action for, quote, "helping," close
5 quote, or, quote, "participating in," close quote,
6 another company's misstatements.
7 Now, is -- is that an accurate description
8 of the Court's holding? It was not objected to by the
9 Respondent here.
10 MR. PERRY: Absolutely, Justice Scalia. And
11 that question can only be --
12 JUSTICE SCALIA: And that's what I thought
13 we granted. We weren't talking about control here.
14 That -- that was not the issue, I thought.
15 MR. PERRY: We agree with the Court. The
16 question presented can only be answered one way: The
17 court of appeals erred.
18 If I may reserve my remaining time.
19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 Mr. Frederick.
21 ORAL ARGUMENT OF DAVID C. FREDERICK
22 ON BEHALF OF THE RESPONDENT
23 MR. FREDERICK: Thank you, Mr. Chief
24 Justice, and may it please the Court.
25 JUSTICE SCALIA: Mr. Frederick, is that an

1 accurate description of -- of the question before us?

2 MR. FREDERICK: I don't think it is, Justice

3 Scalia.

4 JUSTICE SCALIA: Why didn't you object to it

5 in -- in your -- in your opposition?

6 MR. FREDERICK: We did object, in the sense

7 that we described the complaint's allegations as JCM

8 writing and preparing and being responsible for the

9 prospectus. And the question of --

10 JUSTICE SCALIA: I don't -- but we -- we

11 don't reevaluate facts. We -- we review the holding of

12 a lower court.

13 Now, was this an accurate description of the

14 holding of the Fourth Circuit? And if it wasn't, why

15 didn't you say that in your brief in opposition?

16 MR. FREDERICK: We did say it in our brief

17 in opposition, Justice Scalia, and the Solicitor

18 General, when you called for the views of the Solicitor

19 General, also said in the invitation brief that this

20 case was not an appropriate vehicle for deciding just

21 simply "help" and "participate," because what the Fourth

22 Circuit was saying in other parts of its opinion was

23 that JCM was responsible for the prospectuses in all

24 their various aspects: In writing, preparing, et

25 cetera. And so we --

1 CHIEF JUSTICE ROBERTS: How can -- I'm
2 sorry. Please --
3 MR. FREDERICK: So we would submit that for
4 the reasons we stated in our opposition and we stated in
5 our red brief, as the case comes to this Court on
6 reviewing a motion to dismiss of a complaint's
7 well-pleaded allegations -- and I can go through the
8 complaint's allegations if you like that explain how JCM
9 wrote and prepared the prospectus and the policies for
10 the Fund and then implemented them falsely -- we would
11 submit this case is not about service providers, but it
12 is about Janus Capital Management being the primary
13 violator. They were the ones who had the motive to lie,
14 they had the incentive to lie, and they did lie.
15 JUSTICE SCALIA: Did they make the
16 statements? Isn't that the statutory text that we're
17 dealing with?
18 MR. FREDERICK: Yes, they did.
19 JUSTICE SCALIA: They did make the
20 statements?
21 MR. FREDERICK: Yes, they composed and
22 created --
23 JUSTICE SCALIA: It didn't go out under
24 their name.
25 MR. FREDERICK: It did, in --

1 JUSTICE SCALIA: If someone writes a speech
2 for me, one can say he drafted the speech, but I make
3 the speech.
4 MR. FREDERICK: Justice Scalia, we address
5 the definition of "make" under the SEC's interpretation,
6 which is entitled to deference, as to being to create or
7 to compose or to accept as one's own.
8 JUSTICE SCALIA: That's not what -- it
9 depends on the context of "make." If you're talking
10 about making heaven and earth, yes, that means to
11 create, but if you're talking about making a
12 representation, that means presenting the representation
13 to someone, not -- not drafting it for someone else to
14 make.
15 MR. FREDERICK: In the prospectus, there is
16 a section on management that explains that Janus Capital
17 Management engages in the day-to-day functions. There
18 are no employees of Janus Funds themselves. All of this
19 is outsourced management --
20 CHIEF JUSTICE ROBERTS: Except -- except
21 when they review material going in the prospectus.
22 MR. FREDERICK: But that --
23 CHIEF JUSTICE ROBERTS: Then they have
24 independent representation by outside counsel.
25 MR. FREDERICK: Right. What they don't

1 have, Mr. Chief Justice, and where the falsity is here,
2 is the ability of any of those outsiders to determine
3 whether or not implementing the policy will be done
4 fraudulently, and that's where the culpability is here.
5 JCM runs these funds, and although the statement might
6 get accepted by the board of trustees --
7 CHIEF JUSTICE ROBERTS: I don't
8 understand -- I don't understand your answer. The
9 outside counsel reviews what the policy is going to be?
10 MR. FREDERICK: Yes.
11 CHIEF JUSTICE ROBERTS: Our question is the
12 validity of that statement, whether that's deceptive in
13 the prospectus. That seems to me to be an entirely
14 different question. I understood your theory of the
15 case to be that JCM is liable, basically, because they
16 put it in the prospectus.
17 MR. FREDERICK: And what they did was to
18 falsely represent what they would do with that
19 statement. I would direct the Court to paragraph 5.
20 CHIEF JUSTICE ROBERTS: Well, that's the
21 question, I guess, that -- your response seems to beg
22 the question -- is that they falsely represented. The
23 issue is whether or not something happened between their
24 drafting and its appearance in the prospectus. That
25 makes it appropriate to say that that's a statement of

1 the trust rather than a statement of JCM.

2 MR. FREDERICK: It is a statement of both,

3 in the sense that the Fund is attracting investors, but

4 the Fund is managed and controlled by the investment

5 manager; here, JCM.

6 JUSTICE SCALIA: But if JCM falsely

7 represented what it would do, it made that false

8 representation to the Fund, and the Fund, as has been

9 acknowledged, would have a cause of action against JCM.

10 MR. FREDERICK: No --

11 JUSTICE SCALIA: But that's not what's going

12 on here.

13 MR. FREDERICK: No. In fact, paragraph 5 of

14 the complaint says Janus is representing that its mutual

15 funds -- Janus Capital Management, its mutual funds --

16 were designed to be long-term investments. It then says

17 in paragraph 6: "As recognized in the prospectuses, JCM

18 purported market timing policy was designed to protect

19 long-term investors."

20 So if you read the prospectus and you read

21 the complaint, it is absolutely clear what Janus Capital

22 Management is telling all the mutual fund investors of

23 the world: If you invest in Janus, we will protect your

24 long-term investments.

25 JUSTICE SCALIA: What isn't clear from all

1 of those things is that JCM made any representation to
2 the public. The representation was made in the
3 prospectus issued by the Fund, not by JCM.
4 Now, the Fund may have a cause of action
5 against JCM, but what's crucial here is whether --
6 whether you can establish that it is JCM who made the
7 representation to the public, and I don't see how you
8 can get there. You might proceed under the control
9 provision, but not by saying that they made the
10 representation.
11 MR. FREDERICK: Justice Scalia, they wrote
12 the prospectus. They're --
13 JUSTICE SCALIA: That's fine. Just like
14 writing a speech for somebody.
15 MR. FREDERICK: And when they issued the
16 prospectus, they used their address and represented to
17 the public that they --
18 CHIEF JUSTICE ROBERTS: I'm sorry to
19 interrupt, but it seems be an important -- when they
20 issued the prospectus? Who issued the prospectus?
21 MR. FREDERICK: Sorry. JCM filed it and
22 disseminated it on its website, and all investors in the
23 Janus Funds knew to -- knew to make inquiries to the
24 manager if they had any question about the Funds.
25 JUSTICE SCALIA: If I carry a letter over

1 and file it on behalf of some principal, does it become
2 my letter? Have I made that representation? Sure, they
3 filed it. What does that prove?
4 MR. FREDERICK: Because it's --
5 JUSTICE SCALIA: As you say, they have no
6 other agents, unless the trustees themselves were going
7 to walk over and file it. JCM was functioning in that
8 capacity as an employee of the Fund in the filing. They
9 didn't file it on their own behalf.
10 MR. FREDERICK: Yes, they did.
11 JUSTICE SCALIA: On their own behalf?
12 MR. FREDERICK: Absolutely. They created
13 the fund, Justice Scalia. That's how mutual funds work.
14 Managers create them, they lure investors to them, they
15 get money by having a percentage of assets under
16 management.
17 CHIEF JUSTICE ROBERTS: And the SEC has
18 recognized that they remain two separate entities,
19 despite the interconnected relationship.
20 MR. FREDERICK: Certainly, but there are
21 many cases -- in fact, I don't think it's ever been
22 disputed in the courts of appeals that if one company
23 outsources its management function and those outsourced
24 managers make lies on behalf of the company, they are
25 also --

1 CHIEF JUSTICE ROBERTS: The one activity --
2 one activity that we know they did not outsource was
3 review of the materials submitted by JCM. They had
4 independent counsel that conducted that review.
5 Would it have been a breach of the trustees'
6 fiduciary obligations to the fund investors under common
7 law -- I forget where this is incorporated -- to
8 rubberstamp what they get from somebody on the outside,
9 not to have independent counsel review what they're
10 going to say in their prospectus?
11 MR. FREDERICK: Mr. Chief Justice, my answer
12 to your question is: That's actually a very difficult
13 question under fiduciary duty law, because here, the
14 fiduciaries have been duped themselves.
15 They, when they got the wording of the
16 prospectus and the policy that JCM was purporting to
17 implement -- JCM didn't tell the Board that there are 12
18 secret deals with hedge funds, pursuant to which we're
19 going to make money by attracting long-term investors
20 and make money with short-term market climbers --
21 CHIEF JUSTICE ROBERTS: Isn't that, again,
22 what has been conceded: That there may well be an
23 action from the Fund represented by their trustees
24 against --
25 JUSTICE SCALIA: Common lawsuit for duping.

1 MR. FREDERICK: Justice Scalia, in no
2 instance that I'm aware of where a mutual fund
3 investment advisor is a publicly traded company would
4 that cause of action run on behalf of the managers
5 shareholders. What we're talking about here is a
6 company with a product, and they lie about the product.
7 And in that instance, it's no different from the Vioxx
8 case last year with Merck or the difference from the
9 cold remedy case you are going to hear argument in next
10 term.
11 The mutual funds happen to be the product of
12 the company. They make misstatements about the
13 product --
14 JUSTICE ALITO: Suppose this case didn't
15 involve a mutual fund. Suppose it involved a
16 corporation with thousands of employees and the
17 prospectus is drafted by outside counsel. It's adopted
18 by the directors of the company without changing a word.
19 Now, would that case come out the same? And
20 if not, what would -- what exactly would you have us say
21 to distinguish the two?
22 MR. FREDERICK: Well, the outside lawyers, I
23 think, are distinguishable in a number of different
24 ways. One is that they are reacting on information
25 provided by the company. That information is typically

1 not subject to an independent investigation by outside
2 counsel to determine the truth or veracity of the
3 information.
4 JUSTICE ALITO: What if it's alleged they
5 knew exactly what was going on?
6 MR. FREDERICK: If there is scienter, where
7 the lawyers knowingly act in a way that helps or that
8 contributes to that fraud, they may well be subject as
9 aiders and abettors. It depends on whether you can
10 establish that the lawyers have met all of the elements.
11 I mean, you would have to show reliance. You would have
12 to show lost causation. You would have to show the
13 primary violation of the party --
14 JUSTICE ALITO: And what are aiders and
15 abettors? I thought there wasn't aiding and abetting.
16 MR. FREDERICK: Sorry. The SEC would be
17 able to proceed against the lawyers for aiding and
18 abetting. Whether or not there would be a private
19 action would depend on whether the lawyers -- it could
20 be pleaded under the heightened pleading requirements
21 that they had met all of the elements of the 10b-5
22 claim. I would submit that's extremely difficult.
23 JUSTICE BREYER: What is it that -- I'm
24 unclear on this. That's why I use the oil company
25 example. Plain, ordinary -- the top executives in the

1 oil company write the false statement. They give it to
2 a board that doesn't know it's false, and the board puts
3 it out in its name.
4 Now, it seems to me it ought to be clear at
5 this point in securities law whether those -- the
6 president and the vice president are or are not liable
7 under this 10-b, the (b) part.
8 MR. FREDERICK: Yes, and we cited those
9 cases --
10 JUSTICE BREYER: And they are liable.
11 MR. FREDERICK: -- i believe at page 37.
12 JUSTICE BREYER: You're saying they are
13 liable? All right. Then their response to that is:
14 This is not like the president of the oil company, and
15 the reason that it's not is something to do with the
16 nature of the obligation that runs between the managers
17 and the Fund, which is somehow different between -- you
18 understand it better than I.
19 Can you say what it is and what you think
20 your response is?
21 MR. FREDERICK: Yes. What I will say is
22 that they don't have a principal distinction between
23 those two situations. Simply having a contract to
24 outsource management where those management functions of
25 the company are resulting in false statements issued by

1 the company shouldn't make --

2 JUSTICE BREYER: All right. So you're

3 saying -- you're saying it shouldn't matter that -- if

4 they issued worse if they run the whole company than if

5 they're just the president?

6 MR. FREDERICK: That's correct.

7 JUSTICE BREYER: All right. Now, at that

8 point, we get into a problem, and the problem is how do

9 we distinguish an aider or abettor from the principal?

10 At that point I am uncertain indeed, and that's why I

11 put out this for comment, this suggestion that you

12 follow criminal law here and say at least they are a

13 principal if they have a high position, they participate

14 in it, they do all these things you say, and the entity

15 they're fooling in the first instance is simply a

16 conduit, and therefore, you cannot say it's a scheme,

17 because the other part of the scheme wasn't part of it.

18 MR. FREDERICK: Well, to be a primary

19 violator, you have to have met all the elements of the

20 cause of action.

21 JUSTICE BREYER: Yes.

22 MR. FREDERICK: To be an aider and abettor

23 for SEC enforcement purposes, you simply have to provide

24 substantial assistance to one who is a primary violator.

25 JUSTICE BREYER: What's the difference

1 between substantial assistance and doing it?

2 MR. FREDERICK: You would not have to make

3 the statement. You would do something to assist the

4 person making the statement.

5 JUSTICE SCALIA: Mr. Frederick, I thought we

6 had held -- I was sure we had held that there is no

7 aiding and abetting liability --

8 MR. FREDERICK: Yes. I'm -- I'm not

9 saying --

10 JUSTICE SCALIA: -- under the provision

11 we're discussing here.

12 JUSTICE BREYER: There's a distinction. You

13 want to say what the distinction is. So I would say,

14 consistent with the view, there is no aiding and

15 abetting liability. You still would win your case?

16 MR. FREDERICK: That's correct, because

17 there is no primary violator under JCM's view of the

18 facts here. They are the primary violator under our

19 view of the facts here, because they met all of the

20 elements of the 10b-5 action, and they had a motive do

21 it, and they made --

22 JUSTICE SOTOMAYOR: Is your claim premised

23 on Janus being duped or not? If Janus was not duped, if

24 its board knew and JCM was doing the activity with

25 either the consent or acquiescence of the board, would

1 you have a claim here?

2 MR. FREDERICK: We would. It would be

3 somewhat different because we would plead multiple

4 violators as the court and central bank and from

5 which --

6 JUSTICE SOTOMAYOR: Then go back to Justice

7 Breyer's question, because I can see when there's one

8 primary violator who uses another entity as a dupe or as

9 a puppet, but I can't, and I don't know how to

10 distinguish what you're proposing, from aiding and

11 abetting. There has to be something to differentiate

12 the two, so what is it?

13 MR. FREDERICK: It's the failure on the part

14 of the person who would not have met all of the elements

15 of the 10b-5 claim. You have to have someone -- you

16 have two people, okay? Both of them have to have

17 satisfied all the elements of a 10b-5 claim to be

18 primary violators. If there is one element that is not

19 satisfied with respect to that person, that person is

20 only an aider and abettor and not subject to private

21 remedies under Section 10(b). They would be subject to

22 aiding and abetting liability under the SEC.

23 JUSTICE ALITO: The distinction you're

24 drawing is between making the statement and assisting in

25 making the statement. Isn't that what you just said?

1 MR. FREDERICK: Well, no, in the sense that
2 we believe, and we assert in the complaint and the
3 complaint is adequately pleaded, is that JCM made the
4 statements. Now --
5 JUSTICE ALITO: Yes, aiding and abetting is
6 assisting in making these statements as if -- as in
7 something you want to take place, right?
8 MR. FREDERICK: Yes.
9 JUSTICE ALITO: What is the difference, the
10 distinction in -- in this context? One possible
11 distinction is who formally makes it, in whose name is
12 it made, but that's obviously not your -- your position.
13 So what is it to distinguish a principal here from an
14 aider and abettor?
15 MR. FREDERICK: Who has substantive control
16 over the content of the message. That kind of
17 substantive control, as -- as the Court in the Utah Ten
18 Commandments case pointed out, the government can have
19 speech attributed to it on the basis of it putting up a
20 monument on public land. There can be multiple speakers
21 with respect to one message, and the question of how
22 much substantive control you attribute to a particular
23 speaker we believe is the appropriate way to view --
24 JUSTICE SCALIA: Do you deny that the Fund
25 had substantive control? Couldn't the Fund have stopped

1 this statement from being placed in its prospectus?
2 Didn't it have outside lawyers who advised it whether it
3 should allow this statement to be included in its
4 prospectus? How can you say that they -- they didn't
5 have control?
6 MR. FREDERICK: Well, they did not have a
7 knowledge of the falsity.
8 JUSTICE SCALIA: Well, that may mean that
9 they're duped, but it doesn't mean that they don't have
10 control. They had control, but you say they -- they
11 were duped, but that's quite a different theory from
12 saying that they had control -- that they didn't have
13 control.
14 MR. FREDERICK: No, Justice Scalia, they
15 didn't have substantive control over the content of the
16 message, because if they did, they would not have
17 allowed these false statements to have been issued. And
18 that's the whole point -- that's the theory here, JCM
19 was luring long-term investors with the promise, if you
20 park your money with the Janus Funds, it will be safe
21 in -- from the kinds of market timing problems. They
22 were then secretly going out and luring money from the
23 hedge funds for then --
24 JUSTICE KENNEDY: But there is -- there is
25 nothing in the record to indicate that that statement

1 was attributed to JCM?

2 MR. FREDERICK: The public understood it

3 that way.

4 JUSTICE KENNEDY: You can -- you can play

5 with the words, "make" as you choose, but do we take the

6 case on the assumption that you can show it was

7 attributed to JCM? I -- I see nothing in -- in the

8 record that would justify that.

9 MR. FREDERICK: Well, JA 275A, Justice --

10 Justice Kennedy -- excuse me -- says that Janus Capital

11 Management reserved the Janus name for itself.

12 JUSTICE GINSBURG: How did it reserve that?

13 You said twice in your brief that Janus is a name to

14 which JCM reserves the right. How did it reserve the

15 right?

16 MR. FREDERICK: It said, and this is at

17 page 275A, if for some reason Janus Capital Management's

18 contract is terminated, the Funds can no longer use the

19 Janus name. They were intending to trademark and get

20 the name out there to attract investors to the

21 investment advisor's method of investing. And it was

22 that type of usage that brought all of this together.

23 The Fund and the management, they are in function

24 essentially one entity. The fact that they have

25 contractually outsourced the management function should

1 not alleviate the securities fraud that is alleged here.
2 JUSTICE KAGAN: Mr. Frederick, a substantial
3 part of the power of your argument comes from this
4 notion that, as Justice Ginsburg said, that JCM was in
5 the driver's seat, that JCM had control, that they
6 were -- Janus was at most an alter ego of JCM and maybe
7 something more, that it was just a creature of JCM. But
8 the securities legislation seems to deal with that in
9 section 20. And your case is not brought under section
10 20, and because of the relationship between mutual funds
11 and their investment advisors, presumably could not be
12 brought under section 20.
13 So, why should we think relevant the kind of
14 controlled relationship that you're talking about?
15 MR. FREDERICK: Because you don't want to
16 create a road map for other people to commit fraud,
17 Justice Kagan, and that's what their theory does. What
18 their theory does is it says is we set up shell
19 companies or if we dupe people to make statements, we
20 can commit securities fraud with impunity, because we
21 won't be held liable to having made the statement, even
22 though we wrote it, we had substantive control over it,
23 et cetera.
24 CHIEF JUSTICE ROBERTS: Except, except to
25 the SEC, right? Because they can pursue it under aiding

1 and abetting. It's kind of a big --

2 MR. FREDERICK: Well --

3 CHIEF JUSTICE ROBERTS: -- problem if you're

4 trying to say we're safe from the actions for security

5 fraud.

6 MR. FREDERICK: Well, Chief Justice Roberts,

7 this Court on numerous occasions has said that the

8 private securities action is a complement to the

9 enforcement efforts of the SEC, and in this instance,

10 the shareholders of the investment --

11 CHIEF JUSTICE ROBERTS: Well, I know, but

12 you were just responding by saying the problem is that

13 this will give people a road map. But they're going to

14 hit a pretty big bump in the road when the SEC brings an

15 action against them, including potential criminal

16 actions.

17 MR. FREDERICK: But, no, the problem,

18 Mr. Chief Justice, is that under their construction of

19 the facts there's no primary violator. Mr. Perry said

20 this morning --

21 CHIEF JUSTICE ROBERTS: The SEC --

22 MR. FREDERICK: -- there's no primary

23 violator. And, so, if there's no primary violator,

24 there can be no controlled person and there can be no

25 aiding and abetting.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Frederick.
3 Mr. Gannon.
4 ORAL ARGUMENT OF CURTIS E. GANNON,
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING RESPONDENT
7 MR. GANNON: Mr. Chief Justice, and may it
8 please the Court:
9 JUSTICE SOTOMAYOR: Counsel, could you start
10 by taking your brief and distilling it down to three
11 sentences? Define what a primary violator is, what a
12 secondary violator is who aids and abets, and who a
13 control person is? And then tell me how that definition
14 would exclude lawyers, auditors, investment -- general
15 investment advisors, et cetera.
16 I've read your brief, but I've been trying
17 to distill it down to three sentences. So try to do
18 that for me.
19 MR. GANNON: A primary violator must be
20 somebody who has actually committed all the elements of
21 a 10b-5 --
22 JUSTICE SOTOMAYOR: Give me an example of
23 that. What do you see as all of the elements?
24 MR. GANNON: Well, the elements for the
25 private cause of action are the ones that this Court has

1 repeated. They are --

2 JUSTICE SOTOMAYOR: I understand. But --

3 MR. GANNON: In this case the key one we're

4 talking about is you would need to be an actual maker of

5 the statement, and -- and --

6 JUSTICE SOTOMAYOR: And that becomes -- how

7 is that different from aiding and abetting the making of

8 a statement?

9 MR. GANNON: It -- we think that somebody

10 can make a statement if they create the statement, and

11 the statute and the rule both expressly apply to those

12 who make statements directly --

13 JUSTICE SOTOMAYOR: But that's every

14 lawyer --

15 MR. GANNON -- or indirectly.

16 JUSTICE SOTOMAYOR: -- who writes the false

17 statement knowing it's false. So, are you saying every

18 lawyer who writes the statement knowing that it's false

19 is a primary --

20 MR. GANNON: Scienter is another element,

21 and so a lawyer who just reviews the policy, JCM in this

22 case, when JCM submitted false statements to the funds,

23 if the funds were unaware, this is where Mr. Frederick

24 concluded for the Chief Justice that if there -- if the

25 person who actually releases the statement to the world

1 has been duped and doesn't have scienter, then there
2 is -- they are not going to be --
3 CHIEF JUSTICE ROBERTS: So, just to get --
4 MR. GANNON: A primary violator.
5 CHIEF JUSTICE ROBERTS: -- to get back, so
6 you are conceding that if you lose this case, you will
7 be unable to bring any aiding and abetting case in a
8 situation such as this?
9 MR. GANNON: Under sections 20 -- it depends
10 on what the situation --
11 CHIEF JUSTICE ROBERTS: It seems like a yes
12 or no question.
13 MR. GANNON: Yes, if the situation here is
14 one in which the Funds ultimately cannot be proved to
15 have scienter. If they did not know about the falsity
16 of the statements in the prospectuses that they released
17 to the public, then there would not be a primary
18 violator. Under section 20(e) for aiding and abetting
19 liability, the Commission can bring an aiding and
20 abetting claim against somebody who provides substantial
21 assistance, recklessly or knowingly -- recklessly or
22 knowingly provides substantial assistance to a primary
23 violator, but the Court has repeatedly made clear that a
24 primary violator needs to have violated all of the
25 elements of a 10b-5 cause of action which includes --

1 JUSTICE ALITO: I'm still not clear what
2 your distinction is between making the statement and
3 aiding and abetting in the making of the statement.
4 Now, could you explain that for me?
5 MR. GANNON: Well, I think that --
6 JUSTICE ALITO: Is it necessary that the
7 person in whose -- the entity in whose name the
8 statement is made is an empty shell, it's simply a
9 puppet that's controlled by somebody else? Is that --
10 is that necessary or does it go beyond that?
11 MR. GANNON: No, I don't think that that's
12 necessary. If the position -- the position that the
13 Commission has taken is that somebody who makes a
14 statement, if he writes the statement or provides the
15 false information that's used to construct the statement
16 or allows the statement to be attributed to him, and we
17 think that that's a reasonable construction of the term
18 "make," because the statute and the rule both apply to
19 persons who make the statement directly or indirectly.
20 And, so, they could be using a conduit, whether the
21 conduit is witting or unwitting, they would be a primary
22 violator if they had --
23 JUSTICE SCALIA: I don't think that's a
24 reasonable interpretation of -- of -- of make a
25 statement indirectly. I mean, you can make it

1 indirectly by not issuing it yourself but having
2 somebody else make it in your name.
3 MR. GANNON: Well, if --
4 JUSTICE SCALIA: But I would not say I'm
5 making a speech indirectly if I have drafted the speech.
6 MR. GANNON: Well, but if --
7 JUSTICE SCALIA: The person for whom I
8 drafted the speech is making the speech.
9 MR. GANNON: Well, that may be true in the
10 case of a speech, Justice Scalia, but in a classic
11 boiler room situation, where somebody has written the
12 scripts for salespersons to -- to use in order to make
13 calls to sell stocks, the person who actually writes the
14 scripts may never speak the words to a customer, he may
15 never have his own name spoken on the phone, and
16 therefore, the statements have not been attributed to
17 him --
18 JUSTICE BREYER: He may just be some poor
19 associate, his first day at work. The law firm sent him
20 there and he got stuck down in the boiler room. And
21 somebody said, why don't you write something that will
22 get everybody to sell things, and -- and why don't you
23 say we're a thousand tons of oil instead of only a ton.
24 In -- he writes it out. You think he's liable?
25 MR. GANNON: If he writes it out and he

1 doesn't know, he obviously isn't liable --
2 JUSTICE BREYER: No, no, at some level he
3 knows, "I shouldn't be saying they found 1,000 tons of
4 oil when they only found 50," okay? And four people
5 told him to go do something like that, but he's the guy
6 who wrote it. I would say he didn't behave well, but I
7 don't think he's the principal.
8 MR. GANNON: In that instance, because he
9 was acting specifically at the direction of superiors --
10 JUSTICE BREYER: They didn't say what words
11 to write.
12 MR. GANNON: They gave --
13 JUSTICE BREYER: They gave him the general
14 idea, and then he did it. He created the words, to use
15 your phrase; when you say creating the words, he's a
16 great writer.
17 MR. GANNON: It -- we do, on page 22,
18 acknowledge that somebody needs to be sufficiently
19 involved in the creation or dissemination of the
20 statement in order to be -- in order to be deemed its
21 maker or its author.
22 JUSTICE BREYER: Ah, now we have
23 "sufficiently involved." Once we're into sufficiently
24 involved, we're back into what is sufficient to make the
25 person the principal rather than the aider and the

1 abettor, and apparently creating or writing the
2 statement is not clear whether it is or is not
3 sufficient. So we're back into the problem.
4 MR. GANNON: In this instance there's no
5 doubt that the manager of the funds was not a mere
6 advisor. They bodily --
7 JUSTICE BREYER: I'm interested in your
8 test. I'm interested in your test, not the --
9 MR. GANNON: Well, the -- the test does
10 acknowledge that -- that if there is not sufficient
11 control over the content of the -- the message and the
12 dissemination of it that somebody may be more in an
13 advisory capacity. That might be the instance with lots
14 of outside law firms when they're acting at the specific
15 direction of counsel. That's not the situation of --
16 JUSTICE GINSBURG: In that connection, just
17 again, would you answer the -- the statement that Mr.
18 Perry made that the government had, in fact conceded
19 that this theory would spread, not only to -- to the
20 investment advisor so closely linked to funds but to
21 every lawyer, every accountant, every bank.
22 MR. GANNON: Well --
23 JUSTICE GINSBURG: You said you said that on
24 page something here.
25 MR. GANNON: We said that -- he was

1 referring to the statement on page 22 of the
2 government's brief, referring to the need -- for the --
3 for the author to be sufficiently involved in creating
4 or disseminating the statement. And I think it's very
5 important to recognize that scienter is an important
6 limiting -- limiting principle for the 10b-5 cause of
7 action.
8 JUSTICE SCALIA: Well, that will always be
9 charged. It's the simplest thing in the world to charge
10 scienter.
11 MR. GANNON: It would be --
12 JUSTICE SCALIA: And you've bought yourself
13 a big lawsuit.
14 MR. GANNON: It's not simple, Justice
15 Scalia, in light of the PSLRA, there requires it to be
16 alleged with articularly; there need to be facts
17 sufficient to give rise to a strong inference that the
18 defendant acted with scienter, and -- and there are
19 penalties beyond rule 11 that are -- that are imposed if
20 the -- if the plaintiff is -- is mistaken in doing so.
21 JUSTICE KENNEDY: You think attribution to
22 the actor is not necessary for the actor's liability for
23 his statement?
24 MR. GANNON: That's correct. We think that
25 -- and any other rule would immunize falsely attributed

1 or anonymous statements. And if the whole purpose of a
2 fraud was to convince somebody that this statement came
3 from Warren Buffet, so that I could turn a quick buck
4 before the market realized that it wasn't actually from
5 Warren Buffett, the fact that it was not attributed to
6 me would not change the fact that I had made the
7 statement and that the market had relied upon it.
8 The truth is that reasonable investors, and
9 that's the test for purposes of reliance, can rely on
10 anonymous and falsely attributed statements. In this
11 instance there's no reason to doubt that an investor
12 would have relied on statements in the prospectus about
13 the fund's purported antimarket timing and excessive
14 trading policies. And so we think that there -- in
15 general there doesn't need to be an attribution
16 requirement, but in this instance it's quite clear that
17 a reasonable investor could have relied on these --
18 prospectus.
19 JUSTICE SOTOMAYOR: Counsel, could you have
20 -- you just admitted if there -- if the company was
21 duped, you couldn't have aiding and abetting liability.
22 Could you impose a 20(b) or 20(b) control person
23 liability?
24 MR. GANNON: The control person liability
25 also needs to have a primary violator under the terms of

1 20(a).

2 JUSTICE KAGAN: Mr. Gannon, suppose that we

3 think that the test that the SEC is using and you recite

4 on page 13 is really pretty broad and that it might

5 apply to a range of factual situations that are not

6 before us. Is there a way to confine our holding just

7 to the mutual fund situation, and if there is, how would

8 you do that?

9 MR. GANNON: Well, I think the easiest way

10 would be to analogize it to the cases involving

11 corporate employees. As Petitioners acknowledge, there

12 are cases where a corporate employee drafts a statement

13 that's issued in the company's name. In this instance

14 the investment advisor is management for the company,

15 and the fact that they happen to be management by virtue

16 of contract rather than just the internal arrangements

17 of the corporation shouldn't change that arrangement.

18 It -- it's also the case that if the Court

19 were -- were looking for a way to narrow its holding, it

20 could do so by talking about the elements of the 10b-5

21 cause of action, which -- which would apply only to

22 private suits and -- and not to enforcement actions

23 brought by the Commission or by the Department of

24 Justice.

25 JUSTICE KENNEDY: Your point is that --

1 JUSTICE SCALIA: Well, it should change
2 that, because Congress has made it very clear that
3 investment advisors are not to be treated like
4 employees. You -- you want us to undo a clear
5 distinction that Congress has made.
6 MR. GANNON: Well, the -- that statute says
7 that somebody -- any person makes the false statement
8 directly or indirectly, and in this instance the SEC
9 sought -- got a cease and desist order that's reprinted
10 at -- on page 407 in the joint appendix that was
11 predicated on a provision of the Investment Company Act,
12 section 34b, that -- that tracks 10b and makes it
13 unlawful for any person to make any untrue statement of
14 material facts; and the Commission believes that they
15 were chargeable with that violation.
16 CHIEF JUSTICE ROBERTS: Thank you, Mr.
17 Gannon.
18 Mr. Perry, you have 4 minutes remaining.
19 REBUTTAL ARGUMENT OF MARK A. PERRY
20 ON BEHALF OF THE PETITIONERS
21 MR. PERRY: Justice Kennedy, in response to
22 your attribution question, Mr. Gannon said something
23 about falsely attributed or anonymous statements. We
24 have neither here. We have a correctly attributed,
25 nonanonymous prospectus that under Federal law says on

1 the first page of the document who it's attributed to,
2 the Janus Funds, who have their own trustees.
3 Justice Ginsburg, who is in the driver's
4 seat? Page 258a of the joint appendix, quote: "The
5 trustees are responsible for major decisions relating to
6 each Fund's objectives, policies and techniques. The
7 trustees also supervise the operations of the Fund by
8 their officers and review the investment decisions of
9 the officers." There is no misdirection here about who
10 is in charge. The trustees are in charge.
11 JUSTICE GINSBURG: But the -- the whole
12 arrangement was made possible by JCM. JCM wants
13 long-term investors, so it puts this provision in the
14 prospectus. The board of directors have no reason to
15 believe that JCM is dissembling and it's going to go out
16 and seek hedge funds.
17 MR. PERRY: If it is a dupe case, Justice
18 Ginsburg and Justice Sotomayor, it's dealt with by
19 20(b), which justice -- Mr. Gannon did not answer. You
20 notice 20(b) does not require a primary violation. It
21 allows the Commission to proceed directly against any
22 person who acts indirectly where it can't act directly.
23 So 20(b) answers this problem. The Commission also --
24 the 34b of the Investment Company Act is broader.
25 There's also section 206 and 215 of the Investment

1 Advisors Act which regulate the conduct of investment
2 advisors. Congress has dealt in a very reticulated way,
3 and all of the questions today I would submit show the
4 absence of bright lines being proposed by my friends on
5 this side of the table. They can't articulate the
6 difference between primary and secondary, between
7 principal and agent, between aiders and abettors and
8 anything else.
9 This is an area that needs bright lines, it
10 needs to be resolved on motions to dismiss. Scienter
11 can't be resolved on a motion to dismiss. And the
12 Congress, in the Dodd-Frank act, which the plaintiffs
13 said in their opposition in this Court to this
14 certiorari petition, was going to solve the problem by
15 enacting a statute -- turns out Congress didn't enact
16 that statute.
17 Instead, Congress referred this issue to the
18 General Accounting Office, to the Controller General,
19 and said take a year, take all the resources of the
20 Federal Government, study the problem of the distinction
21 between companies that issue securities on the one hand,
22 -- the funds here -- and those who provide services on
23 the other hand -- the advisor here. And tell us, come
24 back to the Congress and tell us whether we need to
25 solve the problem. If the government --

1 JUSTICE ALITO: Well, just to sum up, if
2 there are -- if investors in a mutual fund are duped by
3 a false statement that is made in fact, is written by --
4 by the management company and issued by the fund without
5 knowledge of its falsity, is there anyplace they can
6 get -- look to for relief?
7 MR. PERRY: The investors in the mutual
8 fund, Justice Alito --
9 JUSTICE ALITO: In the mutual fund, yes.
10 MR. PERRY: -- got $100 million through the
11 SEC action and resolved all the civil litigation.
12 They're a separate class of investors, whole different
13 set of securities laws problems, because they were the
14 recipients of the prospectus that offered these
15 securities and that contained the false statements.
16 These plaintiffs' foundation problem, they didn't
17 purchase or sell the securities that were offered by the
18 prospectus they complain about. They can't find any
19 false statements --
20 JUSTICE KAGAN: Mr. Perry, on the
21 allegations of this complaint, these plaintiffs were
22 harmed by the misrepresentations, the alleged
23 misrepresentations from JCM to the fund. So if the Fund
24 was duped, would these shareholders, JCM's shareholders,
25 have any relief?

1 MR. PERRY: These shareholders -- JCG's
2 shareholders have no relief. And Justice Kagan, I would
3 point out in the 70 years since the Investment Company
4 Act was enacted and the modern mutual fund industry was
5 built, I'm not aware of any case -- and they certainly
6 haven't cited one -- in which the investors in the
7 parent company have ever recovered a dime in an SEC
8 action, a private action or otherwise, for statements in
9 the fund's prospectuses.
10 There is a -- there is a line between
11 corporate entities, and the liability runs up different
12 channels. This is a totally novel, unprecedented theory
13 that they're presenting.
14 JUSTICE GINSBURG: What was the theory of --
15 of the fund shareholders? You said the fund
16 shareholders recovered during the settlement.
17 MR. PERRY: Right.
18 JUSTICE GINSBURG: What -- what was that
19 act?
20 MR. PERRY: Their theory was that there was
21 an omission, that the advisor owned a duty to the Fund.
22 The statements were correctly made, Justice Ginsburg.
23 There was no market timing. When the advisor later
24 allowed certain traders in, it owed a duty to correct
25 the statements to the Fund. That was the liability

1 theory of the investors.

2 These plaintiffs can't pursue that liability

3 theory because the duty doesn't run the other way, it

4 doesn't run from JCM to JCG's investors, that's the law

5 in this case. Therefore, they can't bring an omissions

6 case, they have to bring an affirmative misstatements

7 case for statements that were not directed to this group

8 of investors.

9 CHIEF JUSTICE ROBERTS: Thank you,

10 Mr. Perry. The case is submitted.

11 (Whereupon, at 11:02 a.m., the case in the

12 above-entitled matter was submitted.)

13

14

15

16

17

18

19

20

21

22

23

24

25

A

abets 48:12
abetting 38:15 38:18 41:7,15 42:11,22 43:5 47:1,25 49:7 50:7,18,20 51:3 56:21
abettor 40:9,22 42:20 43:14 54:1
abettors 3:24 22:15 38:9,15 60:7
ability 32:2
able 8:22 38:17
above-entitled 1:11 63:12
absence 60:4
absolutely 13:14 23:18 25:5 28:10 33:21 35:12
accept 5:23 31:7
accepted 10:5 32:6
accountant 27:24 54:21
Accounting 60:18
accurate 28:7 29:1,13
acknowledge 53:18 54:10 57:11
acknowledged 33:9
acknowledging 25:12
acquiescence 41:25
act 23:4,5 38:7 58:11 59:22,24 60:1,12 62:4,19
acted 26:5 55:18
acting 53:9 54:14
action 3:23,23 9:13 14:9 19:11 28:4 33:9 34:4 36:23 37:4 38:19 40:20 41:20 47:8,15 48:25 50:25 55:7 57:21 61:11 62:8,8
actions 3:12,19 3:25 47:4,16 57:22
active 13:23
activities 4:6
activity 7:20 36:1 36:2 41:24
actor 8:13 9:9 55:22
actor's 55:22
acts 24:6 59:22
actual 4:5 49:4
address 31:4 34:16
adequately 5:22 43:3
adjudicator 7:10
admission 5:4
admit 27:22
admitted 56:20
adopt 16:3
adopted 12:8 13:15 37:17
advanced 10:4
advised 44:2
advisor 7:22 10:16,18 11:5 12:4 13:6 15:18 15:25 18:6 19:14,16 23:2 24:8,13 37:3 54:6,20 57:14 60:23 62:21,23
advisors 18:13 23:5 46:11 48:15 58:3 60:1 60:2
advisory 54:13
advisor's 45:21
affair 20:25
affairs 15:6 20:18
affirmative 63:6
Affirming 3:11
agency 25:2,3
agent 20:2,15,19 21:25 24:20,25 25:11,12,15,24 25:24 60:7
agents 35:6
agree 19:7 28:15
Ah 53:22
aider 40:9,22 42:20 43:14 53:25
aiders 3:24 22:14 38:9,14 60:7
aiding 38:15,17 41:7,14 42:10 42:22 43:5 46:25 47:25 49:7 50:7,18,19 51:3 56:21
aids 48:12
AL 1:3
Alito 37:14 38:4 38:14 42:23 43:5,9 51:1,6 61:1,8,9
ALJ 7:11
allegation 15:5 15:22,25 26:8,9
allegations 29:7 30:7,8 61:21
allege 5:22 11:13
alleged 4:2 7:7 8:3,4 11:16 38:4 46:1 55:16 61:22
alleging 4:8 14:18
alleviate 46:1
allow 44:3
allowed 7:20 10:16 18:19 23:8 44:17 62:24
allows 51:16 59:21
alter 46:6
alternate 13:21
amicus 1:21 2:11 48:5
analogize 57:10
analyst 4:20 5:1 5:3,6,11,13,16 6:6
analysts 4:15,16 4:17,24
announced 7:17 8:4
anonymous 56:1 56:10 58:23
answer 7:14 10:14 21:16,17 24:1,5 32:8 36:11 54:17 59:19
answered 17:6 28:16
answers 22:22 59:23
antimarket 56:13
anyplace 61:5
anyway 8:23
apparently 54:1
appeal 10:10
appeals 27:5 28:17 35:22
appear 4:10
appearance 32:24
APPEARANC... 1:14
appears 14:6
appellants 4:5 5:20,25 6:4
appendix 21:21 25:22 58:10 59:4
apply 27:23 49:11 51:18 57:5,21
appropriate 29:20 32:25 43:23
area 60:9
arguing 14:13
argument 1:12 2:2,5,8,12 3:4,7 9:2 28:21 37:9 46:3 48:4 58:19
arrangement 57:17 59:12
arrangements 57:16
articularly 55:16
articulate 60:5
asked 17:23
asking 20:13
aspects 29:24
assault 3:15
assert 43:2
asserted 11:11
assets 35:15
assist 41:3
assistance 40:24 41:1 50:21,22
Assistant 1:19
assisting 42:24 43:6
associate 52:19
Assuming 24:3
assumption 45:6

attached 25:22
attract 45:20
attracting 33:3 36:19
attributable 8:5 13:19
attribute 43:22
attributed 27:10 43:19 45:1,7 51:16 52:16 55:25 56:5,10 58:23,24 59:1
attribution 27:9 55:21 56:15 58:22
auditor 14:4
auditors 48:14
author 53:21 55:3
authored 11:17
authority 26:5
authorize 3:11
authorized 3:22 20:2,15,19 24:24
aware 37:2 62:5
a.m 1:13 3:2 63:11

B

b 5:4 39:7
back 17:24 42:6 50:5 53:24 54:3 60:24
bank 3:16 27:6 42:4 54:21
banks 27:15
barrels 19:19
basic 5:16
basically 32:15
basis 43:19
beg 32:21
behalf 1:15,17 1:21 2:4,7,10 2:14 3:8 9:14 24:25 28:22 35:1,9,11,24 37:4 48:5 58:20
behave 53:6
believe 17:1 39:11 43:2,23 59:15
believes 58:14
better 21:19 39:18
beyond 26:15,22 51:10 55:19
big 47:1,14 55:13
bit 16:20
board 7:4 12:9 14:13,20 17:8,9 17:14 18:11,23 19:21 20:5,7 24:18 32:6 36:17 39:2,2 41:24,25 59:14
bodily 54:6
boiler 52:11,20
bought 55:12
breach 10:19,20 36:5
Breyer 19:17 20:4,9,12,13 20:17,23 21:3 21:11 22:3,7,10 38:23 39:10,12 40:2,7,21,25 41:12 52:18 53:2,10,13,22 54:7
Breyer's 24:1,16 42:7
brief 14:12,18 25:23 27:23 29:15,16,19 30:5 45:13 48:10,16 55:2
briefs 4:3,3 14:6 24:12
bright 60:4,9
bring 9:11 10:7 10:12 50:7,19 63:5,6
brings 47:14
broad 57:4
broader 59:24
broadly 19:6
brought 4:25 5:4 9:13,16 15:2 22:14 45:22 46:9,12 57:23
buck 56:3
Buffet 56:3
Buffett 56:5
built 62:5
bump 47:14
business 20:17 23:12,20
buy 21:24
buys 19:22

C

C 1:17 2:1,6 3:1 28:21
cake 14:19
called 8:6 29:18
calls 52:13
capacities 16:18
capacity 35:8 54:13
Capital 1:3 3:5 30:12 31:16 33:15,21 45:10 45:17
careful 13:8
carry 34:25
carrying 25:19
case 3:4 5:2,7 8:17,18,19,21 9:12,20,22,23 9:23,23,24 10:8 10:12,13 14:7 15:1,22 18:8 19:5,15 24:11 26:17,18 27:3,5 27:8 29:20 30:5 30:11 32:15 37:8,9,14,19 41:15 43:18 45:6 46:9 49:3 49:22 50:6,7 52:10 57:18 59:17 62:5 63:5 63:6,7,10,11
cases 3:17 4:14 4:20,25 5:1,3,3 6:6 24:12 35:21 39:9 57:10,12
categories 4:21
causation 38:12
cause 14:9 33:9 34:4 37:4 40:20 48:25 50:25 55:6 57:21
cease 58:9
central 3:16 27:6 42:4
cert 10:11 28:1
certain 7:19 15:25 21:23 25:14 62:24
certainly 35:20 62:5
certiorari 60:14
cetera 29:25 46:23 48:15
chairman 18:10
challenge 4:9 9:19,20
challenged 19:5
change 17:13 56:6 57:17 58:1
changes 17:18
changing 37:18
channels 62:12
charge 55:9 59:10,10
chargeable 13:24 58:15
charged 55:9
chief 3:3,9 16:13 16:13 18:2 19:8 23:14 28:19,23 30:1 31:20,23 32:1,7,11,20 34:18 35:17 36:1,11,21 46:24 47:3,6,11 47:18,21 48:1,7 49:24 50:3,5,11 58:16 63:9
choose 45:5
chose 9:11 15:23 23:6
Circuit 10:11 26:22 27:16 28:2 29:14,22
Circuit's 26:24 27:20,21
cited 16:1 24:11 39:8 62:6
civil 61:11
claim 4:3 5:1,2,7 6:1 14:24 15:2 19:15 38:22 41:22 42:1,15 42:17 50:20
clarify 24:15
class 3:12,19,25 17:18,19 61:12
classic 52:10
clear 27:11 28:1 33:21,25 39:4 50:23 51:1 54:2 56:16 58:2,4
client 12:7,8 13:7 13:7 20:24 23:10,17
clients 12:24,25 13:9
client's 12:7
climbers 36:20

close 28:4,5
closely 54:20
cold 37:9
come 37:19 60:23
comes 27:22 30:5 46:3
Commandments 43:18
comment 40:11
commission 5:10 50:19 51:13 57:23 58:14 59:21,23
commit 46:16,20
committed 48:20
common 23:12 36:6,25
companies 12:12 13:6 14:24 15:15 23:9 25:9 46:19 60:21
company 4:14,19 4:23,23 5:5,11 5:14,15 14:25 15:6,11,23 19:18,25 20:3,8 20:10,18,19,20 21:4,5,6 23:4 24:19,20,21,25 25:3,9 35:22,24 37:3,6,12,18 37:25 38:24 39:1,14,25 40:1 40:4 56:20 57:14 58:11 59:24 61:4 62:3 62:7
company's 3:14 4:17 9:6 28:6 57:13
complain 61:18
complainants 9:22
complaint 4:2 5:21 7:6 8:25 9:10 11:13,15 11:16 16:1 33:14,21 43:2,3 61:21
complaint's 29:7 30:6,8
complement 47:8
complying 26:1
compose 31:7
composed 30:21
compulsorily 23:7
conceded 36:22 54:18
conceding 50:6
concluded 49:24
concluding 28:2
conduct 8:3 19:16 24:9 60:1
conducted 36:4
conduit 4:7,20 22:17,17 40:16 51:20,21
confine 57:6
Congress 3:19 3:20,22 6:14 14:8,23 22:25 23:5 24:8 25:10 58:2,5 60:2,12 60:15,17,24
connection 54:16
consent 41:25
consistent 41:14
construct 51:15
construction 47:18 51:17
consultants 12:12 17:25
contained 61:15
content 43:16 44:15 54:11
context 13:5 31:9 43:10
contract 10:20 17:21 25:20 39:23 45:18 57:16
contractual 19:13
contractually 45:25
contrast 26:3
contributes 38:8
control 6:20,23 13:23 14:5,8,9 14:16,25 15:6,8 15:14 28:13 34:8 43:15,17 43:22,25 44:5 44:10,10,12,13 44:15 46:5,22 48:13 54:11 56:22,24
controlled 33:4 46:14 47:24 51:9
Controller 60:18
controlling 27:17
convince 56:2
corporate 14:15 14:15,16 16:4 21:8 57:11,12 62:11
corporation 6:10 23:11 37:16 57:17
correct 5:5 8:7 8:10 11:8 14:12 19:5,12 23:21 40:6 41:16 55:24 62:24
correctly 58:24 62:22
counsel 4:1 12:3 12:5,6,11,11 13:6 17:11,12 17:24 18:3,5,16 18:23,24 19:3 28:19 31:24 32:9 36:4,9 37:17 38:2 48:9 54:15 56:19
course 19:13 20:18 27:8
court 1:1,12 3:10 3:17 7:11 9:4,6 10:5,10 14:7 15:3 23:6 26:18 27:4,5,5 28:15 28:17,24 29:12 30:5 32:19 42:4 43:17 47:7 48:8 48:25 50:23 57:18 60:13
courts 35:22
Court's 3:15,25 7:1 28:8
create 31:6,11 35:14 46:16 49:10
created 30:22 35:12 53:14
creating 53:15 54:1 55:3
creation 53:19
creature 46:7
criminal 22:15 22:20 40:12 47:15
crucial 34:5
culpability 32:4
curiae 1:21 2:11 48:5
CURTIS 1:19 2:9 48:4
customer 52:14

D

D 3:1
daily 20:18
DAVID 1:17 2:6 28:21
day 52:19
day-to-day 13:22 13:23 31:17
deal 6:15 7:7 46:8
dealing 30:17
deals 36:18
dealt 14:8,23 22:22 59:18 60:2
deceive 4:7 15:23
December 1:9
deceptive 32:12
deciding 29:20
decision 7:19 8:8 24:8
decisions 3:15 3:21 59:5,8
deemed 53:20
defend 15:5,9
defendant 9:20 55:18
defends 27:21
defense 6:12
deference 31:6
Define 48:11
definition 31:5 48:13
Delaware 23:10
deny 43:24
department 1:20 12:22 57:23
depend 38:19
depends 31:9 38:9 50:9
Derivative 1:6 3:5
described 29:7
description 28:7 29:1,13
designed 33:16 33:18

desist 58:9
despite 35:19
determination 7:23
determine 32:2 38:2
determined 18:9
deviated 7:16
deviation 10:19
difference 5:10 14:20 37:8 40:25 43:9 60:6
different 5:22 10:1 14:3,15,15 25:3 32:14 37:7 37:23 39:17 42:3 44:11 49:7 61:12 62:11
differentiate 42:11
differs 25:9
difficult 21:13 36:12 38:22
dime 62:7
direct 32:19
directed 63:7
direction 53:9 54:15
directly 6:7,18 49:12 51:19 58:8 59:21,22
directors 7:4 14:14 24:18 37:18 59:14
disagree 11:12
disclose 10:18
disclosed 18:19 21:19
disclosure 17:20
disconnect 9:19
discovered 19:19
discretion 8:1
discretionary 7:24
discuss 8:17,18 8:19
discussing 41:11
dismiss 11:21 30:6 60:10,11
disputed 35:22
dissembling 59:15
disseminated 34:22
disseminating 55:4
dissemination 53:19 54:12
distill 48:17
distilling 48:10
distinction 7:2 20:11 22:12,12 25:6 39:22 41:12,13 42:23 43:10,11 51:2 58:5 60:20
distinguish 37:21 40:9 42:10 43:13
distinguishable 37:23
distribute 4:23
distributed 5:12
district 7:11 10:5 10:9 15:3 26:18
divulges 4:15 5:11
document 16:1 16:25 59:1
documents 18:20 21:20,20
Dodd-Frank 60:12
doing 12:20 41:1 41:24 55:20
doubt 54:5 56:11
draft 12:6 15:7,8 16:24
drafted 6:15 10:24 11:2 12:11,17 15:7 17:3 18:15,18 31:2 37:17 52:5 52:8
drafters 19:2
drafting 3:13 16:22 25:19 31:13 32:24
drafts 19:10 57:12
drawing 42:24
driver's 27:1,6 46:5 59:3
dummy 6:19 22:23
dupe 42:8 46:19 59:17
duped 36:14 41:23,23 44:9 44:11 50:1 56:21 61:2,24
duping 36:25
duty 5:6,8 10:3,8 10:20 36:13 62:21,24 63:3
D.C 1:8,15,17,20

E

E 1:19 2:1,9 3:1,1 48:4
earlier 17:19
ears 5:17
earth 31:10
easiest 57:9
eat 14:19
economically 23:21
efforts 47:9
ego 46:6
either 14:20 41:25
elected 23:5
element 42:18 49:20
elements 24:22 38:10,21 40:19 41:20 42:14,17 48:20,23,24 50:25 57:20
employee 35:8 57:12
employees 16:7 16:11,15,16 31:18 37:16 57:11 58:4
Employment 12:14
empty 51:8
enact 60:15
enacted 24:6 62:4
enacting 60:15
enforced 19:14
enforcement 40:23 47:9 57:22
engage 7:20
engages 31:17
entirely 32:13
entities 4:11 23:20 35:18 62:11
entitled 31:6
entity 6:8 8:6 14:10 22:18 23:3,8 40:14 42:8 45:24 51:7
erred 28:2,17
escape 15:15
ESQ 1:15,17,19 2:3,6,9,13
essentially 45:24
establish 34:6 38:10
et 1:3 29:24 46:23 48:15
eventually 16:21
everybody 52:22
everyday 15:6
exactly 8:24 15:13 17:6 37:20 38:5
example 25:10 38:25 48:22
exception 27:6
excess 26:5
excessive 56:13
exclude 48:14
excuse 4:20 21:18 45:10
executive 16:13
executives 38:25
exists 27:7
expansion 27:7
explain 21:11 30:8 51:4
explains 31:16
expressly 49:11
extensive 24:6
external 16:24
extremely 38:22

F

fact 7:1,13 12:18 17:19 18:25 20:1 21:20 24:10 33:13 35:21 45:24 54:18 56:5,6 57:15 61:3
facts 7:11 11:14 29:11 41:18,19 47:19 55:16 58:14
factual 57:5
failed 5:5
failure 10:18 42:13
fair 9:10
fall 4:20
falling 27:14
false 4:4 5:13 6:3

7:5 8:20 19:19 22:16 24:18 33:7 39:1,2,25 44:17 49:16,17 49:18,22 51:15 58:7 61:3,15,19
falsehood 5:11
falsely 30:10 32:18,22 33:6 55:25 56:10 58:23
falsity 4:16,17 22:18 32:1 44:7 50:15 61:5
far 26:15
Federal 3:23 21:9 26:1 58:25 60:20
fiduciaries 36:14
fiduciary 10:20 36:6,13
file 35:1,7,9
filed 34:21 35:3
filing 35:8
financial 16:13
find 6:2 61:18
fine 34:13
finish 10:14
firm 14:3 18:5,7 18:12,14 20:24 52:19
firms 18:13 54:14
first 1:6 3:4,5,22 4:22 22:22 40:15 52:19 59:1
follow 40:12
following 22:15
fooling 40:15
forget 36:7
form 21:8
formally 43:11
forms 6:25 14:16
forth 17:24 25:23
found 7:12 53:3,4
foundation 61:16
four 53:4
Fourth 10:10 26:22,24 27:15 27:19,21 28:2 29:14,21
fraud 3:12 28:4 38:8 46:1,16,20 47:5 56:2
fraudulently 32:4
Frederick 1:17 2:6 28:20,21,23 28:25 29:2,6,16 30:3,18,21,25 31:4,15,22,25 32:10,17 33:2 33:10,13 34:11 34:15,21 35:4 35:10,12,20 36:11 37:1,22 38:6,16 39:8,11 39:21 40:6,18 40:22 41:2,5,8 41:16 42:2,13 43:1,8,15 44:6 44:14 45:2,9,16 46:2,15 47:2,6 47:17,22 48:2 49:23
frequently 10:16
friends 60:4
frontal 3:15
function 23:2,8 25:20 35:23 45:23,25
functioning 35:7
functions 21:24 21:24 22:1 31:17 39:24
fund 9:13,24 10:3 10:23 11:3,3 12:20 13:23,24 16:6,8,12 18:3 18:5,23 20:25 21:2 22:13 23:22,23 25:13 26:13 27:20 30:10 33:3,4,8 33:8,22 34:3,4 35:8,13 36:6,23 37:2,15 39:17 43:24,25 45:23 57:7 59:7 61:2 61:4,8,9,23,23 62:4,15,15,21 62:25
fundamental 9:19
funds 4:11 6:8 7:19,20,25 10:15 12:9 13:4 13:7,8 14:15 15:11 16:3 17:10 18:7,18 21:18 23:3,11 31:18 32:5 33:15,15 34:23 34:24 35:13 36:18 37:11 44:20,23 45:18 46:10 49:22,23 50:14 54:5,20 59:2,16 60:22
fund's 11:1 12:17 16:10 24:9,14 25:25 56:13 59:6 62:9
further 11:23 26:23

G

G 3:1
Gannon 1:19 2:9 48:3,4,7,19,24 49:3,9,15,20 50:4,9,13 51:5 51:11 52:3,6,9 52:25 53:8,12 53:17 54:4,9,22 54:25 55:11,14 55:24 56:24 57:2,9 58:6,17 58:22 59:19
general 1:20 29:18,19 48:14 53:13 56:15 60:18,18
Ginsburg 7:16 7:23 8:2,8,12 10:14 12:16 13:1 18:14,21 19:1 26:17,21 27:12,19 45:12 46:4 54:16,23 59:3,11,18 62:14,18,22
give 39:1 47:13 48:22 55:17
given 8:20
gives 19:21 24:17
go 7:1 26:22 30:7 30:23 42:6 51:10 53:5 59:15
goes 24:19 26:22
going 5:12 6:1 31:21 32:9 33:11 35:6 36:10,19 37:9 38:5 44:22 47:13 50:2 59:15 60:14
good 27:2
govern 22:6,7
governance 23:13
governed 15:12 21:18
government 3:23 27:22 43:18 54:18 60:20,25
government's 27:23 55:2
granted 28:1,13
great 53:16
grounded 25:8
group 1:3 3:5 21:6 63:7
guess 19:1 32:21
guy 53:5

H

hand 60:21,23
happen 37:11 57:15
happened 26:16 32:23
happens 16:22 17:7 19:17 20:14
harmed 61:22
hats 12:24
hear 3:3 37:9
heaven 31:10
hedge 7:19 36:18 44:23 59:16
heightened 38:20
held 3:17 9:5,7 10:10 27:6 28:3 41:6,6 46:21
help 29:21
helped 15:7,8
helpers 22:8,10
helping 28:4
helps 27:20 38:7
high 40:13
hire 21:25
hired 15:7
hit 47:14
hold 24:8
holding 28:8 29:11,14 57:6 57:19
holds 17:9 24:13

25:3,4
Honor 4:19 5:15 6:6 7:1 8:7,10 8:15 10:1,23 11:8,22 12:23 14:1,5,22 15:10 15:17,24 16:8 16:17 17:17 18:7 19:5,12 21:1,17 25:5,18 26:7,20 27:4
Honors 3:17
house 22:1
hundred 14:6
hypothetical 9:23,24 24:16 24:17

I

idea 53:14
immunize 55:25
implement 36:17
implemented 30:10
implementing 32:3
important 34:19 55:5,5
impose 56:22
imposed 55:19
impression 26:23
impunity 46:20
inadequate 19:9
incentive 30:14
included 44:3
includes 50:25
including 11:10 47:15
incorporated 36:7
independence 14:20 18:10
independent 14:13 17:11 18:8,22 31:24 36:4,9 38:1
indicate 44:25
indirectly 6:17 49:15 51:19,25 52:1,5 58:8 59:22
industry 24:7 62:4
inference 55:17
information 4:24 5:18 6:13 24:18 37:24,25 38:3 51:15
injured 9:24
innocent 24:18
inquiries 34:23
inside 12:11
instance 37:2,7 40:15 47:9 53:8 54:4,13 56:11 56:16 57:13 58:8
intended 10:15
intending 45:19
intentionally 6:13
interconnected 35:19
interested 18:11 54:7,8
intermediary 4:14
internal 57:16
internalization 23:7
interpretation 31:5 51:24
interrogatories 17:2
interrogatory 19:6
interrupt 34:19
intervening 6:8
invest 33:23
investigation 38:1
investing 7:18 45:21
investment 12:4 12:14 13:5 15:5 15:10,18 21:2 23:4,4 24:13 25:19,24 33:4 37:3 45:21 46:11 47:10 48:14,15 54:20 57:14 58:3,11 59:8,24,25 60:1 62:3
investments 33:16,24
investor 56:11 56:17
investors 9:12 9:13,16,17 33:3 33:19,22 34:22 35:14 36:6,19 44:19 45:20 56:8 59:13 61:2 61:7,12 62:6 63:1,4,8
invitation 29:19
invoke 22:24
invoked 6:16,23
involve 5:4 37:15
involved 17:25 18:1 37:15 53:19,23,24 55:3
involvement 24:6
involving 57:10
in-house 12:3,5 12:19 13:2,3 16:24 17:3 18:15,23 19:3
issue 5:23 19:22 20:5 25:17 27:8 27:11 28:14 32:23 60:17,21
issued 20:3,6 34:3,15,20,20 39:25 40:4 44:17 57:13 61:4
issuer 6:7 13:15 13:16
issuers 25:10
issuer's 13:16
issues 16:21
issuing 26:2 52:1

J

JA 45:9
Janus 1:3 3:4 4:3 4:7,10 6:2,8 7:3 7:7,18 30:12 31:16,18 33:14 33:15,21,23 34:23 41:23,23 44:20 45:10,11 45:13,17,19 46:6 59:2
JCG 10:9
JCG's 62:1 63:4
JCM 8:6 9:5,25 10:2,3,9 11:7 11:25 12:19,21 13:4,19,22 16:16,21 18:16 18:17 19:3,10 25:4,11,23 26:25 27:9,10 27:17 29:7,23 30:8 32:5,15 33:1,5,6,9,17 34:1,3,5,6,21 35:7 36:3,16,17 41:24 43:3 44:18 45:1,7,14 46:4,5,6,7 49:21,22 59:12 59:12,15 61:23 63:4
JCM's 8:19,20 11:9,17 12:18 12:21 13:11 17:2 18:16 41:17 61:24
job 19:9
Joe 19:22,24
joint 16:18,18 21:21 23:13,13 58:10 59:4
Judge 7:11
judgment 3:11
justice 1:20 3:3,9 4:1,9,13 5:9,19 6:11,14,20 7:3 7:9,16,23 8:2,8 8:12,16,24 9:1 9:8,21 10:13,21 10:25 11:4,7,9 11:13,15,20,25 12:2,3,16 13:1 13:11,14,18,21 14:2,11 15:4,13 15:21 16:6,10 16:15,19 17:1,7 17:13,16 18:2 18:14,21 19:1,8 19:17 20:4,9,12 20:13,17,23 21:3,11 22:3,7 22:10 23:14,15 23:19,25 24:1,3 24:15,16,23 25:1,7,11,15 25:16,21 26:4,8 26:10,15,17,21 27:12,19,25 28:10,12,19,24 28:25 29:2,4,10 29:17 30:1,15 30:19,23 31:1,4 31:8,20,23 32:1 32:7,11,20 33:6

33:11,25 34:11 34:13,18,25 35:5,11,13,17 36:1,11,21,25 37:1,14 38:4,14 38:23 39:10,12 40:2,7,21,25 41:5,10,12,22 42:6,6,23 43:5 43:9,24 44:8,14 44:24 45:4,9,10 45:12 46:2,4,17 46:24 47:3,6,11 47:18,21 48:1,7 48:9,22 49:2,6 49:13,16,24 50:3,5,11 51:1 51:6,23 52:4,7 52:10,18 53:2 53:10,13,22 54:7,16,23 55:8 55:12,14,21 56:19 57:2,24 57:25 58:1,16 58:21 59:3,11 59:17,18,19 61:1,8,9,20 62:2,14,18,22 63:9

justify 45:8

K

Kagan 10:21,25 11:4,7,9,13,15 11:20,25 12:2,3 16:6,10,15,19 17:1,7,13,16 46:2,17 57:2 61:20 62:2

Kennedy 8:16,24 9:1,21 13:11,14 13:18,21 14:2 24:15,23 25:1,7 26:4,8,10,15 44:24 45:4,10 55:21 57:25 58:21

kept 22:1

key 49:3

kind 43:16 46:13 47:1

kinds 44:21

knew 34:23,23 38:5 41:24

know 7:4 19:14 21:14 25:14 26:14 36:2 39:2 42:9 47:11 50:15 53:1

knowing 5:12 7:6 19:18 49:17,18

knowingly 38:7 50:21,22

knowledge 8:20 44:7 61:5

knows 15:1 53:3

L

LaFave 22:20

laid 25:20

land 43:20

law 10:19 14:3 18:5,7,12,13 18:14 21:9,9 22:15,20 23:10 25:8 36:7,13 39:5 40:12 52:19 54:14 58:25 63:4

laws 26:1 61:13

lawsuit 4:12 10:4 23:17 36:25 55:13

lawyer 27:24 49:14,18,21 54:21

lawyers 11:2,3,4 11:5,7,9,14,17 11:23 12:2,2,17 12:18,19,19,23 12:25 13:2,3,8 15:8 16:21,23 17:3,3,24 18:15 18:22 19:9 27:14 37:22 38:7,10,17,19 44:2 48:14

leaving 3:24

left 3:19

legal 4:11 6:8,12 12:22

legislation 46:8

letter 34:25 35:2

let's 13:11

level 53:2

liability 6:25 7:2 14:17 20:21,24 20:25 23:11 41:7,15 42:22 50:19 55:22 56:21,23,24 62:11,25 63:2

liable 8:23 9:5 21:5,7 22:14 24:9,13,19,20 28:3 32:15 39:6 39:10,13 46:21 52:24 53:1

lie 30:13,14,14 37:6

lies 35:24

light 55:15

limited 23:10

limiting 55:6,6

line 7:13 62:10

lines 60:4,9

linked 54:20

litigation 9:15 61:11

little 16:20

longer 27:14,15 45:18

long-term 33:16 33:19,24 36:19 44:19 59:13

look 7:10 11:23 18:25 61:6

looked 22:25 25:10

looking 57:19

lose 50:6

loses 19:22

lost 38:12

lot 22:10

lots 54:13

lower 29:12

lure 35:14

luring 44:19,22

M

mail 26:13

major 59:5

maker 49:4 53:21

making 5:13 13:25 24:25 27:9 31:10,11 41:4.42:24,25 43:6 49:7 51:2 51:3 52:5,8

malpractice 19:10

manage 22:5

managed 21:18 33:4

management 21:2 23:2,8 30:12 31:16,17 31:19 33:15,22 35:16,23 39:24 39:24 45:11,23 45:25 57:14,15 61:4

Management's 45:17

manager 15:5 27:17,20 33:5 34:24 54:5

managers 13:12 13:22 22:13 35:14,24 37:4 39:16

manages 21:4

manipulates 6:13

map 46:16 47:13

MARK 1:15 2:3 2:13 3:7 58:19

market 4:7,14,16 4:17,24 5:16,17 5:17 6:7,13 7:18 10:15 15:23 17:18,20 23:21 33:18 36:20 44:21 56:4,7 62:23

Massachusetts 23:11

material 20:1 31:21 58:14

materials 12:6 36:3

matter 1:11 3:19 40:3 63:12

mean 6:11 16:4 24:4 27:12 38:11 44:8,9 51:25

meaning 21:9

means 31:10,12

meet 24:22

meeting 17:9

Merck 37:8

mere 54:5

merge 23:2

message 43:16 43:21 44:16 54:11

met 4:21 38:10 38:21 40:19 41:19 42:14

method 45:21

million 9:14 61:10

minutes 58:18
misdirection 59:9
misleading 4:15
misrepresenta... 11:11 61:22,23
misstatements 28:6 37:12 63:6
mistaken 55:20
modern 62:4
money 19:23 35:15 36:19,20 44:20,22
monument 43:20
morning 3:4 47:20
motion 11:21 30:6 60:11
motions 60:10
motive 30:13 41:20
Mott 7:11
multiple 12:24 12:24,25 17:23 42:3 43:20
mutual 15:11 33:14,15,22 35:13 37:2,11 37:15 46:10 57:7 61:2,7,9 62:4

N

N 2:1,1 3:1
naive 21:15
name 30:24 39:3 43:11 45:11,13 45:19,20 51:7 52:2,15 57:13
narrow 57:19
narrower 27:16
nature 39:16
necessary 51:6 51:10,12 55:22
need 49:4 55:2 55:16 56:15 60:24
needs 50:24 53:18 56:25 60:9,10
neither 4:21 58:24
never 9:6 15:2 24:8,11 52:14 52:15
nonanonymous 58:25
notice 59:20
notion 46:4
novel 62:12
number 12:13 37:23
numerous 47:7

O

O 2:1 3:1
object 29:4,6
objected 28:8
objectives 59:6
obligation 39:16
obligations 36:6
obvious 21:15
obviously 43:12 53:1
occasions 47:7
offered 9:18 61:14,17
Office 60:18
officer 16:13,14
officers 13:12 16:12 59:8,9
oil 19:18,20,25 38:24 39:1,14 52:23 53:4
okay 25:21 26:21 42:16 53:4
omission 5:7,10 10:2,8 62:21
omissions 10:12 63:5
once 3:20 9:21 9:21 12:6 53:23
ones 30:13 48:25
one's 31:7
operational 21:24
operations 25:24 59:7
opinion 26:24 29:22
opposition 8:4 29:5,15,17 30:4 60:13
oral 1:11 2:2,5,8 3:7 28:21 48:4
orchestrated 4:23
order 52:12 53:20,20 58:9
ordinary 38:25
ought 39:4
outside 12:5,11 12:13 14:3 17:10,12,24 18:2,5,22,24 31:24 32:9 36:8 37:17,22 38:1 44:2 54:14
outsiders 32:2
outsource 36:2 39:24
outsourced 21:23 22:13 31:19 35:23 45:25
outsources 35:23
owed 62:24
owned 15:11 62:21
ownership 23:13

P

P 3:1
page 2:2 21:21 27:23 39:11 45:17 53:17 54:24 55:1 57:4 58:10 59:1,4
pages 24:12
paid 11:4,5,7,25 18:17
paper 19:20
papers 22:4
paragraph 19:4 32:19 33:13,17
parent 62:7
park 44:20
part 39:7 40:17 40:17 42:13 46:3
participate 29:21 40:13
participates 3:13
participating 28:5
particular 17:5 17:15 43:22
parties 4:11
parts 29:22
party 6:17 38:13
payroll 12:21 18:16
penalties 55:19
people 21:6 22:14 42:16 46:16,19 47:13 53:4
percent 26:12
percentage 35:15
period 17:19,19
periodically 18:1
permitted 6:18 17:20
Perry 1:15 2:3,13 3:6,7,9 4:9,19 5:15 6:6,14,22 7:9,22 8:7,10 8:14,24 9:3,11 10:1,21,23 11:2 11:5,8,12,19 11:22 12:1,5,16 12:23 13:3,14 13:20 14:1,5,22 15:10,17,24 16:6,8,12,17 16:23 17:5,8,15 17:17 18:4,17 18:24 19:4,12 20:2,7,11,15 20:21 21:1,8,17 22:6,9,22 23:18 23:22 24:2,5,21 24:24 25:5,8,14 25:18,22 26:6,9 26:14,20 27:4 27:19 28:10,15 47:19 54:18 58:18,19,21 59:17 61:7,10 61:20 62:1,17 62:20 63:10
person 6:21,23 14:16 15:9 18:11 22:18 41:4 42:14,19 42:19 47:24 48:13 49:25 51:7 52:7,13 53:25 56:22,24 58:7,13 59:22
personnel 7:22
persons 15:14 51:19
petition 10:12 60:14
Petitioners 1:4 1:16 2:4,14 3:8 57:11 58:20
phone 52:15
phrase 53:15
piece 19:20
place 43:7

placed 44:1
Plain 38:25
plaintiff 55:20
plaintiffs 6:16,24 8:14 9:22 10:7 22:24 60:12 61:16,21 63:2
plaintiff's 14:7 16:5
play 45:4
plead 42:3
pleaded 8:25 38:20 43:3
pleading 38:20
please 3:10 28:24 30:2 48:8
point 39:5 40:8 40:10 44:18 57:25 62:3
pointed 43:18
policies 12:14,14 12:14 16:2,4 21:22 30:9 56:14 59:6
policy 7:17,23 8:5,9 10:15,19 12:10,10 15:25 17:18 18:25 32:3,9 33:18 36:16 49:21
poor 52:18
position 7:9 14:21,22 24:11 40:13 43:12 51:12,12
possible 22:11 43:10 59:12
possibly 26:16
potential 47:15
power 46:3
predicated 58:11
premised 41:22
prepared 30:9
preparing 26:2 29:8,24
present 10:11 12:6
presented 17:8 28:16
presenting 31:12 62:13
president 16:17 19:18,24 20:9 20:19 21:4,4,5 24:17 25:2 39:6 39:6,14 40:5
presumably 14:14 46:11
pretty 47:14 57:4
primarily 3:18 28:3
primary 5:25 7:2 7:8 8:13 15:16 30:12 38:13 40:18,24 41:17 41:18 42:8,18 47:19,22,23 48:11,19 49:19 50:4,17,22,24 51:21 56:25 59:20 60:6
principal 13:12 35:1 39:22 40:9 40:13 43:13 53:7,25 60:7
principals 22:14 22:16
principle 55:6
private 3:12,19 3:24 9:15 28:3 38:18 42:20 47:8 48:25 57:22 62:8
problem 7:14 40:8,8 47:3,12 47:17 54:3 59:23 60:14,20 60:25 61:16
problems 44:21 61:13
proceed 34:8 38:17 59:21
process 16:22
product 37:6,6 37:11,13
promise 44:19
proposals 23:1
proposed 60:4
proposing 42:10
prospectus 3:14 9:6,18 11:1,10 11:18 12:1,18 12:20 15:7 17:5 17:6 18:15 19:2 24:19 25:19 26:2,12 27:11 29:9 30:9 31:15 31:21 32:13,16 32:24 33:20 34:3,12,16,20 34:20 36:10,16 37:17 44:1,4 56:12,18 58:25 59:14 61:14,18
prospectuses 4:10 12:2 16:20 24:14 29:23 33:17 50:16 62:9
protect 33:18,23
protecting 23:17
prove 8:22 14:25 26:16 35:3
proved 26:11 27:2 50:14
proven 26:12
provide 12:13 40:23 60:22
provided 37:25
provider 3:13 15:19,19 28:3
providers 3:18 12:13 30:11
provides 14:8 50:20,22 51:14
provision 34:9 41:10 58:11 59:13
PSLRA 3:22 55:15
public 3:14 10:24 22:17 34:2,7,17 43:20 45:2 50:17
publicly 13:19 37:3
puppet 6:19 42:9 51:9
puppets 6:12,15
purchase 9:17 61:17
purported 33:18 56:13
purporting 36:16
purpose 56:1
purposely 5:11
purposes 13:7,10 13:25 23:16 25:14,16,17 40:23 56:9
pursuant 17:21 36:18
pursue 46:25 63:2
put 32:16 40:11
puts 39:2 59:13
putting 43:19

Q

question 3:24 7:15 9:3 10:14 19:1 21:15 23:1 24:1 27:25 28:11,16 29:1,9 32:11,14,21,22 34:24 36:12,13 42:7 43:21 50:12 58:22
questions 7:1 17:23 60:3
quick 56:3
quite 44:11 56:16
quote 28:4,5,5,5 59:4

R

R 3:1
range 57:5
reacting 37:24
read 4:3 14:11 33:20,20 48:16
reading 9:10 14:18
real 11:24
realized 56:4
really 13:22 57:4
reason 23:20 24:4 39:15 45:17 56:11 59:14
reasonable 51:17,24 56:8 56:17
reasons 10:2 30:4
REBUTTAL 2:12 58:19
recipients 61:14
recite 57:3
recklessly 50:21 50:21
recognize 55:5
recognized 13:5 23:6 33:17 35:18
record 44:25 45:8
recovered 62:7 62:16
recovery 20:14
red 30:5
reduced 26:24

reevaluate 29:11
referred 60:17
referring 55:1,2
refuse 7:24,25
registering 25:25
regulate 24:7 60:1
regulatory 24:6
relating 59:5
relation 25:2,4
relationship 35:19 46:10,14
released 50:16
releases 49:25
relevant 10:22 11:10,17 17:3 46:13
reliance 38:11 56:9
relied 56:7,12,17
relief 61:6,25 62:2
rely 56:9
remain 35:18
remaining 28:18 58:18
remedies 42:21
remedy 37:9
remember 9:12
repeated 49:1
repeatedly 50:23
represent 12:24 12:25 13:4 18:3 18:6 32:18
representation 31:12,12,24 33:8 34:1,2,7 34:10 35:2
represented 15:3 17:10,11 32:22 33:7 34:16 36:23
representing 11:3,23 13:6 16:23 18:18,22 33:14
represents 18:5 18:6,8
reprinted 58:9
require 23:7 59:20
requirement 56:16
requirements 38:20
requires 55:15
reserve 28:18 45:12,14
reserved 45:11
reserves 45:14
resolution 3:25
resolve 3:20
resolved 9:15 10:6 60:10,11 61:11
resources 60:19
respect 15:24 42:19 43:21
respond 3:20 26:14
Respondent 1:18 1:22 2:7,11 28:9,22 48:6
responding 47:12
response 19:6 32:21 39:13,20 58:21
responsible 12:10 16:2 21:22 29:8,23 59:5
resulting 39:25
retain 12:12
reticulated 60:2
review 12:10 29:11 31:21 36:3,4,9 59:8
reviewed 18:24
reviewing 19:9 30:6
reviews 32:9 49:21
revised 17:21
right 8:25 17:6 25:5 31:25 39:13 40:2,7 43:7 45:14,15 46:25 62:17
rights 19:13
rise 55:17
road 46:16 47:13 47:14
Roberts 3:3 18:2 19:8 23:14 28:19 30:1 31:20,23 32:7 32:11,20 34:18 35:17 36:1,21 46:24 47:3,6,11 47:21 48:1 50:3 50:5,11 58:16 63:9
room 52:11,20
rubberstamp 36:8
rule 49:11 51:18 55:19,25
ruling 27:21
run 16:19 20:25 21:1 37:4 40:4 63:3,4
running 20:17 27:1
runs 10:3,8 32:5 39:16 62:11

S

S 2:1 3:1
safe 27:15,15 44:20 47:4
salaries 11:6
sales 26:1
salespersons 52:12
satisfied 42:17 42:19
saying 15:18 22:4 25:1 29:22 34:9 39:12 40:3 40:3 41:9 44:12 47:12 49:17 53:3
says 10:15 16:2 19:19 24:10 33:14,16 45:10 46:18 58:6,25
Scalia 25:11,15 25:16,21 27:25 28:10,12,25 29:3,4,10,17 30:15,19,23 31:1,4,8 33:6 33:11,25 34:11 34:13,25 35:5 35:11,13 36:25 37:1-41:5,10 43:24 44:8,14 51:23 52:4,7,10 55:8,12,15 58:1
scheme 4:22,25 9:9,11 40:16,17
scienter 4:18 6:2 6:9,9 7:4,10,12 7:14 8:19 9:4,5 38:6 49:20 50:1 50:15 55:5,10 55:18 60:10
scripts 52:12,14
seat 27:1,6 46:5 59:4
SEC 7:12 8:11 9:13 13:4 18:19 24:10 35:17 38:16 40:23 42:22 46:25 47:9,14,21 57:3 58:8 61:11 62:7
second 5:3 9:12 14:25 18:7 22:25 27:8
secondary 5:25 6:25 7:2 48:12 60:6
secret 6:4 7:7 36:18
secretly 44:22
section 6:16 14:8 22:23 31:16 42:21 46:9,9,12 50:18 58:12 59:25
sections 50:9
secure 18:10
secured 9:14
securities 3:12 9:18 25:25 26:1 28:4 39:5 46:1 46:8,20 47:8 60:21 61:13,15 61:17
security 47:4
SEC's 31:5
see 34:7 42:7 45:7 48:23
seek 59:16
sell 21:25 52:13 52:22 61:17
sense 29:6 33:3 43:1
sent 52:19
sentences 48:11 48:17
separate 4:11 6:9 10:4 13:9 14:9,24 15:15 18:4,12 23:8,9 23:20 35:18 61:12
separately 15:11 15:12

series 9:15
serve 16:18
served 12:20,20
service 3:13,18 12:13 15:19,19 28:2 30:11
services 60:22
set 9:12 23:23 46:18 61:13
sets 18:4 25:23
settlement 62:16
seven 18:9
shareholders 9:24 10:9 37:5 47:10 61:24,24 62:1,2,15,16
shell 46:18 51:8
short-term 36:20
show 11:14 27:1 38:11,12,12 45:6 60:3
side 14:7 60:5
simple 26:25 55:14
simplest 55:9
simply 11:16 19:2 29:21 39:23 40:15,23 51:8
situation 14:23 50:8,10,13 52:11 54:15 57:7
situations 39:23 57:5
Six 18:9
sky 27:14
Smith 19:22,24
Solicitor 1:19 29:17,18
solve 60:14,25
somebody 7:14 7:16,19,21 34:14 36:8 48:20 49:9 50:20 51:9,13 52:2,11,21 53:18 54:12 56:2 58:7
somewhat 42:3
sorry 30:2 34:18 34:21 38:16
Sotomayor 4:1,9 4:13 5:9,19 6:11,14,20 7:3 7:9 9:8 14:11 15:4,13,21 23:15,19,25 24:3 41:22 42:6 48:9,22 49:2,6 49:13,16 56:19 59:18
sought 58:9
sounded 27:13
speak 19:6 52:14
speaker 43:23
speakers 4:5 43:20
speaks 6:7
specific 54:14
specifically 13:5 24:7 25:25 53:9
speech 31:1,2,3 34:14 43:19 52:5,5,8,8,10
spoken 52:15
spread 54:19
squarely 8:5
start 16:21 48:9
started 27:13
State 10:19 21:9 23:10 25:8
stated 30:4,4
statement 4:4 5:5,13,16 8:2 8:20 12:7 13:12 13:15,16,17,25 17:2,4 19:18,25 20:3,8 22:16,19 24:25 26:25 32:5,12,19,25 33:1,2 39:1 41:3,4 42:24,25 44:1,3,25 46:21 49:5,8,10,10 49:17,18,25 51:2,3,8,14,14 51:15,16,19,25 53:20 54:2,17 55:1,4,23 56:2 56:7 57:12 58:7 58:13 61:3
statements 4:10 4:15 6:3 7:5 9:5 10:22,24 11:11 11:17 17:14,15 24:14 27:10,13 30:16,20 39:25 43:4,6 44:17 46:19 49:12,22 50:16 52:16 56:1,10,12 58:23 61:15,19 62:8,22,25 63:7
States 1:1,12,21 2:10 23:23 48:5
statute 6:19,19 6:21,23 18:12 22:24 24:10 49:11 51:18 58:6 60:15,16
statutes 6:15
statutory 30:16
stock 19:22 21:24,25
stocks 52:13
Stoneridge 3:16
stopped 43:25
strong 55:17
stuck 52:20
study 60:20
subject 19:10 20:21,23,24 38:1,8 42:20,21
submit 9:4 30:3 30:11 38:22 60:3
submitted 36:3 49:22 63:10,12
substantial 40:24 41:1 46:2 50:20 50:22
substantive 43:15,17,22,25 44:15 46:22
sue 9:25 10:2 19:24
sued 3:18 20:16 24:21
sufficient 53:24 54:3,10 55:17
sufficiently 53:18,23,23 55:3
suggest 22:11
suggesting 23:16
suggestion 40:11
suits 57:22
sum 61:1
superiors 53:9
supervise 59:7
supporting 1:22 2:11 48:6
suppose 11:15 11:16 19:8 26:10,11 37:14 37:15 57:2
Supreme 1:1,12
sure 35:2 41:6
survive 11:21
sustain 4:13

T

T 2:1,1
table 60:5
take 9:25 43:7 45:5 60:19,19
taken 24:11 51:13
takes 5:17
talk 4:15,16 5:21
talking 4:6 18:3 28:13 31:9,11 37:5 46:14 49:4 57:20
techniques 59:6
tell 36:17 48:13 60:23,24
telling 33:22
Ten 43:17
term 37:10 51:17
terminated 45:18
terms 56:25
test 54:8,8,9 56:9 57:3
text 30:16
Thank 28:19,23 48:1 58:16 63:9
theory 5:20,22 5:24 8:19,25 10:4 13:22 15:4 27:22 32:14 44:11,18 46:17 46:18 54:19 62:12,14,20 63:1,3
thing 26:13 55:9
things 25:23 26:2 26:5,6,11 34:1 40:14 52:22
think 4:8 6:1 8:18 19:21 21:14 29:2 35:21 37:23 39:19 46:13 49:9 51:5 51:11,17,23 52:24 53:7 55:4 55:21,24 56:14 57:3,9
third 24:2,5
thought 13:1

14:17 27:2,25 28:12,14 38:15 41:5
thousand 52:23
thousands 37:16
three 3:21 22:22 48:10,17
time 18:11,18 28:18
timers 7:18
times 3:21 14:6
timing 10:15 17:18,20 33:18 44:21 56:13 62:23
today 60:3
told 5:12 53:5
ton 52:23
tons 52:23 53:3
top 38:25
totally 62:12
tracks 58:12
trade 10:16
traded 37:3
trademark 45:19
traders 1:6 3:5 10:16 62:24
trades 7:24,25
trading 56:14
transfer 21:25
treated 58:3
trillion 19:19
true 19:21 52:9
trust 19:9,11,13 33:1
trustees 10:18 12:9 16:2,3 17:9,10,11,14 17:23 18:8,9 19:15,21 20:6,7 21:19,21 22:5 32:6 35:6 36:5 36:23 59:2,5,7 59:10
trusts 16:24 23:12
truth 11:24 38:2 56:8
try 48:17
trying 47:4 48:16
Tuesday 1:9
turn 56:3
turns 60:15
twice 3:21 45:13
two 4:4,20 5:20 6:15 14:14,15 14:24 18:4,12 24:6 25:9 35:18 37:21 39:23 42:12,16
type 45:22
typically 37:25

U

ultimately 50:14
unable 50:7
unaware 22:18 49:23
uncertain 40:10
unclear 38:24
underlying 16:24 19:16
understand 7:6 10:25 21:13,16 32:8,8 39:18 49:2
understood 32:14 45:2
undo 58:4
unitary 23:3
United 1:1,12,21 2:10 23:23 48:5
unlawful 6:17 58:13
unprecedented 62:12
untrue 19:25 58:13
unusual 12:12
unwitting 51:21
usage 45:22
use 38:24 45:18 52:12 53:14
useful 23:21
uses 42:8
Utah 43:17

V

v 1:5 3:5
validity 32:12
various 13:9 29:24
vehicle 29:20
ventriloquist 6:19 22:23
veracity 38:2
vice 39:6
view 27:16,16,20 41:14,17,19 43:23
views 29:18
violated 8:9 50:24
violation 38:13 58:15 59:20
violator 4:2 5:25 6:5 7:8 9:10 30:13 40:19,24 41:17,18 42:8 47:19,23,23 48:11,12,19 50:4,18,23,24 51:22 56:25
violators 15:16 42:4,18
Vioxx 37:7
virtually 23:22
virtue 57:15

W

walk 35:7
want 21:14 41:13 43:7 46:15 58:4
wants 59:12
Warren 56:3,5
Washington 1:8 1:15,17,20
wasn't 29:14 38:15 40:17 56:4
way 7:5 23:24 28:16 38:7 43:23 45:3 57:6 57:9,19 60:2 63:3
ways 37:24
wear 12:24
website 34:22
well-pleaded 30:7
went 26:18
weren't 18:21 28:13
we're 15:18 30:16 36:18 37:5 41:11 47:4 49:3 52:23 53:23,24 54:3
win 41:15
witting 51:21
word 14:5 21:19 37:18
wording 36:15
words 22:3 45:5 52:14 53:10,14 53:15
work 26:12 35:13 52:19
world 11:24 33:23 49:25 55:9
worse 40:4
wouldn't 15:8
write 12:2 39:1 52:21 53:11
writer 53:16
writes 19:20 31:1 49:16,18 51:14 52:13,24,25
writing 29:8,24 34:14 54:1
written 12:1 17:21 52:11 61:3
wrong 14:12
wrongdoing 10:13,17,17
wrote 10:21 11:1 11:10 13:12 15:25 30:9 34:11 46:22 53:6

X

x 1:2,7

Y

year 37:8 60:19
years 62:3
Yucatan 19:20 19:24

$

$100 9:14 61:10

0

09-525 1:4 3:4

1

1,000 53:3
10b 58:12
10b-5 24:20,22 38:21 41:20 42:15,17 48:21 50:25 55:6 57:20
10b-5(a) 4:25 5:1
10b-5(b)-making 5:2
10(b) 42:21
10-b 39:7
10:01 1:13 3:2
100 26:12
11 55:19

11:02 63:11
12 10:16 36:17
12b-6 26:19
13 57:4
138 24:12
1938 23:1
1939 23:1
1940 23:4,5 24:7

2

20 46:9,10,12 50:9
20(a) 6:22 14:8 14:17 57:1
20(b) 6:16 22:23 56:22,22 59:19 59:20,23
20(e) 50:18
2010 1:9
206 59:25
215 59:25
22 27:23 53:17 55:1
234 24:12
258a 21:21 59:4
275A 45:9,17
28 2:7

3

3 2:4
34b 58:12 59:24
37 39:11

4

4 58:18
407 58:10
42 19:19
48 2:11

5

5 32:19 33:13
50 53:4
58 2:14

6

6 33:17

7

7 1:9
70 62:3

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. B-02320-A

STATE STREET GLOBAL ADVISORS)

WITNESS: John Patrick Flannery

PAGES: 809 through 973

PLACE: Securities and Exchange Commission

33 Arch Street

Boston, Massachusetts

DATE: Tuesday, March 2, 2010

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

1 Q Okay. How about fact sheets for SSgA strategies?
2 What was the role of product engineering with respect to the
3 preparation, drafting, editing of fact sheets?
4 A Well, the -- as I recall, product engineers were
5 responsible for updating characteristics. The template, if
6 you will, for each of those fact sheets was something that
7 had been developed by legal, and so to the best of my
8 knowledge, they -- the characteristics were updated by the
9 product engineers.
10 Q What do you mean by "characteristics" in this
11 context?
12 A It might, depending upon the fact sheet, I really
13 -- I don't know much about the fact sheets, but types of
14 exposures, allocations.
15 Q How about the narrative description of a strategy
16 within a fact sheet? Who drafted that?
17 A The narrative description, as I recall, was one
18 that was driven by legal, and I believe taking -- taken from
19 the fund declaration or paraphrasing the fund declaration.
20 Q Was anyone in product engineering involved in
21 drafting the narrative for fact sheets?
22 A My understanding, and I was not close to this
23 process, but my understanding was that -- that the -- the
24 descriptive text on the fact sheets was -- was put in place
25 by legal at some point, maybe several years ago.

E

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. B-02320

STATE STREET GLOBAL ADVISORS)

WITNESS: James D. Hopkins

PAGES: 1 through 234

PLACE: Securities and Exchange Commission

33 Arch Street, Suite 2300

Boston, Massachusetts

DATE: Monday, February 2, 2009

The above-entitled matter came on for hearing, pursuant to notice, at 9:45 a.m.

Draft Copy

1 what does that mean?

2 A Generally it was just to update performance

3 characteristics, and anything else in the presentation that

4 might need updating.

5 Q Okay. So are you saying there would be a standard

6 presentation, for example, for LDBF?

7 A Yes.

8 Q And is the presentation for LDBF potential and

9 current clients?

10 A It could be for both, yes.

11 Q Okay. Where within -- in 2006-2007, where within

12 SSgA is the LDBF standard located?

13 A It's in the standard server.

14 Q Okay. And who generally within SSgA would have

15 access to that server?

16 A Product engineers, the product -- many people, all

17 the client-facing people would have access to it.

18 Q So if you were, say, a relationship manager, is

19 that a term that you're familiar with?

20 A Yes.

21 Q Okay. What's a relationship manager?

22 A Relationship managers are the client-facing people

23 who maintain and -- maintain relationships with existing

24 clients, and -- yeah, that's their -- that's how they're

25 defined.

Draft Copy

1 Q All right. So if you were an SSgA relationship
2 manager in 2006-2007 and you had a client in LDBF and you
3 wanted to do a presentation to them in LDBF, would you go
4 to the LDBF standard?
5 A Yes.
6 Q Okay. Would you go anywhere else?
7 A You could go to a recent presentation, which is
8 located in a different server. But those are the two
9 places you would go.
10 Q Okay. Now, with respect to updating the LDBF
11 standard in the '06-07 time frame, what individuals at SSgA
12 were responsible for that?
13 A Product engineers. And the presentation group.
14 Q What's the presentation group?
15 A Well, they're the group that actually builds
16 the -- that builds the PowerPoint presentation. So they're
17 the ones that actually change it, the standards. Or they
18 are among the people who could change a standard.
19 Q Are they part of product engineering?
20 A No.
21 Q Okay. Part of just SSgA generally?
22 A Yes.
23 Q All right. What would -- did you have a standard
24 process for updating the quarterly LDBF standard?
25 A No.

Draft Copy

THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)
)
STATE STREET) File No. B-02320-A
GLOBAL ADVISORS)

WITNESS: James D. Hopkins

PAGES: 235 through 430

PLACE: Securities and Exchange Commission
Boston District Office
33 Arch Street
Suite 2300
Boston, Massachusetts

DATE: Tuesday, February 3, 2009

The above-entitled matter came on for hearing, pursuant to notice, at 10:05 a.m.

Diversified Reporting Services, Inc.
(202) 467-9200

1 (SEC Exhibit No. 287 was marked for
2 identification.)
3 Q Mr. Hopkins, I've provided you with a copy of
4 what's been marked as Exhibit 287. And I want you to take a
5 moment to look through it. I'll briefly describe it for the
6 record. The Bates number is SSP-000056913 through
7 SSP-000056933, and the first page of the document is a
8 presentation to Houston Police, presented on August 28, 2007;
9 Craig A. DeGiacomo, spelled earlier; the witness, Jim
10 Hopkins, and John a Tucker, T-U-C-K-E-R. Let me know when
11 you've had a chance to look at this document.
12 A Okay.
13 Q First of all, have you seen this document before?
14 A I don't recall seeing it.
15 Q There's a lot of handwriting on here, as with some
16 of the documents we looked at yesterday. Whose handwriting
17 appears?
18 A It looks like mine.
19 Q All of it?
20 A It looks like all of it, yes.
21 Q When did you make the handwriting on the document?
22 A I don't recall.
23 Q Do you have any recollection of whether you made
24 the handwriting before the presentation was given to the
25 Houston Police, during the presentation, or after the

1 presentation?

2 A My general practice was to write this before the

3 presentation.

4 Q How about with this particular document?

5 A I don't recall.

6 Q Who created this presentation?

7 A I don't recall.

8 Q Is this the -- Is this a reference, August 28, '07,

9 to the meeting that you have a recollection of going to

10 Houston for?

11 A It looks like it is, yes.

12 Q And does this document refresh your recollection as

13 to whether a presentation was provided to the Houston Police

14 during this meeting?

15 A It looks like this is the presentation that was

16 provided.

17 Q That's your recollection?

18 A That's not my recollection. I don't recall if this

19 was presented to them or not.

20 Q Was this provided to Houston Police?

21 A I don't recall that.

22 Q Let's go with the notes on the first page, just as

23 we did -- the very first page of the exhibit, as we did

24 yesterday. Can you just tell me what the handwriting says

25 there?

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the Matter of:)

) File No. B-02320-A

STATE STREET GLOBAL ADVISORS)

WITNESS: James D. Hopkins

PAGES: 686 through 821

PLACE: Securities and Exchange Commission

33 Arch Street, 23rd Floor

Boston, Massachusetts

DATE: Tuesday, April 27, 2010

The above-entitled matter came on for hearing, pursuant to notice, at 10:10 a.m.

Diversified Reporting Services, Inc.

(202) 467-9200

1 A I don't know that.

2 Q And do you know whether or not they would have had

3 a hard copy after the presentation to keep?

4 A I don't know that.

5 Q Who would know that?

6 A The client-facing person.

7 Q So it was always the client-facing person who was

8 responsible for sending the PowerPoint or providing

9 information to the extent that it was provided?

10 A That's -- that's our practice, yes.

11 Q Now, you were responsible for updating these

12 presentations; is that correct?

13 A That's not necessarily correct.

14 Q So you were responsible for creating standard

15 presentations that were maintained?

16 A I was -- I was a part of the process that updated

17 standards.

18 Q And who also was part of that process that updated

19 standards?

20 A Client-facing people, the performance group,

21 portfolio managers. Many, many people could have been

22 involved in that process.

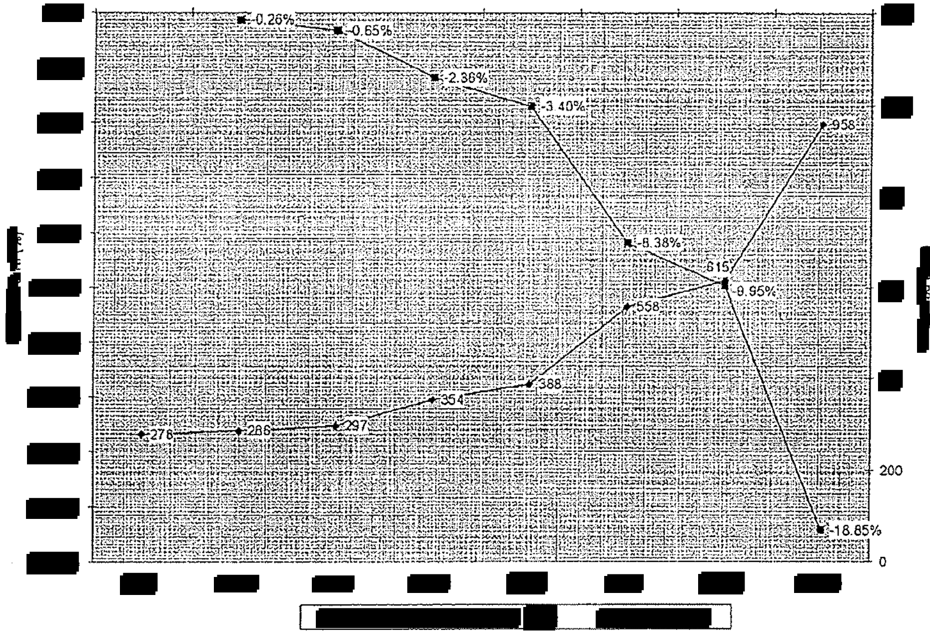
23 Q But weren't you the one who had primary

24 responsibility for getting information to update, for

25 example, holdings information from the portfolio managers?

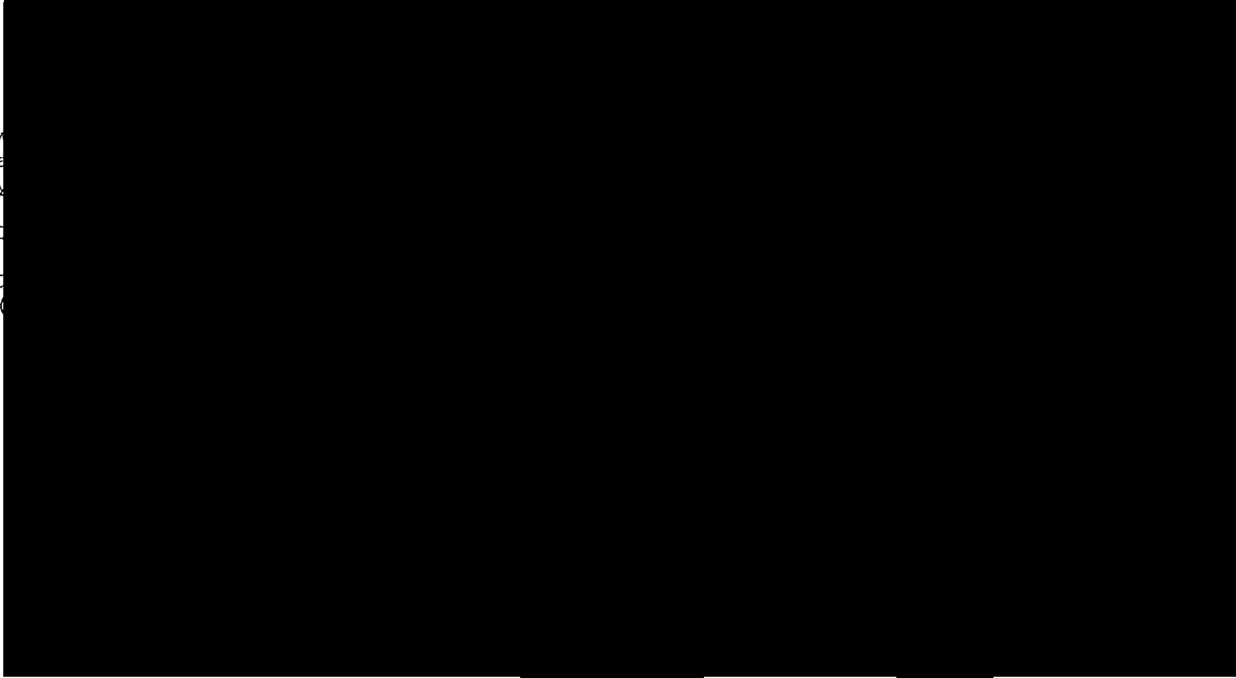
1 A That's not correct.
2 Q So the client-facing person wouldn't go to you to
3 say, "Is this information correct?" They would go straight
4 to a portfolio manager?
5 A Sometimes they would, yes.
6 Q Under what circumstances would they?
7 A It -- I mean there are -- it could be different
8 circumstances. I mean I don't -- I don't -- I can't think of
9 anything off the top of my head.
10 Q Before the March 28th presentation, would you have
11 had an opportunity to review that presentation to make sure
12 that it was accurate?
13 A Sometimes I would be able to do that, yes.
14 Q Okay. For example, if we go back to your calendar,
15 if you look at 8278, the March 23rd entry, there seems to be
16 an entry 9:00 a.m. to 9:00 a.m. saying "Honeywell
17 presentation."
18 What does that mean?
19 A I don't know what that means, I'm sorry.
20 Q Would it mean perhaps that you were reviewing the
21 presentation to ensure its accuracy prior to the meeting on
22 March 28th?
23 A It could mean that, yes.
24 Q And so you might have as much as five days, maybe a
25 week, to look at presentations prior to them being provided

F


-0.26%
-0.65%
-2.36%
-3.40%
-8.38%
-9.95%
-18.85%
278
286
297
354
388
558
615
958
200
0

G

From:	Jim_Hopkins@ssga.com
Sent:	Friday, March 02, 2007 10:03 PM
To:	Mark_Dacey@ssga.com
Cc:	Adele_Kohler@ssga.com; Consultant_Liaisons_-_SSGA@StateStreet.com; Staci_Reardon@ssga.com
Subject:	Re: Fw: CAR Alert!
Attachments:	pic06654.jpg; pic16972.jpg



H

MINTZ LEVIN

John F. Sylvia | 617 348 1820 | jsylvia@mintz.com

One Financial Center
Boston, MA 02111
617-542-6000
617-542-2241 fax
www.mintz.com

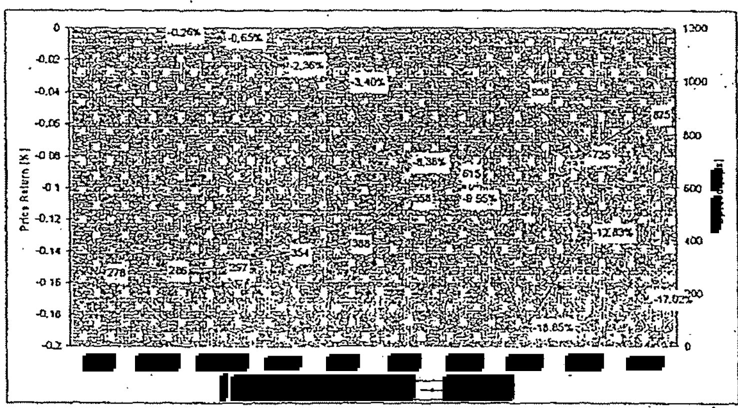
CONFIDENTIAL TREATMENT REQUESTED PURSUANT TO 17 C.F.R. §200.83

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

John F. Sylvia

EXHIBIT A

SS 3676913


Price Return [%]
0
-0.02
-0.04
-0.06
-0.08
-0.1
-0.12
-0.14
-0.16
-0.18
-0.2
1200
1000
800
600
400
200
0
-0.26%
-0.65%
-2.36%
-3.40%
-8.38%
-8.55%
-12.83%
-17.02%
-18.85%
278
286
297
354
388
558
615
725
875

3676917

EXHIBIT B

SS 1216644

ABX

Below are approximations of the magnitude of underperformance in our active strategies to

1216648

To:

From:

Cc:

5086423

payment. This put pressure on asset values and credit spreads in the market. Bear

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

To:

Deleted: exposure

consider to be short-term market mispricing.

EXHIBIT G

EXHIBIT H

EXHIBIT I

EXHIBIT J

From:

EXHIBIT K

94112172

[illegible]

EXHIBIT L

From:

FOIA Confidential Treatment Requested by SSgA Funds Management, Inc.

STATE STREET GLOBAL ADVISORS
Participant Record Keeping System
Transaction Activity Report

From: 01 September 2006
To: 01 March 2008

Sent By: Nicole Guercia 617-664-7360

Account: JRDCTF - National Jewish Medical & Research Center Board Designated Funds

Brian Thurston	Senior Vice President	
Ali Chaudhry	Financial Accountant	
Jennifer Powers	Manager of Treasury	

	Activity					Unit Balance
01-Sep-2006						147,505.718
29-Sep-2006						
29-Sep-2006						
29-Dec-2006						
29-Dec-2006						
30-Mar-2007						
30-Mar-2007						
05-Jun-2007						
29-Jun-2007						

Report Created At: 09 April 2008 11:32 AM

FOIA Confidential Treatment Requested by SSgA Funds Management, Inc.

STATE STREET GLOBAL ADVISORS
Participant Record Keeping System
Transaction Activity Report

Sent By: Nicole Guercia 617-664-7360

Account: JRDCTF - National Jewish Medical & Research Center Board Designated Funds

Brian Thurston	Senior Vice President
Ali Chaudhry	Financial Accountant
Jennifer Powers	Manager of Treasury

Activity	
29-Jun-2007	
07-Aug-2007	
07-Aug-2007	
01-Mar-2008	0.000

Report Created At: 09 April 2008 11:32 AM

SSgA-SEC 036960

STATE STREET GLOBAL ADVISORS
Participant Record Keeping System
Transaction Activity Report

From: 01 September 2006
To: 01 March 2008

Sent By: Nicole Guercia 617-664-7360

Account: NJERCTF - NATIONAL JEWISH MEDICAL & RESEARCH CENTER - RITTER ENDOWMENT

Brian Thurston | Senior Vice President | (303) 8328374

	Activity	Transaction Types	Price	Units	Unit Balance
01-Sep-2006					
28-Sep-2006					
29-Sep-2006					
29-Sep-2006					
29-Dec-2006					
29-Dec-2006	ect				
30-Mar-2007		0.00			
30-Mar-2007	n				
05-Jun-2007					
29-Jun-2007					

Report Created At: 09 April 2008 11:32 AM

FOIA Confidential Treatment Requested by SSgA Funds Management, Inc.

SSgA-SEC 036992

FOIA Confidential Treatment Requested by SSgA Funds Management, Inc.

STATE STREET GLOBAL ADVISORS
Participant Record Keeping System
Transaction Activity Report

From: 01 September 2006
To: 01 March 2008

Sent By: Nicole Guercia 617-664-7360

Account: NJERCTF - NATIONAL JEWISH MEDICAL & RESEARCH CENTER - RITTER ENDOWMENT

Brian Thurston | Senior Vice President | (303) 8329374

	Activity		Transaction Types	Price	[redacted]	Unit Balance
29-Jun-2007	[redacted]n [redacted]	[redacted]	[redacted]	[redacted]	[redacted]	
07-Aug-2007	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	
07-Aug-2007	[redacted] Realized Gain/Loss	[redacted]	[redacted]	[redacted]	[redacted]	
01-Mar-2008	[redacted]	[redacted]				0.000

Report Created At: 09 April 2008 11:32 AM

SSgA-SEC 036993