No. 13-3532

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GLICKENHAUS INSTITUTIONAL GROUP,

Plaintiff-Appellee,

v.

HOUSEHOLD INTERNATIONAL, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Civil Action No. 1:02-cv-05893
Hon. Ronald A. Guzman

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLANTS AND REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Securities Industry and Financial Markets Association

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Sidley Austin LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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<u>INTEREST OF *AMICUS CURIAE*[1]</u>

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

SIFMA has a strong interest in this litigation because of its potential adverse impact on the securities industry. Plaintiffs seek to expand the implied private right of action under § 10(b) of the Securities Exchange Act of 1934 by diluting the requirement of loss causation and by extending liability to secondary actors who did not "make" actionable statements. Neither is permissible. First, as the Supreme Court has recognized, the requirement of loss causation is necessary to ensure that the judicially created private right of action does not become a form of "broad insurance against market losses." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). Second, the Supreme Court has repeatedly explained how extending liability to secondary actors would impose tremendous costs and have significant "ripple effects" detrimental to issuers and investors alike. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994); *see also Janus Capi-*

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus curiae* states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than *amicus curiae*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

tal Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302–03 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163–64 (2008). SIFMA submits this brief because the decision below cannot be reconciled with the Supreme Court's decisions on *either* loss causation *or* secondary liability.

SUMMARY OF ARGUMENT

As the Supreme Court has stressed, vexatious litigation is a special problem in securities law. Given the high costs of defending against private securities actions and the potentially devastating liability, defendants are especially vulnerable to meritless suits designed to extort lucrative settlements. To address these concerns, Congress and the Supreme Court have chosen not to expand the private right of action, but rather to limit it. Pertinent to this brief, the Supreme Court has emphasized two key limitations on the Rule 10b-5 private right of action: the requirement of loss causation and the unavailability of a private action against secondary actors. The judgment below cannot be squared with either requirement.

First, in accepting plaintiffs' "leakage model," the district court gutted the requirement of loss causation under *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). To prove loss causation, a plaintiff must show that the defendant's misrepresentation caused an actual economic loss. A plaintiff can establish this causal chain only by showing that: (a) a misrepresentation inflated the security's price before the plaintiff's purchase; and (b) such inflation then exited the price before the plaintiff's sale once the market learned the truth behind the misrepresentation. Here, plaintiffs wholly failed to establish this causal chain. Most notably, they did not even attempt to link declines in stock price to specific corrective disclosures, or inflation to specific misstatements, but instead improperly *assumed* that their leakage model relieved them of this burden. In addition, plaintiffs failed to account for the role non-fraud-related factors played in price declines, despite *Dura's* clear instruction that a plaintiff must account for such factors.

Second, the jury instructions erroneously extended liability to secondary actors who did not "make" the alleged misrepresentations. As the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), makes clear, the maker of a statement is the person with ultimate authority over that statement, and only the person with such ultimate authority can be liable in a Rule 10b-5 private action. In permitting the jury to find liable anyone who "approved, or furnished information to be included in" false statements, the district court adopted a theory of liability that *Janus* expressly rejected. Yet the district court erroneously held that *Janus* does not apply when the defendants are "corporate insiders." That holding cannot be reconciled with *Janus*'s reasoning and has been rejected by every single court that has considered the question.

ARGUMENT

I. Courts Must Strictly Enforce The Limitations On The Implied Private Right Of Action Under Rule 10b-5.

A. Class actions under Rule 10b-5 present unique dangers.

In considering the issues presented, this Court should bear in mind the substantial costs imposed by class action litigation under Rule 10b-5. In any context, class actions present unique dangers because "when the central issue in a case is given class treatment and so resolved by a single trier of fact, a trial becomes a roll of the dice." *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008). Faced with potentially devastating liability, companies face enormous pressure to settle even meritless claims. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than bet the company, even if the betting odds are good.").

This is true in spades of litigation under Rule 10b-5, which the Supreme Court has long recognized "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). The massive exposure companies face and the high cost and disruption of Rule 10b-5 litigation "allow plaintiffs with weak claims to extort settlements" from defendants. *Stoneridge*, 552 U.S. at 163. Confronted with the prospect of hundreds of millions or even billions of dollars in potential liability, many securities fraud defendants "find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. at 189. As a result, "[p]rivate securities fraud actions, … if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

This undermines important goals of the securities laws and harms the public interest. Securities markets "'deman[d] certainty and predictability.'" *Cent. Bank*, 511 U.S. at 188 (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). Extortionate suits create their opposites, thereby "unnecessarily increas[ing] the cost of raising capital," S. Rep. No. 104-98, at 4 (1995), and "shift[ing] securities offerings away from domestic capital markets," *Stoneridge*, 552 U.S. at 164; *see Report and Recommendations of the Commission on the Regulation of U.S. Capital Markets in the 21st Century* 31 (Mar. 2007) (noting "the widely held global perception that the U.S. securities litigation and regulatory environment makes it dangerous to participate in our capital markets");[2] N.Y. Office of the Mayor, *Sustaining New York's and the US' Global Financial Leadership* ii (2007) ("[T]he prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business—and driven away potential investors.").[3] This diminishes access to capital and undermines the securities laws' "overriding purpose" of promoting confidence in our capital markets. H.R. Rep. No. 104-369, at 31 (1995); *see* H.R. Rep. No. 104-50, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets.").

Moreover, the costs of such suits ultimately fall on the defendant's shareholders, hurting the very class Rule 10b-5 seeks to protect. *See Cent. Bank*, 511 U.S. at 189. A successful private action simply transfers wealth from current shareholders

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[2] *Available at* https://web.archive.org/web/20111021031749/http://www.uschamber.com/sites/default/files/reports/0703capmarkets_full.pdf.

[3] *Available at* https://web.archive.org/web/20070131201515/http://schumer.senate.gov/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf.

to past shareholders. *See, e.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1538 (2006) ("Securities class actions essentially impose costs on public shareholders in order to compensate public shareholders"); Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. Ill. L. Rev. 913, 921 (2003) (describing settlements as a "transfer payment" from "current" shareholders to "former shareholders"). Thus, class action plaintiffs' lawyers are the only real winners, and "[i]nvestors are always the ultimate losers when extortionate 'settlements' are extracted from issuers." H.R. Rep. No. 104-369, at 32; *see also Blue Chip Stamps*, 421 U.S. at 739 (noting the "possibility that unduly expansive imposition of civil liability 'will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers'") (quoting *SEC v. Tex. Gulf Sulphur Co.*, 401 F. 2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)).

B. Congress and the Supreme Court have carefully circumscribed the Rule 10b-5 implied private right of action.

In response to these very real problems, Congress and the Supreme Court have not been silent, but have actively taken steps to minimize abusive litigation. After an era in which the Supreme Court took the lead in defining the Rule 10b-5 right of action—including by implying the existence of the private right of action itself—Congress "reassert[ed] its authority in this area." S. Rep. No. 104-98, at 5. In enacting the Private Securities and Litigation Reform Act (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995), Congress understood the need for "specific legislative action," rather than "judicial decisionmaking," to govern the scope of the private right of action. S. Rep. No. 104-98, at 4. And Congress acted with a clear purpose: to "maintain confidence in our capital markets" and "protect investors" against "abusive and meritless suits." H.R. Rep. No. 104-369, at 31.

Deferring to Congress, the Supreme Court in recent years has repeatedly rebuffed efforts to expand the implied private right of action. *See Janus*, 131 S. Ct. at 2302 ("[W]e must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'"); *Stoneridge*, 552 U.S. at 165 ("The decision to extend the cause of action is for Congress, not for us."). Because the "§ 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes," and because the scope of that cause of action has significant policy consequences that are best addressed by Congress, the Supreme Court has specifically directed that "the § 10(b) private right should not be extended beyond its present boundaries." *Stoneridge*, 552 U.S. at 164–65.

At issue in this case are two important limitations on the scope of the private right of action—limitations to which Congress and the Supreme Court have strictly adhered, and which the district court essentially ignored. *First*, to establish liability under Rule 10b-5, Congress provided in the PSLRA that "the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages." 15 U.S.C. § 78u-4(b)(4). This "loss causation" requirement cannot be met by showing only that the alleged misrepresentation caused the plaintiff to purchase shares at an artificially inflated price. *Dura*, 544 U.S. at 342–46. Rather, to establish the requisite "causal connection between the material misrepresentation and the loss," the plaintiff must also show that the subsequent disclosure of the truth caused the stock price to drop. *Id.* at 342. By limiting recovery to "those economic losses that misrepresentations actually cause," Congress made clear that Rule 10b-5 does not "provide investors with broad insurance against market losses." *Id.* at 345.

Second, the statute does not create a private right of action against secondary actors, *i.e.*, those who merely aid and abet another's violation of Rule 10b-5. *Cent. Bank*, 511 U.S. at 191 ("a private plaintiff may not maintain an aiding and abetting suit under § 10(b)"). Initially established by the Supreme Court's landmark decision in *Central Bank*, this limitation on the private right of action remains a cornerstone of the Court's Rule 10b-5 jurisprudence, and the Court has repeatedly rejected theories of liability that seek in effect to impose primary liability on secondary actors. *See Janus*, 131 S. Ct. at 2302 (rejecting an interpretation of Rule 10b-5 under which "aiders and abettors would be almost nonexistent"); *Stoneridge*, 552 U.S. at 162–63 (rejecting a theory of "scheme" liability that would "revive in substance the implied cause of action against … aiders and abettors"). In addition, Congress has soundly rejected proposals to extend the private right of action to aiders and abettors. *See Stoneridge*, 552 U.S. at 158, 162–63.

Notably, neither of these limitations on the private right of action applies in an action brought by the SEC. In the PSLRA, Congress expressly authorized the SEC to prosecute aiders and abettors. 15 U.S.C. § 78t(e); *see Stoneridge*, 552 U.S. at

158, 162–63 ("Aiding and abetting liability is authorized in actions brought by the SEC but not by private parties."). Likewise, loss causation is not a required element in an action brought by the SEC. *See, e.g., SEC v. Goble*, 682 F.3d 934, 943 (11th Cir. 2012). Unlike private actions, which are driven primarily by entrepreneurial class action lawyers, SEC actions are subject to public officials' prosecutorial discretion, which ensures a focus on serious wrongdoing and the public interest. Thus, permitting private plaintiffs to recover under Rule 10b-5 without proof that the defendant committed a primary violation that caused actual economic loss "would undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants." *Stoneridge*, 552 U.S. at 163.

C. This Court should strictly enforce the limitations on the Rule 10b-5 private right of action.

This Court's decision will set an important precedent governing proof of liability under Rule 10b-5. Not surprisingly given the dynamics discussed above, few private actions under Rule 10b-5 are litigated to judgment; those that survive the pleadings stage usually settle. *See, e.g.,* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 Colum. L. Rev. 1301, 1323 n.101 (2008). This case is therefore being closely watched in the industry, and this Court's decision will be carefully scrutinized by both the plaintiffs' bar and defense counsel to determine what evidence suffices to establish liability in a private action under Rule 10b-5.

It is thus critical that this Court strictly enforce the limitations on the implied private right of action as set forth by the Supreme Court. As appellants have shown, and as discussed below, the judgment in this case cannot be reconciled with the requirement of loss causation or the prohibition on private actions against aiders and abettors. If this Court were nonetheless to affirm, the plaintiffs' bar will undoubtedly use this case, including plaintiffs' deeply flawed "leakage" model of loss causation, as a template for innumerable future lawsuits. And defendants, knowing that such claims have succeeded in the past despite their legal infirmities, will have no realistic choice but to settle. A ruling expanding the scope of the implied private right of action would therefore give plaintiffs a powerful weapon with which to inflict the very harms Congress and the Supreme Court have sought to mitigate.

II. Plaintiffs' "Leakage" Model of Loss Causation Is Inconsistent With The Supreme Court's Decision In *Dura*.

A. Under *Dura*, plaintiffs must prove that the alleged misstatements caused their economic loss.

As courts have long recognized, and as the PSLRA now requires, a plaintiff in a private action under Rule 10b-5 must prove "loss causation." 15 U.S.C. § 78u-4(b)(4); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648–49 (7th Cir. 1997) (citing *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990)). Whereas "transaction causation" requires proof that the plaintiff relied on the defendant's misrepresentation in purchasing a security, loss causation requires proof that the plaintiff suffered an economic loss as a result of that misrepresentation. *Ray v. Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir. 2007). Both are necessary to establish a viable claim: "a non-disclosure that may affect a person's choice about which securities to hold, but does not relate to the value of those securities, yields transaction causation but not loss causation. And without loss causation there is no liability." *Nelson v. Hodowal*, 512 F.3d 347, 351 (7th Cir. 2008).

In *Dura*, the Supreme Court held that a plaintiff cannot show loss causation merely by proving that "the price on the date of purchase was inflated because of the misrepresentation." 544 U.S. at 342 (internal quotation marks and emphasis omitted). "[A]n inflated purchase price will not itself constitute or proximately cause the relevant economic loss," the Court explained, because an investor suffers no loss simply by paying an inflated price for which he receives a security that can then be resold at the same inflated price. *Id.* Moreover, even if after the misrepresentation is exposed the investor sells the security at a price below what he paid, "that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." *Id.* at 342–43. Accordingly, a plaintiff must prove not only that the purchase price was inflated as a result of the misrepresentation, but also that the subsequent price decline was attributable to the disclosure of the misrepresentation rather than other factors. *See id.* at 344; *accord Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) ("Loss causation . . . requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss.").

This rule is critical to ensuring that Rule 10b-5 does not undermine the "important securities law objective" of "maintain[ing] confidence in the marketplace." *Dura*, 544 U.S. at 345. A private right of action that enables investors to recover "economic losses that misrepresentations actually cause" serves this objective by "deterring fraud." *Id.* But a private right of action that enables investors to recover for any and all price declines would transform Rule 10b-5 into a form of "broad insurance against market losses," *id.*, deterring not fraud but prudent investment. "There is no support in the Securities Exchange Act, the Rule, or [Supreme Court] cases for such a result." *Basic Inc. v. Levinson*, 485 U.S. 224, 252 (1988) (White, J., concurring in part and dissenting in part).

B. Plaintiffs' "leakage" model failed to establish loss causation.

Plaintiffs' "leakage" model cannot be reconciled with the Court's decision in *Dura*, because plaintiffs failed to link price declines to specific corrective disclosures or account for non-fraud-related factors. Instead, at plaintiffs' direction, their expert witness *assumed* that the inflation dissipated by the end of class period as the truth about the alleged misrepresentations emerged over time. Thus, plaintiffs' rigged their model to assume what *Dura* required them to prove: that they sustained losses "when the facts became generally known and as a result share value 'depreciate[d]." 544 U.S. at 344 (internal quotation marks and ellipsis omitted).

To show that the misrepresentation's disclosure caused the stock price to decline, a plaintiff must, at a minimum, (1) "identif[y] any statements" that revealed the truth, *Tricontinental Indus., Ltd., PriceWaterhouseCoopers, LLP*, 475 F.3d 824, 843 (7th Cir. 2007), and (2) show that the security's price reacted negatively "just when the alleged misrepresentations were revealed," *Ray,* 482 F.3d at 995; s*ee also In re Northfield Labs., Inc.*, 527 F. Supp. 2d 769, 789 (N.D. Ill. 2007). Only by establishing "the existence of a 'corrective disclosure' in which the truth about the previously misrepresented information was revealed and was followed by a decline in stock price," *Ross v. Career Educ. Corp.*, 2012 WL 5363431, at *12 (N.D. Ill. Oct. 30, 2012), can a plaintiff succeed in meeting *Dura*'s requirements.

A plaintiff cannot avoid these requirements by asserting that the truth "leaked out" gradually over time. *See, e.g.*, *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 472-73 (4th Cir. 2011); *In re Williams Sec. Litig.—WCG Subclass*, 558 F.3d 1130, 1138 (10th Cir. 2009). Whether the truth came to light through a "single complete disclosure," or through "a series of partial disclosures," the plaintiff still has the burden of demonstrating a link between the disclosure of fraud and declines in stock price. *Katyle*, 637 F.3d at 472; *see also Ross*, 2012 WL 5363431, at *12 (plaintiff properly alleged a "series of corrective disclosures").

Accordingly, even under a "leakage" theory, the plaintiff must identify the specific disclosures that partially revealed the truth and show that the stock price promptly declined in response. "A plaintiff cannot simply state that the market had learned the truth by a certain date and, because the learning was a gradual process, attribute all prior losses to the revelation of the fraud." *Williams*, 558 F.3d at 1138. Every court (except the one below) that has addressed the issue has reached the same conclusion. *See, e.g.*, *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse First Bos.*, 853 F. Supp.2d 181, 192 (D. Mass. 2012).

The PSLRA confirms that plaintiffs must, in all events, identify the precise corrective disclosures. The statute caps recoverable damages based on the "mean trading price of th[e] security during the 90-day period beginning on *the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated* to the market." 15 U.S.C. § 78u-4(e)(1) (emphasis added). This provision demonstrates Congress's understanding that plaintiffs must show discrete, identifiable corrective disclosures on specific dates; otherwise calculating the damages cap would be impossible.

Because plaintiffs neglected to tie price declines to specific corrective disclosures, they failed to establish the requisite connection between purported misrepresentations and economic losses. This failure is compounded by plaintiffs' related failure to show that the price had any inflation in the first place. Rather than identify the pre-class-period statements that allegedly introduced inflation into the stock price, plaintiffs merely *assumed* there were such statements and such inflation, and argued that subsequent statements "maintained" this inflation.

But plaintiffs cannot assume away Supreme Court precedent. At the very least, plaintiffs must identify the original misstatement and show that this statement and the "maintaining" statements related to the same alleged fraud. *See Findwhat Investor Grp. v. Findwhat.com*, 658 F.3d 1282, 1314–17 (11th Cir. 2011) (permitting liability based on *confirmatory* misstatements that maintained inflation caused by earlier misstatements *about the same fraud*), *cert. denied*, 133 S. Ct. 109 (2012). Thus, not only did plaintiffs fail to connect price declines to specific corrective disclosures, they also failed to prove that any class-period statements—the only statements that could be actionable under the statute of repose—introduced or "maintained" any inflation at all.

In any event, even if plaintiffs' leakage model did not suffer from these fatal infirmities, plaintiffs made no effort to exclude the effects of contemporaneous non-fraud-related firm-specific news. This directly contravenes *Dura*, which requires accounting for "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events." 544 U.S. at 343. Plaintiffs argued below that their failure to account for these factors was not fatal to their claims because (1) *defendants* "failed to adduce any evidence at trial that [their] stock price underperformance and declines . . . were due to a non-fraud company specific reason," Doc. 1876 at 9, and (2) plaintiffs' expert witness testified that price increases and decreases caused by non-fraud-related factors "cancel[led] each other out" over the class period, *id.* at 14–15. Neither argument is valid.

Plaintiffs' first argument misallocates the burden of proof. The PSLRA "imposes on *plaintiffs* 'the burden of proving' that the defendant's misrepresentations 'caused the loss for which the plaintiff seeks to recover.'" *Dura*, 544 U.S. at 345–46 (quoting 15 U.S.C. § 78u-4(b)(4)) (emphasis added). This choice was intentional. Congress knows how to shift the burden to defendants when it wants to. It did so under Section 12 of the Securities Act. *See* 15 U.S.C. § 77*l*(b) (shifting the burden to defendants to show the portion of the depreciation in value of the security that was attributable to other factors). Thus, it is not defendants' burden to prove that the declines *were* due to a non-fraud-related factor; it is plaintiffs' burden to show that the declines were *not* due to a non-fraud-related reason. *See In re Williams*, 558 F.3d at 1137 ("*Dura* requires that a *plaintiff* show that it was this revelation that caused the loss and not one of the tangle of factors that affect price.") (internal quotation marks omitted and emphasis added); *In re Scientific Atlanta, Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1376 (N.D. Ga. 2010) ("[W]here several competing factors may have resulted in a decline . . . the *plaintiff* must provide sufficient evidence to apportion the loss between fraud-related and non-fraud-related causes." (emphasis added)), *aff'd*, 489 F. App'x 339 (11th Cir. 2012). And that burden requires the "*plaintiff's expert* to disentangle the effects of the alleged fraud from both industry-wide information and company-specific information unrelated to such fraud." *Scientific Atlanta*, 754 F. Supp.2d at 1376 (emphasis added); *see Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) ("plaintiffs bear the burden of persuasion, after all").

Plaintiffs' second argument is likewise meritless. Even assuming arguendo that price changes attributable to non-fraud-related factors cancelled each other out *over the course of the class period*, that would not prove that they cancelled each other out *for any given plaintiff or even for some hypothetical average plaintiff*. Just as the "[t]iming of each person's transactions, in relation to the timing of the supposedly false statements, determines how much a given investor lost (or gained) as a result of the fraud," *Schleicher*, 618 F.3d at 681, the timing of each person's transactions, in relation to the timing of non-fraud-related factors, determines how much a given investor lost or gained as a result of those factors. If, for example, a plaintiff sold at a time when the price was depressed by non-fraud-related firm-specific news, it would not matter for that plaintiff whether later such disclosures canceled out the decline for other investors. To establish loss causation, that plaintiff would need to show what portion of his loss was attributable to the misrepresentation and what portion to the non-fraud-related factors. Because plaintiffs' model failed to disentangle these factors, it failed to prove loss causation under *Dura*.

III. The Jury Instructions Were Inconsistent With The Supreme Court's Decision in *Janus* Because They Permitted Liability For Those Who Did Not "Make" The Alleged Misstatements.

A. Under *Janus*, only those who "make" a misrepresentation can be held primarily liable under Rule 10b-5.

Under Rule 10b-5, it is unlawful for any person to "make" a false statement of material fact in connection with the purchase or sale of a security. 17 C.F.R. § 240.10b-5. In *Janus*, the Supreme Court rejected the government's proposed construction of the term "make," under which primary liability would attach to "a person who 'provide[d] the false or misleading information that another person then pu[t] into the statement,'" on the theory that such a person helped to "create" the false statement. 131 S. Ct. at 2303. Instead, consistent with "the narrow scope … [of] the implied private right of action," *id.*, the Court held that "the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 2302. Accordingly, one who merely "prepares or publishes a statement on behalf of another is not its maker," and thus is not primarily liable. *Id.*

The Court adopted this narrower definition of "make" in part because "[a] broader reading … would substantially undermine *Central Bank*" by allowing primarily liability to be imposed on those who "contribute 'substantial assistance' to the making of a statement but do not actually make it." *Id.* This would make aiders and abettors "almost nonexistent," thereby undermining Congress's decision that aiders and abettors should be pursued by the SEC, "but not by private parties." *Id.* To prevent blurring the distinction between primary and secondary liability, the Court drew a "clean line between the two—the maker is the person or entity with ultimate authority over a statement and others are not." *Id.* at 2302 n.6.

B. The jury instructions misstated the law under *Janus*.

The jury instructions transgressed this "clean line." The district court instructed the jury that defendants "made" false statements if they "approved, or furnished information to be included in" such statements. That is precisely the definition of "make" that the Supreme Court rejected in *Janus*. 131 S. Ct. at 2303 (holding that a private party may not "sue a person who 'provides the false or misleading information that another person then puts into the statement'").

Those who approve or furnish information to be included in a false statement do not necessarily have "ultimate authority" over the statement's "content" or the decision "whether and how to communicate it." *Id.* at 2302. Neither approving a statement nor furnishing information to be included in a statement makes it "'necessary or inevitable'" that the statement will be communicated to the public or that it will contain the information furnished. *See id.* at 2303. Both may *assist* the person with ultimate authority, but "assistance, subject to the ultimate control of [the person with ultimate authority], does not mean that [the person providing assistance] 'made' any statements." *Id.* at 2305. If one who drafts a speech for another does not "make" the statements therein, *id.* at 2302, neither does one who furnishes information to be included in that draft. Both are, at most, aiders and abettors.

Although the district court did not have the benefit of *Janus* when it instructed the jury, the error in the instructions is now crystal clear. This Court should not permit it to go uncorrected.[4]

C. *Janus's* definition of "make" applies to "corporate insiders."

The district court, however, concluded that the instructions "did not misstate the law" because this case "dealt with corporate insiders," whereas *Janus* involved a mutual fund and its investment advisor. Doc. 1887 at 4–5. This distinction cannot be reconciled with the Court's reasoning in *Janus* and has been correctly rejected by every other court to consider the question. *See In re UBS AG Secs. Litig.*, 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1071 (N.D. Cal. 2012); *La. Mun. Police Emps. Ret. Sys. v. KPMG, LLP*, 2012 WL 3903335, at *2–3 (N.D. Ohio Aug. 31, 2012); *Red River Res., Inc. v. Mariner Sys., Inc.*, 2012 WL 2507517, at *6 (D. Ariz. June 29, 2012); *City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011); *Haw. Ironworkers Annuity Trust Fund v. Cole*, 2011 WL 3862206, at *4 (N.D. Ohio Sept. 7, 2011).[5]

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[4] The jury instructions were erroneous even before *Janus*, which was a straightforward application of the Supreme Court's rejection of secondary liability in *Central Bank* and *Stoneridge*. Regardless, *Janus* unquestionably applies here. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (the Supreme Court's "interpretation of federal law … must be given full retroactive effect in all cases still open on direct review").

[5] Neither case on which the district court relied is to the contrary. *In re Smith Barney Transfer Agent Litigation*, 884 F. Supp. 2d 152 (S.D.N.Y. 2012), *rejected* the argument that corporate insiders could be held liable for each other's statements and held only that they

Janus's holding that a statement's "maker" is the person with "ultimate authority" over the statement is unqualified; it does not except "corporate insiders." The Court's reasoning turned on the meaning of the word "make," the narrow scope of the implied right of action, and the need to avoid blurring the distinction between primary and secondary liability—none of which depends on the identity of the defendant. *See Cole*, 2011 WL 3862206, at *4 ("The Court's interpretation of the verb 'to make' is an interpretation of the statutory language in question . . . and . . . cannot be ignored simply because the defendants are corporate insiders."). Like other defendants, corporate insiders who lack "ultimate authority" over statements do not "make" those statements. In holding otherwise, the district court improperly "read into *Janus* a distinction that does not appear in the opinion." *In re UBS AG Secs. Litig.*, 2012 WL 4471265, at *10.

Janus's refusal to "disregard the corporate form," 131 S. Ct. at 2304, does not mean that a corporate insider may be liable for statements over which another insider had "ultimate authority." To the contrary, because the "corporate form" of the mutual fund and its investment advisor made them "legally separate entities," the statements of one were not attributable to the other—regardless of any "'uniquely close relationship'" between the two entities. *Id.* Likewise, because corporate officers are legally distinct persons, their statements are not attributable to one another, regardless of the "close relationship" they share as fellow corporate insiders.

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could be liable for statements they signed. *Id.* at 165. And *In re Satyam Computer Services Ltd. Securities Litigation*, 915 F. Supp. 2d 450 (S.D.N.Y. 2013), addressed whether corporate insiders could be held liable for statements attributed to the corporation itself, not whether they could be held liable for *each other's* statements. *Id.* at 477 n.16.

Like separate corporate entities, corporate insiders "cannot be liable solely on account of their relationship with the 'maker.'" *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 164 (S.D.N.Y. 2012).

The district court's ruling effectively resurrects the "group pleading" doctrine. This Court, like others, has rejected that doctrine, holding that plaintiffs cannot impute one corporate insider's scienter to another. *Pugh v. Tribune Co.*, 521 F.3d 686, 693 (7th Cir. 2008); *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 437 F.3d 588, 602–03 (7th Cir. 2006), *vacated on other grounds*, 551 U.S. 308 (2007); *see Winer Family Trust v. Queen*, 503 F.3d 319, 337 (3d Cir. 2007); *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 287 (5th Cir. 2006). This requirement of defendant-by-defendant proof recognizes that "[c]orporate officers are *not* liable for acts solely because they are officers." *Blackwell*, 440 F.3d at 287. There is no basis for holding otherwise when the making of the statement, rather than scienter, is at issue.

Janus cannot be evaded by claiming that defendants are liable for "omissions" or "implied statements" when they fail to correct other individuals' false statements. Indeed, this Court has already squarely rejected such a contention. *Fulton Cnty. Emps. Ret. Sys. v. MGIC Inv. Corp.*, 675 F.3d 1047, 1051–52 (7th Cir. 2012). Although it may be true that investors "rely on the role corporate executives play in issuing public statements even in the absence of explicit attribution," *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 158 n.6 (2d Cir. 2010), such reliance does not mean that an executive has impliedly "made" a statement, *see SEC v. Tambone*, 597 F.3d 436, 446–48 (1st Cir. 2010) (en banc) (rejecting "implied statement" theory based on investors' reliance on underwriters' role in securities offerings). Under Rule 10b-5, a corporate insider who fails to correct statements made by another insider is "no more liable than was Janus Capital Management for keeping silent when someone else spoke." *Fulton,* 675 F.3d at 1052.

Indeed, the text of the rule is clear on this point. A defendant is liable only for "mak[ing]" a false statement or "omit[ing] to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b-5(b). To "omit" to state a fact is to leave out certain content. By definition, only the person with ultimate authority over a statement's content (*i.e.*, the statement's "maker") can leave that content out of the statement. Put simply, only one who "makes" a statement can "omit" content from that statement. And following the logic of *Janus*, a defendant who has not omitted content is not liable for someone else's omission. "Since each party is liable only for their own misstatements, *Janus* implies that each party is only liable for their own omissions as well." *Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 572 n.13 (S.D.N.Y. 2012).

CONCLUSION

For these reasons, the district court's judgment should be set aside as inconsistent with the Supreme Court's decisions in *Dura* and *Janus*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 6,177 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/ *Jonathan F. Cohn*

February 19, 2014 Jonathan F. Cohn

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I hereby certify that on February 19, 2014, I caused the foregoing Brief of *Amicus Curiae* Securities Industry and Financial Markets Association to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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February 19, 2014 Jonathan F. Cohn