Index No. 22-123

In the
United States Supreme Court

FORDHAM PUBLIC EMPLOYEES INVESTMENT FUND

Petitioner,

- against –

KATIE GORDON

Respondent,

ON APPEAL FROM THE
Circuit Court of Fordham

BRIEF FOR PETITIONER

COUNSEL FOR THE PETITIONER
TEAM 4
DATED FEBRUARY 15, 2022

QUESTIONS PRESENTED

1. Whether an individual who neither "makes" nor distributes false or misleading statements, but rather, instructs an employee to distribute them to investors, is subject to primary liability as a "disseminator" under Rule 10b-5(a) and (c) of the Securities Exchange Act.

2. Whether plaintiffs in "mixed" cases that allege both omissions and affirmative misrepresentations are entitled to a rebuttable presumption of reliance under *Affiliated Ute*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

CIRCUIT COURT CASES

STATUTES

STATEMENT OF THE CASE

Grace Underwood and Danielle Scott, both recent graduates of business school, decided to combine their wealth and make a major investment together. R. at 1. Underwood and Scott pooled in their capital and searched for an underperforming small or mid-sized manufacturing company. R. at 2. Although their interests differed, Underwood and Scott found a large manufacturer named McGrath, Inc., who planned to sell their sophisticated machine tool business. R. at 2. Underwood and Scott hired a business consulting firm, Forsyth Financial ("Forsyth") to examine the company. R. at 3.

Further, the two hired an engineering firm, MMC Inc. ("MMD") to examine the company's property, equipment, and plant. R. at 3. Forsyth's report relayed the company's capability to substantially grow in its field. R. at 3. MMD's report stated that McGrath's physical assets were satisfactory for their intended use; however, in the same report the engineering company also noted a deficiency in one of the composites used by their largest selling machine. R. at 3. MMD's report stated that this composite may lead to the development of microscopic cracks over time and under stress. R. at 3. However, this was overlooked or deemed inconsequential in the final review by Miss Underwood and Scott. R. at 3.

In January of 2018, Miss Underwood and Scott closed on the company and renamed the new entity Gemstar. R. at 3. The manager in charge of running the day-to-day was Maya Neuberger and her title was Vice President of Operations. Miss Underwood would serve as Gemstar's Chief Executive Officer

and Miss Scott would serve as the President. R. at 3. Although both Underwood and Scott shared responsibility for making material executive decisions, it was Miss Neuberger who managed the day-to-day. R. at 3.

Over the course of three years, Gemstar became a substantial presence as a sophisticated machine tool company. R. at 4. Gemstar's most popular product was the SwiftMax, a machine tool used to produce a fastener. R. at 4. This fastener was used in numerous applications, including being used in structural applications on cargo jet aircrafts. R. at 4.

After running Gemstar for three years, both Underwood and Scott wanted an exit strategy to leave the company. R. at 4. Miss Underwood reached out to a friend from business school who was a Junior Managing Director at Carter Capital, Allison Ritter. R. at 4. Miss Underwood explained that both her and Danielle wanted to meet regarding a business liquidity matter. R. at 4. Following a meeting with all the women, Miss Ritter told the owners of Gemstar that Carter Capital would be interested in advising their transaction and wished to deep-dive the financial statements of Gemstar. R. at 4. Both Underwood and Scott agree to this and prepared to make their financial statements and auditors available for Carter Capital. R. at 4.

After reviewing financial statements and their financial conditions, Miss Ritter introduced a financial possibility where the two owners could sell 80% of Gemstar in a private placement while retaining 20% in the form of super voting shares. R. at 4. Therefore, ensuring their control of the business. While Underwood and Scott were not keen on keeping positions within the company,

they ultimately decided to go with Miss Ritters plan. R. at 5. This process extended over a period of several months. R. at 5.

Katie Gordon, as Gemstar's Vice President of Investor Relations, was given the responsibility to organize the process. R. at 5. As Vice President of Investor Relations, Miss Gordon coordinated with attorneys, financial advisors, auditors, engineering firms, and other experts ("the Experts"). R. at 5. These Experts were compiling the Private Placement Memorandum ("the Memo"). R. at 5. This Memo would be used to market the common stock and Miss Gordon's primary responsibility was to manage the flow of information to Carter Capital and all other potential investors. R. at 5. In May of 2021, the principal engineering firm for Gemstar, Keane & Company ("Keane"), delivered their report ("the Report") on the structural integrity of the Company's assets and products directly to Miss Gordon. R. at 5. Within the Report contained boilerplate information regarding the firm's practices and their procedures. R. at 5. In addition, the Report listed Gemstar's facilities, capital machinery, all the products, and identified files containing material deficiencies. R. at 5.

As part of her duties as Vice President, Miss Gordon reviewed the Report prior to it being delivered to Gemstar's experts. R. at 5. Included in the Report was a memorandum ("Trade Letter") from a now departed junior structural engineer suggesting that Gemstar's most in demand product, the Swiftmax, used a composite that could over time become defective. R. at 6. This composite, the defective composite, could develop microscopic cracks produced by stress under extreme conditions, such as an aircraft takeoff. R. at 6. This

Trade Letter also included an article supporting the same hypothesis. R. at 6. Katie Gordon read all this information and decided to not take any action until she spoke with Miss Underwood and Miss Scott. R. at 6. The three women met, and Miss Gordon showed them the memo. R. at 6. Underwood and Scott could not agree on whether the auditors should review the Trade Letter. R. at 6. Underwood aggressively stated that it would be a waste of time given that the Trade Letter was from three years prior. R. at 6. After their meeting the women decided to remove the Trade Letter from the report completely. R. at 6. Miss Gordon herself removed the memorandum from the file then proceeded to deliver the Report to the Gemstar experts. R. at 6.

In August of 2021, the Memo was complete and there was no reference to the microscopic cracks in the SwiftMax composite. R. at 6. Instead, the report stated there were no material defects in the products sold to customers and no undisclosed material contingent liabilities relating to the products, which were required to be noted in the financial statements. R. at 6. The Memo also stated that Gemstar‘s property, plant and equipment were in reasonable condition for their intended use and made no reference to “defective composite.” R. at 6. Miss Gordon then directed one of her associates to distribute the Memo to 26 of the country’s largest non-bank financial institutions. R. at 6. The cover letter of the Memo did not invite investors to inquire about the contents nor did it identify Katie Gordon as the Vice President of Investor Relations. R. at 6. Following the Memo’s disbursement, in October 2021 the private placement was complete and both owners of Gemstar were made incredibly wealthy. R. at

7. The common shares of Gemstar were sold to sixteen investors at $27 per share. R. at 7. One of those investors was the Fordham Public Employees Investment Fund ("the Fund"). R. at 7. The Fund purchased 3,000,000 shares. R. at 7.

Following the Fund's investment in 3,000,000 shares, a Seaboard Airlines wide bodied cargo jet, routinely serviced by Silberfarb Solutions, taxied on a runway at Kennedy International Airport in New York City in December 2021. R. at 7. Twenty seconds after the pilot started to accelerate, an explosion occurred on the left side of the plane. R. at 7. Thankfully for the pilot's experience, the pilot was able to maintain control and bring the plane to a stop 200 yards from the end of the runway. R. at 7. Following the incident, the FAA conducted a preliminary investigation. R at 7. The FAA determined that the explosion occurred due to an engine becoming dislodged from the airplane's left wing. R. at 7. This occurred because the two fasteners were unable to support the engine's weight. R. at 7. Silberfarb Solutions had manufactured the fasteners using Gemstar's Swiftmax. R. at 7. Investigations into the issue concluded that the fasteners had developed microscopic fissures over time due to the pressure generated by takeoffs. R. at 7. A month after the FAA released their findings, the Fund sold its entire position to a special situation financial participant at only $4 per share. The loss incurred was $68,000,000. R. at 7.

Due to the severe losses the Fund incurred as a result of Gemstar's stock prices declining drastically, the Fund brought an action in the United States District Court for the District of Fordham in March of 2022. R. at 8. The Fund

sought $68 million dollars in compensatory damages from Gemstar and all three executives who were involved with the purchase of the common stock in reliance on allegedly false and misleading statements and material omissions in the Memo.

The District Court for the District of Fordham had original jurisdiction over the matter where they found that Miss Gordon was subject to primary liability under Rule 10b-5 and that the Fund was entitled to a rebuttable presumption of reliance under the *Affiliated Ute* principle. Miss Gordon appealed to the Circuit Court of Fordham where they reaffirmed the 10b-5 holding and reversed the finding on the presumption of reliance standard. The Fund now appeals the decision of the Circuit Court and received certiorari from the Supreme Court.

SUMMARY OF THE ARGUMENT

Katie Gordon should be held primarily liable as a "disseminator" of the statements from the Memo through Rule 10b-5(a) and (c) of the Securities Exchange Act. Although Miss Gordon was not a "maker" of the false and misleading statements or material omissions, she was responsible for the dissemination of the Memo to the investors. *Lorenzo v. SEC* 139 S. Ct. 1094, 1101 (2019). This Court has long held that Securities Law embodies a "flexible" principle and is adaptable to meet the many variable fraudulent schemes of individuals. *SEC. v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946). Further, this Court has held the dissemination of false or misleading statements falls within

the scope of 10b5-(a) and (c) when the individual has the intent to defraud. *Lorenzo v. SEC* 139 S. Ct. 1094, 1101 (2019). As the Vice-President of Investor Relations, Miss Gordon was responsible for delivering the Report to Gemstar's experts and thus disseminated the Memo to the investors, including the Fund. R. at 15. Prior to disseminating the Memo, Miss Gordon was aware of the defect composite and discussed it with Miss Underwood and Miss Scott. R. at 14. Miss Gordon's conduct falls within the scope of Rule 10b-5 (a) as she "employed" a "device, scheme, and artifice to defraud" within the expansive language the rule. *Lorenzo v. SEC* 139 S. Ct. 1094, 1101 (2019). In addition, as the primary individual responsible for the dissemination of the Memo to investors, Miss Gordon acted with "fraud or deceit" as needed in subsection (c) of the Rule. *Id.* The dissemination of the Memo was central to show that Katie may be found primarily liable under Rule 10b-5(a) and (c). R. at 17.

Additionally, there is rebuttable presumption of reliance under *Affiliated Ute* because this case primarily alleges omissions rather than affirmative misrepresentations. Rule 10b-5(b) makes clear that there must be either a false statement or an omission of material fact. This is because the Court held in *Affiliated Ute* that it would be impossible or overly burdensome for a plaintiff to prove reliance on misrepresentation; therefore, the presumption of reliance is necessary. Furthermore, defendants who engage in schemes and conceal pertinent information justifies the application of *Affiliated Ute. Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 1543 (1972). Mixed allegations of misrepresentation and omissions must be primarily omission to have a

claim; yet an omission cannot arise from affirmative misrepresentations. I*n re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1208 (9th Cir. 2021); *Binder v. Gillespie*, 184 F. 3d 1059 (9th Cir. 1999). Miss Gordon did not compile or compose the Memo with misleading statements, if she had personally written the Memo, it may be construed as an affirmative misstatement. However, the author of the memo was "Keane and Company" and Miss Gordon's failure to give notice to the investors of her knowledge of the defects gives rise to a majority omissions case. *Affiliated Ute* also makes clear with a "mixed allegation" of omissions and affirmative misrepresentations the claim will still fall under Rule 10b-5. This is because Miss Gordon was intentionally deceptive by devising a plan ensuring the investors, including the Fund, would not be made aware of the defects. By scheming with the two Gemstar owners to deceive potential investors, Miss Gordon's deceptive behavior falls within the scope of the rule. All of Miss Gordon's failures to act over the course of three months were because of intent to keep the deception and scheme continuing. There are primarily omissions in this case and not affirmative misrepresentations.

Further, Katie Gordon has a duty to disclose the part defects and therefore, *Affiliated Ute* applies. Rebuttable presumption of reliance is present when there is material information withheld by an individual who had a duty to disclose the information. *Affiliated Ute Citizens of Utah,* 406 U.S. at 154. As Vice President of Investor Relations Miss Gordon owed the Fund a duty to disclose the information regarding the defective composite. Miss Gordon is the

only individual responsible for the contact and coordination of investors. R. at 5. Therefore, she has created a relationship with the investors, and they trust the information or lack thereof that she provides to them. Notice about the defective products would have influenced whether the Fund purchased shares in the company. However, even if the knowledge of the defects did not impact the Fund's decision, the Fund as well as any potential investor, had the right to know about these issues prior to investment. Miss Gordons omissions were directed at the investors in her facilitation of the memo. Further, this Court has recognized how impossible and overly burdensome it is to prove reliance on a misrepresentation. In the circumstances here, the Fund has no way of proving they relied on the misstatements in the memo in the purchasing of the stocks. Since Miss Gordon was not identified in the memo nor provide any information to follow up with questions, it would be impossible to prove. R. at 29. Since Miss Gordon's main action was the omissions of the defect and because of her duty to fully disclose these defects with potential investors, the rebuttable presumption of reliance must apply.

ARGUMENT

I. THE APPELLEE IS PRIMARILY LIABLE UNDER RULE 10B-5(A) AND (C) FOR SERVING AS THE "DISSEMINATOR" OF THE ALLEGEDLY FALSE AND MISLEADING STATEMENTS OR MATERIAL OMISSIONS.

The United States Supreme Court should reaffirm in part the decision of the District Court for the District of Fordham. The District Court properly held that, although Katie Gordon was not a "maker" of the false and misleading statements or material omissions, she can be held primarily liable as the

"disseminator" of the statements through Rule 10b-5(a) and (c) of the Securities Exchange Act. Rule 10b-5 states,

> "[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) to employ any device, scheme or artifice to defraud, (b) to 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, or (c) to engage in any act, practice, or court of business which operates or would operate as a fraud or deceit upon any person." 17 CFR §240.10b-5 (2018).

This Court in *SEC v. M.J. Howey Co.* stated that Securities Laws embody "a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *SEC. v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946). On multiple subsequent occasions, this Court has stated that "the 1934 Act and its companion legislative enactments embrace a fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Capital Gains Research Bureau Inc.*, 375 U.S. 180, 186 (1963).

In the 2019 case *Lorenzo v. SEC,* this Court took the views outlined in *W.J. Howey Co.*, and *Capital Gains* and applied them to Rule 10b-5. In *Lorenzo*, Lorenzo's firm was hired by Waste2Energy to sell to investors $15 million worth of debentures. *Lorenzo v. SEC* 139 S. Ct. 1094, 1099 (2019). Lorenzo was told, and it was publicly disclosed, that Waste2Energy's assets amounted to

$370,552. *Id.* Shortly after, Lorenzo was instructed by his boss, who supplied the content and "approved" the messages, to send two e-mails to prospective investors. These emails claimed they had $10 million in "confirmed assets" instead of the true amount. *Id.* This court held that even though Lorenzo did not "make" the statements and would thus not be held liable through Rule 10b-5(b), "dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5." *Id.* at 1101. This Court went on to say that through Rule 10b-5's expansive language, "Lorenzo 'employed' a 'device,' 'scheme,' and 'artifice to defraud' within the meaning of subsection (a) of the Rule." *Id.* Additionally, "he 'engaged in an act, practice, or course of business' that 'operated . . . as fraud or deceit' under subsection (c) of the Rule. *Id.* This Court affirmed the Court of Appeals decision to sanction Lorenzo. *Id.* at 1105.

In 2022, the United States Court of Appeals for the Second Circuit was "called upon to determine whether, post-*Lorenzo*, misstatements and omissions alone can form the basis for scheme liability." *SEC v. Rio Tinto,* 41 f.4th 47, 53 (2022). In *Rio Tinto, the* court looked back on the Lorenzo decision and stated that "misstatements or omissions were not the sole basis for scheme liability. The dissemination of those misstatements was key." Id. Thus, scheme liability through 10b-5(a) was proper in *Lorenzo*.

Similar to the facts of *Lorenzo,* as Vice-President of Investor Relations, the Respondent, Miss Gordon, was responsible for delivering the Report to

Gemstar's experts and disseminating the Memo to the Fund. R. at 15. Additionally, just as *Lorenzo*'s boss supplied the content and "approved the message", Miss Gordon's bosses Miss Underwood and Miss Scott instructed her to remove the Trade Letter from the Report and distribute it. R. at 6. Even though Miss Underwood and Miss Scott had "ultimate authority" over the Report and Memo making Miss Gordon not the primary violator, the Circuit Court agreed with the District Court that, per *Lorenzo*, "Katie's conduct plainly falls within Rule 10b-5's "expansive language." R. at 14. By delivering the Report to Gemstar's experts, Miss Gordon participated in a "plan to conceal the risk of microscopic cracks in Gemstar's composite. *Id.* This Court here should follow the reasoning of the lower courts and the precedent set in *Lorenzo* that even though Miss Gordon did not "make" the report, she "employed" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of Rule 10b-5 of the Securities Exchange Act.

Furthermore, as discussed in *Rio Tinto,* "misstatements and omissions alone are not enough" to give rise to liability under (a) and (c). *Rio Tinto* at 53. Miss Gordon was primarily responsible for the dissemination of the Memo to investors. Her associate merely acted as a "mailroom clerk" when she sent the Memo to potential investors at Katie's instructions. R. at 17. The lower court made clear that, according to *Lorenzo*, since Miss Gordon was responsible for the dissemination of the Memo to investors, she "engaged in an act, practice or course of business" that "operated . . . as fraud or deceit" under subsection (c) of the Rule. *Lorenzo* at 1101. Dissemination of the Memo was

key to show that Miss Gordon was more than "tangentially involved" and gave rise to scheme liability under Rule 10b-5(a) and (c). R. at 17.

Therefore, Miss Gordon "employed" a "device," "scheme," and "artifice to defraud" and is primarily responsible for disseminating the Memo to all potential investors, and the Fund. Miss Gordon's action give rise to scheme liability under Rule 10b-5(a) and (c) of the Securities Exchange Act. Accordingly, this Court should reaffirm the lower courts finding the Respondent, Miss Gordon, can be held primarily liable under Rule 10b-5(a) and (c) of the Securities Exchange Act

II. THERE IS A REBUTTABLE PRESUMPTION OF RELIANCE UNDER *AFFILIATED UTE* BECAUSE IT PRIMARILY ALLEGES OMISSIONS.

If a defendant is deceptive in every move as part of a secret plot, the primary allegation is omission rather than affirmative misstatements if the party had a duty to disclose that information which provides a rebuttable presumption of reliance. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972); *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1199 (9th Cir. 2021).

A. The Fund primarily alleges omissions rather than affirmative misrepresentations.

Defendants cannot omit relevant facts that would induce a different decision on the purchase of stocks. *Affiliated Ute* urged that "the defendants

may not stand mute while they facilitate the mixed-bloods' sales to those seeking to profit in the non-Indian market the defendants had developed and encouraged and with which they were fully familiar." *Id.* at 153 (where the bank sold the shares in a secondary market at higher prices to non-tribe members without informing the "mixed blood" members that their shares were being sold at a higher price).

The Supreme Court held that it is impossible or overly burdensome for a plaintiff to prove that they relied on the misrepresentations and thus, the presumption of reliance is a necessary policy. Otherwise, as the Court notes, plaintiffs who were wronged by a defendant for misrepresentations and omissions would not be able to recover. In its reasoning, the Court specified that Rule 10b-5(b) makes clear that it is either a false statement *or* an omission of material fact; therefore, the section is not restrictive to one or the other or both. Furthermore, the Court acknowledged that, "the defendants devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell." *Id.* at 153. Defendants engaging in schemes and concealing pertinent information justifies an application of *Affiliated Ute*.

If a plaintiff, however, alleges that they relied upon only misrepresentations that then bring omissions, the *Affiliated Ute* principle does not apply. *In re Volkswagen,* 2 F. 4th at 1206. The Puerto Rico Government Employees and Judiciary Retirement Systems Administration fund brought a

securities-fraud class action suit against Volkswagen for losses incurred relating to the bonds they purchased. Volkswagen secretly installed "defeat devices", devices that mask emissions, onto their cars. *Id.* at 1202. In its reasoning, the Court specified that:

> "The plaintiff also alleges more than nine pages of affirmative misrepresentations that were made by Volkswagen *and relied upon* by Plaintiff and its investment advisor. These affirmative misrepresentations, which Plaintiff alleges it relied upon when purchasing the bonds, push this case outside *Affiliated Ute*'s narrow presumption." *Id.* at 1206.

Mixed allegations need to be primarily omission based in order to have a claim. An omission cannot stem from affirmative misrepresentations. *In re Volkswagen* made clear that:

> "There is no question that Plaintiff alleges an omission regarding Volkswagen's use of defeat devices, but that omission is simply the inverse of the affirmative misrepresentations described above: Volkswagen made certain affirmative statements about environmental compliance and financial liabilities and those statements were materially false or misleading." *Id.* at 1208.

In re Volkswagen changes the view in *Affiliated Ute* by holding that "mixed" allegations of omission and misrepresentations do not fall under *Affiliated Ute*. The Court in *In re Volkswagen* held that "while fraud necessarily involves concealing the truth, we cannot allow such concealment to transform affirmative misstatements into implied omissions." *Id.* at 1208-1209. If there is a mixed allegation, the allegation must be primarily omissions based. *Binder v. Gillespie*, 184 F. 3d 1059 (9th Cir. 1999) (finding that *Affiliated Ute* applies only to cases that primarily allege omissions, not affirmative misrepresentations).

It is unfeasible to see that Miss Gordon made an affirmative misrepresentation. An affirmative misstatement is speaking or writing something that is not true. Miss Gordon did not compile or compose the memo with the misleading statements, all she did was become a delivery person and ask a coworker to distribute it. If Miss Gordon had personally written the memo, then it could be construed as an affirmative misstatement; however, "Keane and Company" engineering was the author of the memo and report and was the company that made the misstatements. Miss Gordons failure to give notice to potential investors with the knowledge of the defects gives rise to a majority omissions case.

Even if Miss Gordon made an affirmative misrepresentation, *Affiliated Ute* makes clear that a "mixed allegation" of omissions and affirmative misrepresentations still falls under Rule 10b-5. Miss Gordon was intentionally deceptive by devising a plan to make sure that future stockholders or buyers, including the Fund, would not be aware of the defects as was the case in *Affiliated Ute*. The Court relied heavily on the concept that the bank operated as a "fraud" upon the Tribe members by failing to disclose the fact that they were selling the share at a higher profit. The same concept applies here where Katie Gordon omitted the Trade letter. She specifically schemed with the two Gemstar owners in order to deceive future stockholders including the Fund.

Miss Gordon knew for three months, from May of 2021 until August of 2021, about the product defects and the Trade Letter before the memo was even sent out. R. at 6. She waited to say anything until she met with the two

owners, and still, she did nothing. R. at 6. Her actions "bothered her" and yet, she still did not do anything about it because she could "live with it". R. at 6. Every single day at work she did nothing. Every single time that Miss Gordon failed to do or say anything about the defects was an omission. She even omitted her name and title from the memo. R. at 6. Because of her omissions, a plane exploded on its left side and was only able to be saved by an experienced pilot. R. at 7. All these failures to act were intended to keep the deception and scheme going.

In the opinion of Circuit Judge Seo, concurring in part, and dissenting in part, Judge Seo correctly agrees that Miss Gordon committed a scheme in order to conceal the defects and the trade letter. He agrees that "her alleged conduct was deceptive and justifies application of the *Affiliated Ute* presumption." R. at 29.

In re Volkswagen argues that concealing the information about the defeat devices cannot transform the misstatements into implied omissions. That is not the case here. There are no "implied" omissions; it is a very blatant omission. Katie Gordon explicitly made the decision to remove the physical Trade Letter from the memo and also had a full conversation with her partners about excluding the Trade Letter. The few misstatements made within the memo do not imply that there is an omission; the omission occurred before the memo with the misstatements was even released. With this, the question is then whether the omission is the inverse of the misrepresentations. Rather, it is the opposite. The misrepresentations only stemmed from the primary omission.

The Circuit Courts make clear that presumption also does not apply where cases involve "earlier misrepresentations made more misleading by subsequent omissions [... or] half truths." *Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017). However, as stated prior, there was no earlier misrepresentation here. The first issue was the omission of the Trade Letter and lack of information on the defects. From there, the misrepresentations occurred because the omitted information was not there for Keane and Company to make correct statements. R. at 5-6.

Unlike *In re Volkswagen*, the Fund did not list an abundance of pages of misrepresentations like the nine pages that the plaintiff in that case had listed and explicitly stated she relied on. The fund alleges three specific bullet point statements of misrepresentations in the memo that was distributed but does not explicitly state they relied upon those statements as it is unclear if they had even read the statements prior to the purchase. Therefore, the primary allegation is the omission of the Trade Letter and information about the defects instead of the misleading statements.

Since the Fund alleges primarily omissions and not affirmative misrepresentations, we then turn to the question of whether Miss Gordon had a duty to disclose the deficiencies to the Fund.

B. The Respondent had a duty to disclose the part defects and thus, *Affiliated Ute* applies.

When it comes to requiring proof of reliance, the Supreme Court in *Affiliated Ute* held that "under the circumstances of this case, involving

primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* at 154.

The Court in *Affiliated Ute* held that a rebuttable presumption of reliance is present when material information is withheld by someone who had a duty to disclose it. *Id.* at 154. The question then becomes, as the Court noted, whether or not the defendants have a duty to disclose the information. In *Affiliated Ute*, "the individual defendants, in a distinct sense, were market makers, not only for their personal purchases constituting 8 1/3% of the sales, but for the other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers." *Id.* at 153.

In *Stoneridge Inv. Partners, LLC v. Sci-Atlanta*, 552 U.S. 148 (2008), the respondents arranged a deal with Charter to supply cable boxes and have Charter pay them an extra twenty dollars to then buy advertisements for Charter at the end of the year. This was a scheme to trick the auditor into thinking Charter was receiving more revenue than they actually were. The Court found that presumption did not apply because the defendants had no duty to disclose these secret transactions. The deceptive acts need to be specific to the petitioner and made by the respondent. In Stoneridge, the deceptive acts "which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance." *Id.* at 161. The Court furthers that "it

was Charter, not respondents, that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did." *Id.* at 161.

Circuit Judge Seo correctly agrees that Miss Gordon owed the Fund a duty to disclose the information about the defective product. This duty stems from a "special relationship of trust and confidence." R. at 29. Miss Gordon is the Vice President of *Investor Relations* which means that she is the sole contact person for these investors and has the responsibility to coordinate the information to the investors. R. at 5. She has then created a relationship where investors believe they can trust the information or lack of information she provides. Miss Gordon had a duty to inform these investors who relied on her information "particularly when the alternative risks lives, as it did in this case." R. at 29.

Similar to *Affiliated Ute*, facts about defective products would have affected whether or not the Fund purchased stock. Even if it did not, the Fund had a right to know about any issues with products before they invested money into it. Miss Gordon clearly felt the need to hide the information about the defect because it had the potential to affect the amount of investments Gemstar received.

Unlike *Stoneridge*, Miss Gordon is the Vice President of Investor Relations at Gemstar. She owed a duty to the investors as their main contact person to disclose any material deficiencies in their company or products. It is her job to make sure the investors are informed. R. at 5. The omissions were

directed specifically to the investors in the facilitation of the memo. Much of the reasoning for deciding that there was no duty to disclose in *Stoneridge* was that the misleading statements and omissions were made towards the auditor, not the public or investors. Here, the omissions were directly made to the stockholders.

Much of the reasoning in *Affiliate Ute* stemmed from the idea that it is impossible or overly burdensome to prove reliance on a misrepresentation. Here, there is no way for the Fund to prove that they relied on the misstatements in the memo in the purchasing of stocks other than alleging they did. In Circuit Court Judge Seo's dissenting opinion, he says that it would "likely be impossible for the fund to provide proof of reliance" because Miss Gordon was not identified in the memo nor did the memo provide information on how to follow up with questions about it. R. at 29. The dissent further states that the Fund had no way of knowing about the defective product or that Miss Gordon instructed an employee to distribute the memo. R. at 29. It would be unrealistic for the Fund to need to prove that they relied on the concealment of information by Miss Gordon.

Since Miss Gordon's main action was omission of the defects and she had a full duty to disclose these defects, the *Affiliated Ute* presumption of reliance applies. We ask you to reverse the decision by the Circuit Court and find that the *Affiliated Ute* presumption of reliance applies.

CONCLUSION

As a result, the Petitioner respectfully request that this Court reaffirm in part and reverse in part the decision of the Circuit Court of Fordham, and hold: (1) Miss Gordon is subject to primary liability pursuant to the Securities Exchange Act Rule 10b-5 since she is a "disseminator" by instructing her employee to distribute the statements; and (2) The Fund is entitled to a rebuttable presumption of reliance under *Affiliated Ute* because the Fund primarily alleges the omission of information that Miss Gordon had a duty to disclose.