Attachment A

09-1619-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PACIFIC MANAGEMENT COMPANY LLC,
RH CAPITAL ASSOCIATES LLC,

Plaintiffs-Appellants,

PIMCO FUNDS: PACIFIC INVESTMENT MANAGEMENT SERIES,
JOSEPH MAZUR, individually and on behalf of all others similarly situated,

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF THE POSITION OF PLAINTIFFS-APPELLANTS ON THE ISSUE ADDRESSED AND IN SUPPORT OF NEITHER AFFIRMANCE NOR REVERSAL

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

CHRISTOPHER PAIK
Special Counsel
Securities and Exchange Commission
100 F. Street. N.E.
Washington, D.C. 20549
(202) 551-5187 (Paik)

IRV KREITENBERG, STEVE KREITENBERG, MATTHEW LARSON, AMERICAN FINANCIAL INTERNATIONAL GROUP-ASIA, L.L. MICHAEL ALBRECHT,

Plaintiffs,

- v. -

MAYER BROWN LLP AND JOSEPH P. COLLINS,

Defendants-Appellees,

REFCO INC., PHILLIP R. BENNETT, GERALD M. SHERER, GRANT THORNTON LLP, BANC OF AMERICA SECURITIES, LLC, BENNETT TRUST, LEO R. BREITMAN, CMG INSTITUTIONAL TRADING, LLC, CREDIT SUISSE SECURITIES LLC, DEUTSCHE BANK, NATHAN GANTCHER, GOLDMAN, SACHS & CO., GRANT THORNTON, LLP, TONE GRANT, DAVID V. HARKINS, HARRIS NESBITT CORP., HSBC SECURITIES (USA) INC., J.P. MORGAN SECURITIES INC., SCOTT L. JAECKEL, DENNIS A. KLEJNA, THOMAS H. LEE, LIND-WALDOCK SECURITIES LLC, SANTO MAGGIO, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MURIEL SIEBERT & CO., INC., JOSEPH J. MURPHY, RONALD L. O'KELLEY, REFCO GROUP HOLDINGS, INC., REFCO MANAGED FUTURES LLC, SAMUEL AL. RAMIREZ & CO. INC., SANDLER O'NEIL & PARTNERS, L.P., SCOTT A. SCHOEN, WILLIAM M. SEXTON, PHILIP SILVERMAN, THE 1997 THOMAS H. LEE NOMINEE TRUST, THE WILLIAMS CAPITAL GROUP, L.P., THL REFCO ACQUISITION PARTNERS, THOMAS H. LEE INVESTORS LIMITED PARTNERSHIP, THOMAS H. LEE PARTNERS, LP, UTENDAHL CAPITAL PARTNERS, L.P., WESTMINSTER-REFCO MANAGEMENT LLC, WILLIAM BLAIR & COMPANY, LLC, THL EQUITY ADVISORS V LLC, THOMAS H. LEE EQUITY FUND V, LP, ROBERT C. TROSTEN, MAYER BROWN LLP, JOSEPH P. COLLINS, BMO CAPITAL MARKETS CORP., NEW REFCO GROUP LTD., LLC, REFCO CAPITAL MARKETS, LTD., REFCO FINANCE HOLDINGS LLC, REFCO FINANCE INC., REFCO GROUP LTD., LLC, THE PHILLIP R. BENNETT THREE YEAR ANNUITY TRUST, THOMAS H. LEE PARALLEL FUND V, LP, and THOMAS H. LEE EQUITY FUND V. L.P.,

Defendants.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND QUESTION ADDRESSED 1

THE DISTRICT COURT'S DECISION 5

ARGUMENT 6

I. A PERSON MAKES A FALSE OR MISLEADING STATEMENT AND THEREFORE CAN BE LIABLE AS A PRIMARY VIOLATOR OF RULE 10b-5 WHEN THAT PERSON, ALONE OR WITH OTHERS, CREATES THE STATEMENT. 6

II. ALTHOUGH PUBLIC ATTRIBUTION OF A FALSE OR MISLEADING STATEMENT TO A PERSON IS ONE MEANS BY WHICH THE PERSON CAN BE A PRIMARY VIOLATOR OF RULE 10b-5, IT IS NOT THE EXCLUSIVE MEANS; ATTRIBUTION IS NOT A REQUIRED ELEMENT OF A PRIMARY VIOLATION. 11

1. This Court's Lattanzio and Wright Decisions Do Not Require Public Attribution In All Instances. 11

2. An Attribution Requirement Would Unjustifiably Allow Defendants To Escape Liability. 14

3. The Reliance Element in Private Actions Does Not Give Rise to an Attribution Requirement. 16

4. The Language Used in Central Bank Does Not Give Rise to an Attribution Requirement. 17

TABLE OF CONTENTS (CONTINUED)

Page

III. ANY ATTRIBUTION REQUIREMENT SHOULD NOT APPLY TO GOVERNMENT LAW ENFORCEMENT ACTIONS. 18

CONCLUSION 20

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

CERTIFICATE OF COMPLIANCE WITH ELECTRONIC FILING REQUIREMENTS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page**

Robert W. Armstrong, Exchange Act Release No. 51920, 2005 SEC LEXIS 1497 (June 24, 2005) . . . . 9 n. 3

Carley Capital Group v. Deloitte & Touche, LLP, 27 F. Supp. 2d 1324 (N.D. Ga. 1998) 9-10

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) . . . . 2, 6-7, 8 passim

Elkind v. Ligget & Myers, Inc., 635 F.2d 156 (2d Cir. 1980) 14

In re Enron Corp. Securities, Derivative & ERISA Litigation, 235 F. Supp. 2d 549 (S.D. Tex. 2002) . . . . 9 n. 3, 10

Geman v. SEC, 334 F.3d 1183 (10th Cir. 2003) . . . . 18 n. 4

Howard v. Everex Systems, Inc., 228 F.3d 1057 (9th Cir. 2000). 7-8

Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147 (2d Cir. 2007) . . . . 2, 6, 11 passim

Novak v. Kasaks, 216 F.3d 300 (2d Cir. 2000) 13-14

In re Scholastic Corp. Securities Litigation, 252 F.3d 63 (2d Cir. 2001) 13

SEC v. Blavin, 760 F.2d 706 (6th Cir. 1985) . . . . 18 n. 4

SEC v. Collins & Aikman Corp., 524 F. Supp. 2d 477 (S.D.N.Y. 2007) 10

SEC v. KPMG LLP, 412 F. Supp. 2d 349 (S.D.N.Y. 2006) 10

SEC v. Lucent Technologies, Inc., 610 F. Supp. 2d 342 (D.N.J. 2009) . 18-19 n. 5

SEC v. Power, 525 F. Supp. 2d 415 (S.D.N.Y. 2007) 10

TABLE OF AUTHORITIES (CONTINUED)

Cases (Continued) **Page**

SEC v. Rana Research, Inc., 8 F.3d 1358 (9th Cir. 1993) . . . . 18 n. 4

SEC v. Tambone, 550 F.3d 106 (1st Cir. 2008) . . . . 18 n. 5

SEC v. Wolfson, 539 F.3d 1249 (10th Cir. 2008) 10, 18

United States v. Finnerty, 533 F.3d 143 (2d Cir. 2008) . . . . 4, 19 & n. 6, 20

Wharf (Holdings) Ltd. v. United International Holdings, Inc.,
532 U.S. 588, 597 (2001) 16

Wright v. Ernst & Young, LLP, 152 F.3d 169 (2d Cir. 1998) 2, 11, 12
passim

Statutes and Rules

Securities Exchange Act of 1934, 15 U.S.C. 78a, et seq.

Section 10(b), 15 U.S.C. 78j(b) 2, 5, 6
passim

Section 21D(b)(2), 15 U.S.C. 78u-4(b)(2) 15

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67 3

Rules Under the Securities Exchange Act of 1934, 17 C.F.R. 240.0-1, et seq.

Rule 10b-5, 17 C.F.R. 240.10b-5 . . . . 2, 7, 8
passim

Miscellaneous

Conference Report on Securities Litigation Reform,
H.R. Rep. No. 104-369 (1995) 3

09-1619-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PACIFIC MANAGEMENT COMPANY LLC,
RH CAPITAL ASSOCIATES LLC,

Plaintiffs-Appellants,

v.

MAYER BROWN LLP AND JOSEPH P. COLLINS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF THE POSITION OF PLAINTIFFS-APPELLANTS ON THE ISSUE ADDRESSED AND IN SUPPORT OF NEITHER AFFIRMANCE NOR REVERSAL

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND QUESTION ADDRESSED

The Securities and Exchange Commission, the agency responsible for the administration and enforcement of the federal securities laws, submits this brief as amicus curiae to address an important question concerning liability in actions

brought under the antifraud provisions in Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. In this Rule 10b-5 private damages action, the district court ruled that, in order for a person to be a primary violator with respect to a publicly disseminated false or misleading statement (in contrast to being only an aider and abettor who cannot be sued in a private action), the person must have been identified to potential investors as the maker of the statement, or, in other words, the statement must have been "attributed" to the person at the time it was made. The Commission disagrees. In the Commission's view, attribution of a false or misleading statement to a person is only <u>one means</u> by which that person can create the statement and thus be a primary violator; a person who, acting with the requisite scienter, creates a misstatement is a primary violator regardless of whether the victim knows of the person's identity. Neither <u>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</u>, 511 U.S. 164, 191 (1994), nor the element of reliance in a private Rule 10b-5 action, supports an attribution requirement; and we believe that our position is consistent with this Court's decisions in <u>Wright v. Ernst & Young, LLP</u>, 152 F.3d 169 (2d Cir. 1998), and <u>Lattanzio v. Deloitte & Touche LLP</u>, 476 F.3d 147 (2d Cir. 2007).

The Commission's interest in this case is two-fold. First, private damages actions under the federal securities laws, when meritorious, serve an important role, both because such actions provide compensation for investors who have been harmed by securities law violations and because they supplement the civil law enforcement actions that the Commission brings. As Congress noted when it adopted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses" and private lawsuits "promote public and global confidence in our capital markets and help to deter wrongdoing and guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs." Conference Report on Securities Litigation Reform, H.R. Rep. No. 104-369, 31 (1995).

The district court's ruling that a private plaintiff cannot bring a Rule 10b-5 damages action unless the false or misleading statement in question had been attributed to a defendant would enable a person to shield himself from liability by arranging to have the statement issued by another person or anonymously. Such a ruling would unduly restrict private actions.

Second, it is important to the Commission that, if this Court concludes that there is an attribution requirement for primary liability in private actions, the Court

should make clear that, because any attribution requirement is derived from the element of reliance, an attribution requirement has no application in government law enforcement actions, where reliance is not an element. The Commission is particularly concerned in this regard because, as the district court appeared to recognize, 609 F. Supp. 2d 304, 312 (S.D.N.Y. 2009), there is language in this Court's recent decision in United States v. Finnerty, 533 F.3d 143, 149-50 (2d Cir. 2008), suggesting in dictum that attribution is required even in a government law enforcement case.

Although the Commission, unlike a private plaintiff, has express statutory authority to bring aiding and abetting claims against defendants in its own actions, there are instances where the Commission nonetheless might find it necessary to assert a claim for primary liability, as where there is no primary violator whom the defendant aided and abetted (this would be the case if a false or misleading statement was disseminated anonymously) or where, because the aiding-and-abetting statutory provision arguably requires the Commission to satisfy a higher scienter standard when bringing an aiding and abetting claim than when bringing a primary violation claim, the Commission would have difficulty meeting that standard.

In this amicus brief, the Commission expresses no views as to the application of the appropriate legal principles to the facts of this case, and thus argues for neither affirmance nor reversal.

THE DISTRICT COURT'S DECISION

Plaintiffs purchased bonds and stock issued by Refco Inc. They allege that Refco's law firm, defendant Mayer Brown LLP, and a partner in the firm, defendant Joseph P. Collins, are liable under Section 10(b) for false and misleading statements contained in three Refco documents -- an offering memorandum and two registration statements (one to register bonds, the other to register an initial public offering of stock). [1] The district court dismissed their claims on the ground that the allegedly false or misleading statements in the Refco documents were not attributed to Mayer Brown or Collins in those documents. 609 F. Supp. 2d 304, 311-15. The district court held that "[t]o rise to the level of a primary violation, the secondary actor must not only make a material misstatement or omission, but 'the misrepresentation must be attributed to the specific actor at the time of public dissemination' . . . so as not to undermine the element of

---

[1] As well as claiming that Mayer Brown and Collins are liable for false and misleading statements, the plaintiffs also claim that Mayer Brown and Collins are liable for engaging in a scheme to defraud because of other alleged conduct. The Commission expresses no views as to that claim.

reliance required for 10(b) liability." 609 F. Supp. at 312 (quoting Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 153 (2d Cir. 2007). The district court found that, in the Refco documents, Mayer Brown was mentioned only as counsel for Refco and that none of the contents of the documents were attributed to Mayer Brown. Id.

The district court rejected the argument that investors were sufficiently aware of Mayer Brown's participation that they should be deemed to have relied on statements in the offering documents as if they were attributed to Mayer Brown. Id. at 313-14. The district court stated that "the relevant inquiry is not simply the extent of [the defendants'] involvement . . . but whether, at the time, plaintiffs reasonably understood Mayer Brown to be speaking." Id. [2]

ARGUMENT

I. A PERSON MAKES A FALSE OR MISLEADING STATEMENT AND THEREFORE CAN BE LIABLE AS A PRIMARY VIOLATOR OF RULE 10b-5 WHEN THAT PERSON, ALONE OR WITH OTHERS, CREATES THE STATEMENT.

The Supreme Court in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994), drew a distinction between persons

---

[2] The Commission has brought an enforcement action against Collins (but not against Mayer Brown), alleging that he aided and abetted violations of the antifraud provisions.

who aid and abet violations of the antifraud provisions of Rule 10b-5 and "primary violators" of the Rule, holding that private plaintiffs cannot bring damages actions against aiders and abettors but only against primary violators. The Supreme Court stated, however, that "secondary actors," such as "lawyer[s], accountant[s], and bank[s]," could be liable so long as "all of the requirements for primary liability under Rule 10b-5 are met," including the requirement that the defendant "make" an alleged false or misleading statement. Thus, a secondary actor can be a primary violator if he made a false or misleading statement.

In the Commission's view, a person makes a false or misleading statement and thus can be liable as a primary violator of Rule 10b-5 when that person <u>creates</u> the statement. A person creates a statement in this context if the statement is written or spoken by him, or if he provides the false or misleading information that another person then puts into the statement, or if he allows the statement to be attributed to him. Thus, for example, a person who actually drafted an offering document containing false or misleading statements can be a primary violator, and so can a person, if any, who supplied the writer with the false or misleading information in the document, as can a person who signed the offering document or otherwise acknowledged to investors that the statements were his own. With respect to the last-mentioned person, as recognized in <u>Howard v. Everex Systems,</u>

Inc., 228 F.3d 1057, 1061 (9th Cir. 2000), a corporate CEO who signs a company's filing with the Commission adopts the statements made in the filing as his own.

The Commission's position is consistent with Central Bank. In Central Bank, the Supreme Court, as noted supra, did two things: it both (1) held that there is no private cause of action for aiding and abetting under Rule 10b-5 but only for primary violations and (2) stated that a plaintiff would have a private cause of action against a secondary actor for primarily violating the Rule when the secondary actor was a primary violator, i.e., had, among other things, made a false or misleading statement. Thus, the Supreme Court was concerned both to exclude liability where a person's responsibility for a false or misleading statement did not rise to the level of a primary violation and to make clear that if a person's responsibility did rise to that level, then the person would be liable, even though he might not have been the principal actor in the fraudulent activity.

A test that imposes primary liability where a person creates a false or misleading statement reflects both of the Supreme Court's Central Bank concerns. Such a person is, with regard to that statement, not just an aider and abettor: he is responsible for the statement's coming into being. As such, the person, under the Central Bank conclusion regarding liability for secondary actors, should be held primarily liable.

A person who created a false or misleading statement would be primarily liable without regard to whether he acted alone or with others. As the Supreme Court noted in Central Bank, "[i]n any complex securities fraud . . . there are likely to be multiple violators." 511 U.S. at 191. He would also be primarily liable regardless of whether he initiated the false or misleading statement, i.e., whether the idea for the misstatement was his own or came from someone else. However, a person who prepared a truthful and complete portion of a document would not be liable as a primary violator if there were false or misleading statements, prepared by other people, in other portions of the document, unless, of course, the person was subject to a duty to speak. [3]

Courts have endorsed the approach the Commission urges here. In Carley Capital Group v. Deloitte & Touche, LLP, 27 F. Supp. 2d 1324, 1334 (N.D. Ga. 1998), a district judge in the Northern District of Georgia adopted the Commission's

---

[3] The Commission first expressed its view that a person who creates a false or misleading statement is a primary violator in a 1998 amicus curiae brief filed in Klein v. Boyd, Nos. 97-1143, 97-1261 (3d Cir.) (that case was settled and did not result in a decision.) The Commission also expressed this view as amicus curiae in In re Enron Corp. Securities, Derivative & ERISA Litigation, 235 F. Supp. 2d 549 (S.D. Tex. 2002). The Commission reiterated its position in a 2005 adjudicatory decision. Robert W. Armstrong, Exchange Act Release No. 51920, 2005 SEC LEXIS 1497 (June 24, 2005).

position. In In re Enron Corp. Securities, Derivative & ERISA Litigation, 235 F. Supp. 2d 549, 585-90 (S.D. Tex. 2002), where, as noted supra, p. 9 n. 3, the Commission made an amicus filing, a district court also followed the Commission's approach, stating that the approach was "reasonable" and "balanced in its concern for protection for victimized investors as well as for meritlessly harassed defendants." See also SEC v. Collins & Aikman Corp., 524 F. Supp. 2d 477, 494 (S.D.N.Y. 2007)(defendant was a primary violator where his conduct "was an essential part of creating [] deceptive financial statements.")

Some courts have stated that a defendant is a primary violator where he "caused" a false or misleading statement to be made – an approach consistent with the approach we urge. The Tenth Circuit has used this term, as have district judges in the Southern District of New York. SEC v. Wolfson, 539 F.3d 1249, 1261 (10th Cir. 2008); SEC v. Power, 525 F. Supp. 2d 415, 420 (S.D.N.Y. 2007) (a defendant could be a primary violator where he "in effect caused the [misrepresentation] to be made"); SEC v. Collins & Aikman Corp., supra, 524 F. Supp. 2d at 490 (same); SEC v. KPMG LLP, 412 F. Supp. 2d 349, 375-76 (S.D.N.Y. 2006) (same). A person causes a false or misleading statement when, for instance, he gives false information to another person who then prepares a false or misleading statement based on that information. A person would arguably not cause a misstatement

where he merely gave advice to another person regarding what was required to be disclosed and then that person made an independent choice to follow the advice.

II. ALTHOUGH PUBLIC ATTRIBUTION OF A FALSE OR MISLEADING STATEMENT TO A PERSON IS ONE MEANS BY WHICH THE PERSON CAN BE A PRIMARY VIOLATOR OF RULE 10b-5, IT IS NOT THE EXCLUSIVE MEANS; ATTRIBUTION IS NOT A REQUIRED ELEMENT OF A PRIMARY VIOLATION.

The district court stated, quoting this Court's decision in Lattanzio (which in turn cited this Court's Wright decision), that "[t]o rise to the level of a primary violation, the secondary actor must not only make a material misstatement or omission, but 'the misrepresentation must be attributed to the specific actor at the time of public dissemination' . . . so as not to undermine the element of reliance required for 10(b) liability." 609 F. Supp. 2d at 312. We believe, to the contrary, that this Court's Lattanzio and Wright decisions should be read as recognizing that attribution is one means by which a person can create a false or misleading statement and thus be a primary violator, though not necessarily the exclusive means.

1. This Court's Lattanzio and Wright Decisions Do Not Require Public Attribution In All Instances.

In both Lattanzio, cited by the district court, and Wright, on which Lattanzio was based, the defendants in question were accounting firms. Ordinarily, if an

accounting firm is held liable as a primary violator, it is because the firm, through its signed opinion, associated itself with a company's audited financial statements. In Wright and Lattanzio, the defendant accounting firms had not signed any opinions; the companies' financial statements had not been audited. At issue were alleged inaccuracies in unaudited financial statements. The accounting firms had neither prepared the financial statements, signed opinions as to the accuracy of the financial statements, nor in any other way associated themselves with the financial statements. The Wright complaint alleged only that the defendant accounting firm advised a company as to the materiality of certain accounting matters and then reviewed the company's unaudited statements that contained misrepresentations. 152 F.3d at 171-72. The Lattanzio complaint alleged only that the defendant accounting firm in that case had reviewed a company's unaudited statements that likewise contained misrepresentations. 476 F.3d at 151-55.

In view of the limited roles of the defendant accounting firms in Wright and Lattanzio, the plaintiffs' claims that the firms were primary violators were not allowed to proceed because the complaints did not allege that false or misleading statements had been attributed to the firms. This Court's remarks as to the absence of attribution should be understood as pointing out the absence of one means – the typical means with regard to accounting firms – by which a defendant engages in

communicative behavior and therefore can be a primary violator. The remarks should not be understood as establishing a requirement that there be attribution in all cases alleging primary liability.

That this Court does not view attribution as a required element of a primary liability claim is reflected in two cases decided after Wright (but before Lattanzio). In these cases, involving defendants who were corporate officials rather than outside professionals such as lawyers or accountants, the Court did not require attribution before a person could be held liable as a primary violator. In In re Scholastic Corp. Securities Litigation, 252 F.3d 63, 75 (2d Cir. 2001), the Court rejected the argument of a corporate official that he could not be primarily liable when it had not been alleged that the misrepresentations in question had been "properly made attributable to him." The Court stated that the complaint alleged that the defendant "was primarily responsible for [the company's] communications with investors and industry analysts . . . and was involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements issued [by the company]." These allegations, the Court concluded, were sufficient to state a Section 10(b) claim against the defendant.

In Novak v. Kasaks, 216 F.3d 300, 314 (2d Cir. 2000), this Court rejected the argument that officials of a company could not be primarily liable for allegedly false

and misleading statements about the company made by securities analysts because the statements were not "attributed" to the officials. The Court stated that corporate officials could be primarily liable for misstatements made in analysts' reports not only where the officials allowed attribution by adopting or placing their 'imprimatur' on the reports but also where the officials, without attribution, "'intentionally fostered a mistaken belief concerning a material fact' that was incorporated into reports." Id. (quoting Elkind v. Ligget & Myers, Inc., 635 F.2d 156, 163-64 (2d Cir. 1980)).

2. An Attribution Requirement Would Unjustifiably Allow Defendants To Escape Liability.

An attribution requirement, by allowing a person who created a false or misleading statement to escape primary liability because that person acted anonymously or in another person's name, would shield significant misconduct from liability. Indeed, a person who acted deliberately to avoid attribution of a false or misleading statement, either by arranging for the statement to be issued in someone else's name, or by acting anonymously, could shield himself from liability. Thus, an attribution requirement could provide a defense for the person having the greatest culpability for a deception.

This concern is not merely theoretical. Wrongdoers in fact do distribute false and misleading statements that have a false name or no one's name attached to them, as when a person participating in a "pump and dump" scheme utilizes the Internet to spread falsely optimistic statements that may be attributed to no one in particular. The Internet in fact has greatly facilitated this type of misconduct, as much of the communication on the Internet, and in particular in "chatrooms" devoted to gossip about investments, is anonymous. Even when a person disseminating information on the Internet claims a certain identity, the recipients of the information cannot be sure that the person is who that person claims to be.

One claimed benefit of an attribution requirement is that it allows a "bright-line" approach to deciding cases because ordinarily attribution can be objectively determined without difficulty. Any such benefit, however, is out-weighed, in our view, by the fact that an attribution requirement would allow significant misconduct to escape liability. Moreover, defendants are protected by the scienter requirement of Section 10(b), coupled with the heightened scienter pleading provisions of the Private Securities Litigation Reform Act, which mandate that private plaintiffs plead "with particularity facts giving rise to a strong inference that the defendant acted with [scienter]." Securities Exchange Act Section 21D(b)(2), 15 U.S.C. 78u-4(b)(2). These scienter provisions provide significant protection against meritless

private actions. See Wharf (Holdings) Ltd. v. United International Holdings, Inc., 532 U.S. 588, 597 (2001) (stating that the "stricter pleading requirements" of the Private Securities Litigation Reform Act lessen the likelihood of meritless private federal securities claims).

3. The Reliance Element in Private Actions Does Not Give Rise to an Attribution Requirement.

The district court expressed a concern that not requiring attribution before a person could be liable as a primary violator would "undermine the element of reliance required for 10(b) liability." 609 F. Supp. 2d at 312. The reliance element, however, does not support an attribution requirement. The element can be satisfied without attribution of the false or misleading statement to the defendant. Investors may and do rely on statements even when they are unaware of the true identity of the authors of the statements and even when they do not know of any authors associated with the statements. They rely on the statements themselves, without regard to the authors. This reliance, by itself, satisfies the reliance element.

For example, as noted supra, pp. 14-15, investors trade on the basis of "tips" that they read in Internet chatrooms devoted to the discussion of investments. Investors who frequent such chatrooms cannot be sure who is behind the statements made in them, because of the anonymous nature of communication on the Internet.

Even when a person posting a statement on the Internet claims to have a certain identity, readers of the statement cannot be sure that the person is telling the truth.

To take another example, investors have long traded on the basis of rumors in the marketplace when they could not be sure of the source of the rumors. An attribution requirement would mean that no one can be held liable in private actions for anonymously circulating false and misleading statements.

Of course, the degree of credence an investor places in a statement is sometimes affected by the identity of the perceived speaker. But the fact that investors may rely more heavily on statements when they believe the speakers to be credible does not mean that investors cannot and do not rely on anonymous statements.

4. The Language Used in Central Bank Does Not Give Rise to an Attribution Requirement.

The word "make" as used in Central Bank does not give rise to a requirement that only a person who has been identified to investors can be deemed to have made a statement. A person can "make" a false or misleading statement anonymously, or indirectly through someone else; "make" does not necessarily imply that the statement when made was identified with the person who made it. Furthermore, not only is an attribution requirement not mandated by the "make" language of Central

Bank, but any such requirement is inconsistent with the provision in Section 10(b) and Rule 10b-5 that declares it unlawful to engaged in fraud "directly or indirectly." A typical example of an indirect violator is one who acts behind the scenes without attribution.

III. ANY ATTRIBUTION REQUIREMENT SHOULD NOT APPLY TO GOVERNMENT LAW ENFORCEMENT ACTIONS.

Even if this Court were to require private plaintiffs to establish attribution, any such requirement should not apply to government law enforcement actions, either civil or criminal. The Tenth Circuit has considered this issue and held that, because the attribution requirement in Wright and Lattanzio is based on the element of reliance in private damages actions, and because the Commission need not show reliance in the law enforcement actions it brings, [4] attribution is not a requirement in a Commission civil law enforcement action. See SEC v. Wolfson, 539 F.3d 1249, 1257-62 (10th Cir. 2008). [5]

---

[4] Geman v. SEC, 334 F.3d 1183, 1191 (10th Cir. 2003); SEC v. Rana Research, Inc., 8 F.3d 1358, 1363 & n.4 (9th Cir. 1993); SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985).

[5] See also SEC v. Tambone, 550 F.3d 106, 138, 139 (1st Cir. 2008) (holding, in a panel decision that has been vacated because the First Circuit has granted en banc review, that there is no attribution requirement in Commission actions).

(continued...)

The district court cited a recent decision of this Court in a criminal case, United States v. Finnerty, supra, in support of the proposition that attribution is required before a secondary actor can be liable as a primary violator, thus appearing to read the decision as requiring attribution even in a government law enforcement case. 609 F. Supp. 2d at 312. This is an incorrect reading of Finnerty. Although Finnerty did cite Wright and refer to attribution, 533 F.3d at 150, it did not hold that there is an attribution requirement in government law enforcement cases. The Court's decision in favor of the defendant in Finnerty was based not on lack of attribution but on the ground that there was no false or misleading statement.[6]

[5](...continued)

In SEC v. Lucent Technologies, Inc., 610 F. Supp. 2d 342 (D.N.J. 2009), a district court in an interlocutory ruling imposed an attribution requirement in a Commission enforcement action.

[6] In Finnerty, the government argued that the defendant, a specialist trader at the New York Stock Exchange, had engaged in non-verbal deceptive conduct by "interpositioning," or trading for his own account with customers who presented matching buy and sell orders rather than executing the customers' orders against each other. 533 F.3d at 148. The government argued that this conduct was deceptive because it was prohibited by the rules of the New York Stock Exchange and at least some of the defendant's customers would have known of these rules and expected that the defendant would follow them. 533 F.3d at 149. This putative customer understanding, however, the Court ruled, did not establish a basis for primary liability unless the "understanding was based on a statement or conduct by" the defendant. 533 F.3d at 150. Since "[t]he government [had] identified no way in which [the defendant] communicated

(continued...)

Thus, the issue whether any deception had been attributed to the defendant did not even arise, and this Court had no occasion to consider whether any attribution requirement applied in a government law enforcement case.

CONCLUSION

For the foregoing reasons, the Court should rule in accordance with the views expressed in this brief.

Respectfully submitted,

DAVID M. BECKER
General Counsel

JACOB H. STILLMAN
Solicitor

s/Christopher Paik
CHRISTOPHER PAIK
Special Counsel

Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549
(202) 551-5187 (Paik)

August 2009

[6](...continued)
anything to his customers," 533 F.3d at 148, the defendant could not be primarily liable.

__CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I, Christopher Paik, hereby certify that the Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Position of Plaintiff-Appellants on the Issue Addressed and in Support of Neither Affirmance Nor Reversal, in Mazur v. Refco, No. 09-1619, complies with the type-volume limitations set forth in F.R.A.P. 32(a)(7). The Brief, excluding tables and certificates, contains approximately 5680 words, as counted by the word processing program WordPerfect 11.

s/Christopher Paik

________CERTIFICATE OF COMPLIANCE WITH ELECTRONIC FILING REQUIREMENTS

I, Christopher Paik, hereby certify that the electronic copy of the Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Position of Plaintiff-Appellants on the Issue Addressed and in Support of Neither Affirmance Nor Reversal in Mazur v. Refco, No. 09-1619, is an exact copy of the written document filed with the Clerk, has been scanned for viruses with VirusScan Enterprise + Anti-Spyware Module 8.0.0, updated August 5, 2007, and is free of viruses.

_____s/Christopher Paik

CERTIFICATE OF SERVICE

_____I, Christopher Paik, hereby declare that on August 6, 2009 I caused to be served by Federal Express copies of the Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Position of Plaintiff-Appellants on the Issue Addressed and in Support of Neither Affirmance Nor Reversal in Mazur v. Refco, No. 09-1619, on the following counsel for plaintiffs and defendants:

Stuart M. Grant
Grant & Eisenhower P.A.
485 Lexington Avenue, 20th Floor
New York, New York 10017

Megan M. McIntyre
1201 North Market Street
Wilmington, Delaware 19801

John P. Coffey
Bernstein Litowitz Berger & Grossman LLP
1285 Avenue of the Americas
New York, New York 10019

John Villa
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005

William Schwartz
Cooley Godward Kronish LLP
1114 Avenue of the Americas
New York, New York 10036

I also declare that on August 6, 2009 I sent an electronic copy of the Brief to the e-mail addresses for the above.

s/Christopher Paik