Team No. P08

No. 22-123

---

IN THE

# SUPREME COURT OF THE UNITED STATES

---

FORDHAM PUBLIC EMPLOYEES INVESTMENT FUND,
*Petitioner,*

v.

KATIE GORDON, ET AL.,
*Respondent.*

---

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

---

BRIEF FOR PETITIONER

---

## QUESTIONS PRESENTED

I. Whether "disseminators" under Rule 10b-5(a) and (c) include an individual who neither "makes" nor distributes false or misleading statements to investors but instructs an employee to distribute the statements to investors, and where the purpose of the Securities Acts is to prevent any form of fraud and to promote full disclosure and investor confidence?

II. Whether the rebuttable presumption of reliance under *Affiliated Ute* applies when a plaintiff asserts "mixed" allegations involving both omissions and affirmative misrepresentations when this Court did not require solely omissions for the presumption to apply, where most courts characterize mixed cases instead of using a rigid rule, and where narrowly restricting the presumption would limit recoveries for fraud?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### UNITED STATES SUPREME COURT CASES

**FEDERAL CIRCUIT COURT CASES**

**STATUTORY PROVISIONS**



**REGULATIONS**

## OTHER AUTHORITIES

## STATUTORY AND REGULATORY PROVISIONS

This case involves alleged violations of Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and the Securities and Exchange Commission's ("SEC") promulgated Rule 10b-5. Section 10(b) of the 1934 Act makes it:

> [U]nlawful 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 . . . [to] use or employ in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 makes it unlawful: "(a) [t]o employ any device, scheme, or artifice to defraud . . . (c) [t]o engage in any act, practice, or course of business which operate or would operate as fraud or deceit . . . in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 b.

## STATEMENT OF THE CASE

### Statement of the Facts

After graduating from MBA programs, Grace Underwood and Danielle Scott decided not to pursue the typical MBA career track due to a generous $50,000,000 combined inheritance. R. at 1. Without any relevant post MBA work experience, they went into business together with the goal of reconstructing an underperforming business. R. at 2. After a three-year search, they settled on purchasing McGrath, Inc., a large manufacturing company, for $75,000,000. *Id.* To ensure the business was suitable for purchase, Grace and Danielle hired Forsyth Financial ("Forsyth"), a business consulting firm, and

MMD Inc. ("MMD"), an engineering firm. R. at 3. Forsyth analyzed the business aspects of McGrath and found that it was capable of substantial growth. *Id.* MMD reported no issues with the physical assets of McGrath but found that one of the composites used by McGrath's largest selling machine was prone to microscopic cracks that could develop over time and with stress. *Id.* This finding was not reported in the final due diligence report. *Id.*

After closing in January 2018, Grace became Chief Executive Officer and Danielle became President. *Id.* Grace and Danielle renamed the entity "Gemstar." *Id.* Gemstar quickly gained popularity for its sophisticated machine tools, with its most popular product being the SwiftMax, which was used to produce fasteners used in applications such as aircraft. R. at 4. In January 2021, Grace and Danielle decided to sell Gemstar and use the proceeds to enter the technology industry. *Id.* They sought the expertise of Allison Ritter from Carter Capital, who had experience with mergers, acquisitions, and capital markets. *Id.* Carter Capital analyzed Gemstar's financial statements and proposed that Danielle and Grace sell eighty percent of the company in a private placement to investors and retain a twenty percent interest through voting shares. *Id.* In February 2021, Grace and Danielle decided to proceed with this option. R. at 5. Gemstar's Vice President of Investor Relations, Katie Gordon ("Defendant"), was responsible for the logistics of the sale and overseeing the distribution of the Private Placement Memorandum ("the Memo"), which would be used to market the common stock. *Id.* She was assigned to manage the information exchange between Carter Capital and

other players in the sale. *Id.* Keane & Company, an engineering firm, prepared the report covering the structural integrity of Gemstar's products and assets. *Id.* Defendant reviewed the Report, noting that it contained a Trade Letter indicating that the SwiftMax was prone to microscopic cracks over time when exposed to stress, for example during takeoff of an aircraft. R. at 5-6. Defendant was alarmed by such a finding but took no immediate action. R. at 6. Defendant brought the matter to Grace and Danielle's attention, but Grace was insistent that the findings in the Trade Letter were not an issue. *Id.* Danielle was cautious but agreed with Grace that auditors tend to "make mountains out of molehills" and that the Trade Letter should be removed. *Id.* After sitting in on this discussion between Danielle and Grace, Defendant removed the Trade Letter and delivered the report to Gemstar's experts despite being bothered by this decision. *Id.*

In August 2021, the Memo was completed with no mention of the potential microscopic cracks associated with the SwiftMax. *Id.* The Memo stated that all of Gemstar's plant, property, and equipment were in reasonable condition and made no reference to material defects or material undisclosed contingent liabilities related to its products. *Id.* Defendant instructed an associate to distribute the Memo in Gemstar's name to twenty-six large non-bank financial institutions. *Id.* The private placement was finalized in October 2021, allowing for Grace and Danielle to secure considerable wealth. R. at 7. The common shares were sold for twenty-seven dollars each, with the Fordham Public Employees Investment Fund ("the Fund") purchasing 3,000,000 shares.

*Id.* The record does not reflect whether the Fund reviewed the Memo, but it was aware of Defendant's role in the placement. *Id.*

In December 2021, a Seaboard Airlines flight experienced an explosion twenty seconds after acceleration. *Id.* After an investigation, the FAA discovered that the engine became dislodged from the wing because the fastener could not support the weight due to microscopic cracks. *Id.* The fastener was manufactured by Silberfarb Solutions using the SwiftMax. *Id.* Consequently, the Fund sold its shares in Gemstar at four dollars a share in February 2022, for a loss of $68,000,000. *Id.*

**Procedural History**

In March 2022, the Fund filed an action against Gemstar and three of its executives after incurring severe losses on its Gemstar shares in the United States District Court for the District of Fordham. R. at 8. The Fund sought $68,000,000 in compensatory damages, claiming it relied on allegedly false and misleading statements and material omissions in the Memo. *Id.* The Fund's complaint asserted that Grace, Danielle, and Defendant ("the Executives") violated Section 10(b) and Rule 10b-5 for participating in a "deceptive scheme to conceal material contingent liabilities relating to the defective composite." *Id.*

In August 2022, the Fund settled with Gemstar, leaving only the claims against the Executives. *Id.* Defendant filed a 12(b)(6) motion to dismiss claiming she did not "make" or "disseminate" the materially false or misleading statements and should not be considered a primary violator under Section 10(b) and Rule 10b-5. *Id.* Defendant also claims that the Fund failed to allege

that it relied on the Memo or any deceptive conduct in connection with its purchase. R. at 9. In October 2022, the District Court of Fordham denied Defendant's motion to dismiss, finding her primarily liable as a "disseminator" despite not being a "maker" under 10b-5(a) and (c). *Id.* The District Court also found that the Fund was entitled to a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). *Id.* Defendant filed a timely appeal challenging the District Court's finding that she was a disseminator and argues the Fund should not be entitled to the *Affiliated Ute* presumption because the conduct in question is affirmative, not concealed. *Id.* On appeal, the Circuit Court affirmed the decision of the District Court that Defendant can be held primarily liable under Rule 10b-5(a) and (c) and reversed the finding that the Fund is entitled to a rebuttable presumption of reliance under *Affiliated Ute*. R. at 23.

## SUMMARY OF ARGUMENT

This Court should affirm the Circuit Court's decision on the first issue and find that Defendant's conduct makes her liable as a disseminator under Rule 10b-5. Rule 10b-5 is construed to extend protections to investors by prohibiting such actions through broad and expansive language. Interpreting Defendant's actions as dissemination does not violate the rule against surplusage and does not run the risk of blurring the lines between the aiding and abetting provisions of 15 U.S.C. § 78t(e) and primary liability. Accordingly, the Court should find that individuals who neither "make" nor distribute the false or misleading documents themselves are primarily liable as a

"disseminator" for instructing an employee to distribute the documents to investors.

This Court should reverse the Circuit Court's decision on the second issue and find that the *Affiliated Ute* presumption of reliance is available to the Fund in this case, which alleges both misstatements and omissions. First, this Court did not restrict its holding in *Affiliated Ute* to solely omissions and stated that courts must consider the circumstances of a case. Most circuit courts have agreed that the presumption does not require solely omissions. Second, most circuit courts, without clear guidance on the mixed case issue, have employed a context specific determination analysis to mixed cases to determine whether the case centers on omissions or misstatements, which follows from *Affiliated Ute's* holding that courts must consider the circumstances of a case. Lastly, applying *Affiliated Ute* too narrowly conflicts with goals of securities legislation because it would limit recoveries from fraudulent conduct.

## **ARGUMENT**

As William Douglas famously stated in his first press conference as Chairman of the Securities Exchange Commission ("SEC"), the role of the SEC is that of the "investor's advocate." *Douglas Wants a Free Market, He Tells Press*, THE WASHINGTON POST, Sep. 23, 1937, at 3. Following the Great Depression, Congress enacted the Securities Exchange Act of 1934 with the "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." *S.E.C. v. Cap. Gains Rsch. Bureau*, 375 U.S.

180, 186 (1963). This Court construes securities law provisions "not technically and restrictively but flexibly to effectuate their remedial purpose." *See S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002).

## Standard of Review

To survive a 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Appellate review of a district court's denial of a motion to dismiss under Rule 12(b)(6) is *de novo*. *See Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A.*, 879 F.3d 79, 83 n.6 (3d Cir. 2018). In a *de novo* review, the reviewing court reviews the entire record without deference to the lower court's decision. *See Bose Corp. v. Consumers Union of U.S. Inc.,* 466 U.S. 485, 508 n.27 (1984).

## I. THIS COURT SHOULD FIND THAT AN INDIVIDUAL WHO INSTRUCTS AN EMPLOYEE TO DISTRIBUTE FALSE OR MISLEADING STATEMENTS TO INVESTORS IS SUBJECT TO PRIMARY LIABILITY AS A "DISSEMINATOR" BECAUSE OF THE BROAD SCOPE OF RULE 10b-5.

In the spirit of limiting the risk of fraud to investors, Rule 10b-5 makes it "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" to engage in any proscribed conduct "in connection with the purchase or sale of any security." § 240.10b-5. Although there is no express private right of action, private parties may bring suit against primary violators of Rule 10b-5. *Superintendent of Ins. of N.Y. v.*

*Bankers Life & Cas. Co.*, 404 U.S. 6, 13, n.9 (1971); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008). This Court has previously held that primary violators of Rule 10b-5 include those who "disseminate" false or misleading information to investors with intent to defraud. *Lorenzo v. S.E.C.*, 139 S. Ct. 1094, 1096 (2019). Secondary violators of Rule 10b-5 fall under the aiding and abetting statute, which is only enforceable by the SEC. *Lorenzo*, 139 S. Ct. at 1103; § 78t(e).

This Court should affirm the Circuit Court's finding that an individual who instructs an employee to distribute false and misleading statements to investors with the intent to defraud is primarily liable as a "disseminator" under Rule 10b-5(a) and (c). While Subsection (b) limits primary liability to makers of any untrue statement of a material fact, Subsections (a) and (c) proscribe a wider range of conduct through its broad and expansive language, which is not intended to be limited by previous provisions. Instructing an employee to distribute false or misleading information to investors with the intent to defraud falls outside the scope of aiding and abetting. Lastly, holding individuals liable as disseminators is in line with the purpose of the 1934 Act to promote full disclosure.

### A. Rule 10b-5 is Construed Through Statutory Interpretation to Extend Primary Liability to Individuals Who Instruct an Employee to Distribute False or Misleading Statements to Investors.

Rejecting the idea that only makers of false and misleading information are subject to primary liability, this Court expressly stated that the text of Rule 10b-5 was sufficiently broad to prohibit the "dissemination" of "false or

misleading information to prospective investors with the intent to defraud." *Lorenzo*, 139 S. Ct. at 1101. Since *Lorenzo*, neither this Court, nor Congress has defined the term "dissemination," leaving a question as to who is a "disseminator." Holding Defendant liable as a "disseminator" for instructing an employee to distribute false statement to investors is not only consistent with language of Rule 10b-5 but does not violate the rule against surplusage.

*1. A Finding That Defendant is Liable as a Disseminator is Consistent with the Language of Rule 10b-5.*

When interpreting the language of a statute, courts consider the plain meaning of the words. *See, e.g.*, *Aaron*, 446 U.S. at 699-700; *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022). Subsection (a) makes it unlawful to "employ any device, scheme, or artifice to defraud." § 240.10b-5(a). Subsection (c) similarly prohibits "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." § 240.10b-5(c).

When the SEC promulgated Rule 10b-5, *Webster's International Dictionary* defined "scheme" as a "plan or program of something to be done" or a "crafty, unethical project," and "artifice" as "an artful stratagem or trick; artfulness; ingeniousness." *Aaron*, 446 U.S. at n.13 (quoting *Webster's International Dictionary* (2d. ed. 1934)). This Court has recognized that schemes include the dissemination of false or misleading statements, *Lorenzo*, 139 S. Ct. at 1101, and misrepresentations and omissions, *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (2009); *S.E.C. v. Rio Tinto PLC*, 41 F.4th 47, 49 (2d Cir. 2022); *Lentell v. Merill Lynch & Co.*, 396 F.3d 161, 172 (2d Cir. 2005).

Individuals who distribute misleading information are "disseminators" of such statements due to the synonymous relationship of the terms "dissemination" and "distribute." "Dissemination" is defined as the "act of spreading . . . or dispersing." *Dissemination*, *Black's Law Dictionary* (11th ed. 2019). The definition of the verb "distribute" uses very similar language, stating that it is to "spread out," or "disperse." *Distribute*, *Black's Law Dictionary* (11th ed. 2019). Due to the synonymous relationship, distributing false or misleading information with the intent to defraud investors falls within the definition of "disseminator."

Furthermore, "to make an employee distribute" false information is the approximate equivalent of "to distribute" false information. *See Janus Cap. Grp., Inc. v. First Derivative Traders,* 564 U.S. 135, 142 (2011). The verb "make" means "to cause to happen" or "to cause to be." *Make*, *Merriam-Webster's Dictionary and Thesaurus* (2022). So, when Defendant instructed an employee to distribute statements to investors, R. at 6, Defendant's actions were the approximate equivalent of distributing the information herself. *See Janus*, 564 U.S. at 142. Instead of employing the use of an email server to distribute the falsified documents to investors, as the defendant in *Lorenzo* did, 139 S. Ct. at 1099, Defendant in this case employed the use of an actual employee to distribute the information to investors. R. at 5-6. Both the email server in *Lorenzo* and the employee of Defendant were parts of a larger scheme to get the falsified documents into the hands of the investors with the intent to defraud. Such a miniscule difference in how the schemes were devised should not allow

Defendant to escape primary liability when the broad language of Rule 10b-5 attempts to cover "*any* scheme," regardless of complexity, and engaging in "*any* act" with the intent to defraud. § 240.10b-5 (emphasis added).

Lastly, although Defendant's conduct is a scheme under Rule 10b-5, Defendant contends that her actions do not give rise to a scheme liability claim because the holding in *Rio Tinto* does not allow courts to circumvent its limitations on liability. 41 F.4th at 49; R. at 15. However, only a widened scope of scheme liability would defeat the intent of Congress to limit a private right of action. *Rio Tinto*, 41 F.4th at 55. While the Second Circuit held that there must be "something beyond" a misstatement or omission to establish scheme liability, dissemination, in and of itself is enough is to satisfy this requirement. *Id.* at 49. Not only did Defendant disseminate the false documents, but she planned to remove evidence of the defective composite from the Memo, place the misleading statements under official Gemstar stationary, and order an associate to present the documents to investors who knew that Defendant was the Vice President of Investor Relations. R. at 6. Thus, a finding that Defendant is liable would not widen the scope of scheme liability, on the contrary, her conduct falls well within the scope already carved out by *Lorenzo*, *Rio Tinto*, and the language of Rule 10b-5.

*2. Interpreting "Disseminator" to Hold Defendant Primarily Liable Does Not Violate the Rule Against Surplusage.*

To determine the meaning of terms, it is helpful to acknowledge the context in which the words appear and the "remainder of the statutory

scheme." *Al Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014). It is generally held that the law should not extend to cover conduct that would render another section of the act "superfluous." *Lorenzo*, 139 S. Ct. at 1101. This Court has previously held that there was not surplusage between Subsections (a) and (c) of Rule 10b-5. *Id.* at 1102.

In *Lorenzo*, this Court rejected the argument that surplusage was prevalent due to the existence of both a general anti-fraud provision and a narrower provision specifically covering non-disclosure. *Id.* However, this Court commends the two provisions, indicating no violation of the rule against surplusage. *Id.* These provisions were intended to "cover additional kinds of illegalities – not to narrow the reach of the prior sections." *Id.* (quoting *United States v. Naftalin*, 441 U.S. 768, 774 (1979)). Furthermore, the 1933 and 1934 Acts were the "first experiment in federal regulation of the securities industry," making it reasonable for Congress, "in declaring certain practices unlawful, to include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against nondisclosure." *Cap. Gains*, 375 U.S. at 198.

Defendant may argue that placing her behavior under Rule 10b-5(a) and (c) will render it superfluous with other sections of the Act. This is not the case. The rule against surplusage is not violated by having both a general provision and a non-disclosure provision. *See Lorenzo*, 139 S. Ct. at 1094. In *Lorenzo*, the defendant argued that because he was not liable under 10b-5(b) as a "maker" of the false statement, he could not be primarily liable. *Id.* While

Defendant may not liable as a "maker" under Subsection (b), it would be an oversight to claim that "provisions should be read as governing different, mutually exclusive, spheres of conduct." *Id.* at 1102. As this Court held in *Lorenzo*, interpreting each subsection as an added layer of protection against fraudulent securities transitions, rather than as a device to limit the reach of any given subsection, is consistent with the overall purpose of the 1933 Act. *Id.* This Court noted that "it is hardly a novel proposition that different portions of the securities laws prohibit some of the same conduct." *Id.* In *Naftalin*, this Court found that Section 17 of the 1933 Act is not indented to be limited by applying the phrase "upon the purchaser" throughout the entire statute since that interpretation would limit the scope of each additional provision when the intent of the drafters was to add prohibitions against additional illegalities with each additional subsection. 441 U.S. at 774. Therefore, interpreting Defendant's conduct to qualify as primary liability does not violate the rule against surplusage and is constitutionally permissible.

### B. Defendant's Actions Subject Her to More than "Aiding and Abetting" Liability Because She Meets All Requirements for Primary Liability.

There are at least two instances in which an individual involved in dissemination of false documents to investors may not be subject to primary liability. *Lorenzo*, 139 S. Ct. at 1101; *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 194 (1994); § 78t(e). The first instance includes individuals who do not meet the requirements for primary violations under Rule 10b-5, but still assist the primary violator as an aider or

abettor. *Cent. Bank of Denver*, 511 U.S. at 194; § 78t(e). However, nothing precludes aiders and abettors from also being liable as primary violators so long as the requirements for primary liability are also met. *Cent. Bank of Denver*, 511 U.S. at 191.[1] The second instance includes individuals who are only "tangentially involved" in dissemination, such as a mailroom clerk tasked with sending false statements through the mail. *Lorenzo*, 139 S. Ct. at 1101.[2]

To establish aiding and abetting liability, there must be evidence of a primary violation of Rule 10b-5, the defendant must have had actual knowledge of the primary violation, and the defendant must have given "substantial assistance" to the primary violator. *Cent. Bank of Denver,* 511 U.S. at 194. In *Lorenzo*, the defendant argued that he could not be held both primarily liable as a disseminator and secondarily liable as an aider and abettor because it would weaken the line between the two categories. *Lorenzo*, 139 S. Ct. at 1096. However, this Court made it clear that disseminators of false information fall well within the lines of primary liability and do not preclude the Court from also finding the defendant secondarily liable as an aider and abettor. *Lorenzo*, 139 S. Ct. at 1096.

---

[1] Requirements for primary liability include "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157-58 (2008).

[2] "Tangential" is defined as "of little relevance," synonymous with "incidental," and "irrelevant." *Tangential, Merriam-Webster's Dictionary and Thesaurus* (2022).

While the existence of primary liability as a disseminator and secondary liability as an aider and abettor requires courts to establish a distinction between the two categories, *e.g.*, *Lorenzo*, 139 S. Ct. at 1096, Defendant falls within the scope of primary liability despite any argument that she is also secondarily liable. Not only did Defendant in this case authorize and direct the distribution of the Memo to investors, which she knew falsely claimed that there were no material contingent liabilities relating to defective products, but she deliberately omitted the Trade Letter and the supporting study of the defective composite with the intent to defraud investors. R. at 6. Consequently, the Fund invested in Gemstar and suffered an economic loss due to the defectiveness of the composite. R. at 7. Since "positive proof of reliance is not a prerequisite to recovery," *Affiliated Ute*, 406 U.S. at 154, these facts make Defendant liable as a primary violator regardless of any lesser assistance she provided to the other Executives because they establish all elements for a primary violation under Rule 10b-5. *See Stoneridge*, 552 U.S. at 157-58; *Lorenzo*, 139 S. Ct. at 1103.

Defendant may argue that holding individuals liable when they neither make nor personally distribute the false or misleading statements broadens the scope of who can be held liable to cover too many people, for example, a mailroom clerk. *See Lorenzo*, 139 S. Ct. at 1101. In *Lorenzo*, Justice Breyer stated that holding a mailroom clerk liable for disseminating false information would not "typically" be appropriate as the mailroom clerk is only "tangentially" involved in dissemination. *Id.* However, this Court should consider the purpose

of the Acts and their significance in protecting investors by ensuring full disclosure. *Cap. Gains*, 375 U.S. at 186. Defendant, as Vice President of Investor Relations, has a fiduciary duty to ensure the information she is instructing her associate to distribute to investors does not contain material misstatements. *Id.* at 191. This duty would not likely be shared by an employee such as a mailroom clerk who has no knowledge of the material misstatements. *Lorenzo*, 139 S. Ct. at 1101. While applying primary liability to all disseminators may foster uncertainty in select borderline cases, the purpose of the Acts to promote full disclosure can help determine if the individual is truly blameworthy. *Id.* This case at hand is not borderline. Defendant knew the Memo contained a material misstatement and omission but authorized its distribution without informing investors about its inaccuracies. R. at 6.

### C. Interpreting Disseminator Broadly to Hold Defendant Responsible Under Primary Liability is Consistent with the Purpose of the Securities Act of 1934.

Extending primary liability under Rule 10b-5(a) and (c) to disseminators of false or misleading statements is consistent with the purpose and goals of the Securities Acts. The Acts were designed with the purpose of promoting a system of over disclosure rather than under disclosure, with a level of "flexibility to effectuate its remedial purposes." *Cap. Gains*, 375 U.S. at 285. These principles, coupled with the broad language of Rule 10b-5, support extending primary liability to individuals who are responsible for the distribution of false statements, just as they supported this Court's decision in

*Lorenzo* to extend primary liability to disseminators of such statements. *See Lorenzo*, 139 S. Ct. at 1102-103.

This Court has previously interpreted terms relating to the 1934 Act in a broad manner to incentivize over disclosure. *S.E.C. v. W. J. Howey Co.,* 328 U.S. 293, 298 (1946). In *Howey Co.,* this Court extended the term "security" to include investment contracts. *Id.* The expansion of the term was done to promote "fulfillment of the statutory purpose of compelling full and fair disclosure." *Id.* at 299. This Court noted that terms should be interpreted in a manner that "embodies 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." *Id.*

Similarly, in *Lorenzo*, this Court held that the dissemination of false or misleading statements with intent to defraud was covered in the scope of 10b-5(a) and (c), even if the individual did not make the statement in question. 139 S. Ct. at 1100. In *Lorenzo*, the defendant disseminated knowingly false and misleading emails to protentional investors at the direction of his boss and signed his name inviting individuals to contact him with questions. *Id.* at 1099. This Court held that disseminators such as the defendant in *Lorenzo* should be held liable as it could not rationalize "why Congress or the Commission would have wanted to disarm enforcement in this way." *Id.* at 1103. In *Reves v. Ernst & Young*, 494 U.S. 56, 59 (1990), this Court held that the fundamental purpose of the Acts was to enforce regulation in an area that was previously unregulated and subject to abuse.

The Circuit Court was correct in broadening the scope of Rule 10b-5 to include Defendant's conduct because it supports the integrity of the Act's purpose. In *Lorenzo*, this Court found the defendant was primarily liable as the individual who sent out an email to potential investors that knowingly contained false and misleading information. 139 S. Ct. at 1099. This Court should apply the same principles to this case. Here, Defendant was aware of the possibility of microscopic cracks in the SwiftMax composite and of the material omission in statements sent to investors but chose to proceed without taking any action to correct the issue. R. at 6. She then directed her associate to send the Memo to twenty-six non-bank financial institutions with Gemstar's name attached. *Id.* Allowing Defendant to escape primary liability simply because she did not make the statement and because she was not the one who clicked send does not align with the purpose of securities laws to protect investors. To promote full disclosure rather than under disclosure, individuals who play an active role in the dissemination of material misstatements or omissions must be primarily liable. *Cap. Gains*, 375 U.S. at 198.

Interpreting disseminator to be included under primary liability for Rule 10b-5(a) and (c) fulfills the flexible purpose indented by the drafters of the 1934 Act. *Id.* at 199. There is no single way fraudsters will attempt to make material misstatements or omissions in a public statement. Interpreting disseminator broadly to include one who instructs an employee to distribute a fraudulent memo ensures that bad actors do not escape liability under Rule 10b-5(a) and (c). If Defendant is permitted to escape liability, it opens a door for an

unimaginable amount of potentially fraudulent conduct and instances of non-disclosure. This would be antithetical to the purpose of the act, which is to eliminate non-disclosure and fraud in the market to promote investor trust and confidence. *Id.* at 201. Allowing deceptive conduct from professionals such as Defendant encourages others to plot and execute more complicated schemes. For example, individuals may attempt to create a chain of individuals involved in dissemination knowing none would be held liable. Extending primary liability to individuals who instruct others to distribute the false information to investors is the best way to encourage behavior the Acts seek to promote.

## II. THE *Affiliated Ute* PRESUMPTION OF RELIANCE APPLIES TO MIXED CASES BECAUSE THIS COURT DID NOT RESTRICT THE PRESUMPTION TO SOLELY OMISSIONS, COURTS ALREADY CHARACTERIZE MIXED CASES TO DETERMINE WHETHER THE PRESUMPTION APPLIES, AND RESTRICTING A PRESUMPTION OF RELIANCE TOO NARROWLY CONFLICTS WITH THE GOALS OF SECURITIES LAW.

Reliance is an essential element of a private right of action under Section 10(b) and Rule 10b-5 to ensure the requisite causal connection between a defendant's misrepresentation or omission and a plaintiff's injury. *Stoneridge*, 552 U.S. at 159. Traditionally, a plaintiff could prove reliance by showing that a sale or purchase was made based on a specific misrepresentation. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011). However, this Court has allowed a presumption of reliance in two circumstances. *See Stoneridge*, 552 U.S. at 159 (discussing the *Affiliated Ute* and *Basics* presumptions of reliance). In cases involving omissions, positive proof of reliance is not required. *Affiliated Ute*, 406 U.S. at 153. The *Affiliated Ute*

presumption is available in cases involving the withholding of material information by someone with a duty to disclose that information. *Id.* at 153-54.[3]

This Court should reverse the Circuit Court's finding that the *Affiliated Ute* presumption does not apply to the present case involving mixed allegations of misrepresentations and omissions. First, this Court's holding in *Affiliated Ute* did not restrict the presumption to cases solely involving omissions. Second, most circuits rejected a rigid rule and currently characterize mixed cases to determine whether the case centers on omissions. Lastly, limiting the use of a reliance presumption too narrowly conflicts with the goals of securities legislation by limiting recoveries for fraud.

### A. The *Affiliated Ute* Presumption Applies to Mixed Cases Because This Court Did Not Limit Its Applicability to Solely Omissions.

The *Affiliated Ute* presumption is applicable in cases involving "primarily" a failure to disclose, and this Court did not explicitly restrict the presumption's applicability to solely omissions. *See Affiliated Ute*, 406 U.S. at 153. Rather, this Court stated that courts must look to the circumstances of the case to determine whether the presumption applies. *See id.* Most circuits have followed this Court's language by stating that the presumption requires "primarily an omission." *See In re InterBank Funding Corp. Sec. Litig.*, 629 F.3d 213, 219

[3] Although the court below disagreed with the District Court's finding that Defendant owed a duty to investors, the Circuit Court's opinion was confined to the issue of applying *Affiliated Ute* in mixed cases. R. at 20 – 23.

(D.C. Cir. 2010) (noting the circuits' holdings on the applicability of the *Affiliated Ute* presumption in mixed cases).

The *Affiliated Ute* presumption of reliance is applicable in mixed cases because *Affiliated Ute* involved both misstatements and omissions. *See Affiliated Ute*, 406 U.S. at 152-53. In *Affiliated Ute*, the plaintiffs were members of the Ute Indian Tribe and employed the defendants to be the transfer agent for the tribe's stock shares. *Id.* at 137. According to the stock transfer agreement, a stock sale had to be offered to members of the tribe before any offering could be made to a nonmember. *Id.* at 137-38. However, two bank employees developed a secondary market, hidden from the tribe, and sold shares at higher prices to nonmembers. *Id.* at 146-47. The defendants failed to disclose the secondary market activity and misstated to the tribe that its shares were being sold at the prevailing market price. *See id.* at 152. This Court held that the plaintiffs were entitled to a presumption of reliance. *Id.* 153-54. Although both misrepresentations and omissions were involved, this Court extended a presumption of reliance because the case centered on omissions of the bank's conduct. *See id.*

Following *Affiliated Ute*, most circuits have held that the presumption is not limited to solely omissions. *See In re Interbank*, 629 F.3d at 219 (noting the circuits' holdings in mixed cases and finding the Fourth Circuit to be the only circuit adopting a rigid rule). In *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 202 (3d Cir. 1990), the Third Circuit addressed the presumption's applicability in mixed cases. The court explicitly stated its willingness to apply

the presumption in mixed cases and rejected a strict application of the presumption to solely omissions. *See id.* In *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1199, 1206 (9th Cir. 2021), the Ninth Circuit addressed the presumption's applicability in mixed cases but restricted it more narrowly by denying it in this particular case. However, the court noted that the presumption should not generally apply in a mixed case unless the case can be characterized as one that primarily alleges omissions. *Id.* at 1204. The Ninth Circuit has applied the presumption in earlier cases that were characterized as mixed. *See Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975).

Here, this Court should affirm the presumption's applicability in mixed cases based on its original holding in *Affiliated Ute*. In *Affiliated Ute*, this Court extended a presumption of reliance in a case where both misstatements and omissions were alleged. *See* 406 U.S. at 146-47. Although this Court stated that the presumption is applicable for primarily omissions, this Court's holding did not require a case to allege solely omissions. *See id.* The circuits mostly agree that the presumption could apply in a case where both omissions and misstatements are alleged, with only the Fourth Circuit deviating from this Court's decision. *See In re InterBank*, 629 F.3d at 219. Therefore, since both this Court's holding and the circuit's interpretation of *Affiliated Ute* agree that the presumption does not require solely omissions, this Court should affirm its original holding in *Affiliated Ute* and not preclude the presumption to the Fund's case.

### B. Most Circuit Courts Characterize Mixed Cases, Rather than Apply a Rigid Rule, to Determine Whether it Primarily Involves an Omission Before Applying *Affiliated Ute.*

When a plaintiff alleges a mixed case, courts will analyze the complaint to determine whether the offenses it alleges can be characterized primarily as omissions or misrepresentations. *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1162 (10th Cir. 2000). To determine the presumption's applicability in a mixed case, courts set "a unitary burden of proof on the reliance issue according to a context-specific determination of where that burden more appropriately lies." *See, e.g., id.* No court has applied *Affiliated Ute* in a case primarily alleging misrepresentations. *See In re Interbank*, 629 F.3d at 219.

In mixed cases, the *Affiliated Ute* test turns on the relative importance of the misrepresentations and omissions and whether the case centers on omissions. *See Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 193-94 (3d Cir. 2001). In *Johnston*, the plaintiffs alleged that the defendant misstated and omitted the fact that a particular person would produce a movie. *Id.* at 193. The plaintiffs were ultimately denied the *Affiliated Ute* presumption because the case centered on the single misstatement. *Id.* The Third Circuit noted that the omissions alleged would have no impact absent the misrepresentation, meaning the defendants only brought suit because of the affirmative statement by the defendants. *Id.* This case is distinguishable from other cases where the Third Circuit applied the presumption in mixed cases, but the same test of relative importance was used. *See, e.g., Sharp v. Coopers & Lybrand*, 649 F.2d 175, 189 (3d Cir. 1981); *Hoxworth*, 903 F.2d at 202. In *Sharp*, the Third Circuit

faced a mixed case when the plaintiffs received a misleading opinion letter from the defendant. 649 F.2d at 186. The court allowed the presumption in *Sharp* because the defendant's actions further facilitated the transaction and increased the likelihood the investors would rely on the opinion letter. *Id.* at 202. Unlike the defendants in *Johnston*, the defendants in *Sharp* did more than merely make a statement by engaging in conduct to influence investment decisions of persons interested in the investment. *See id.* The Third Circuit additionally held that the existence of misrepresentations and omissions, without more, should not conclude that *Affiliated Ute* is inapplicable. *Id.* at 188.[4]

The Second and Tenth Circuits apply similar context-based determinations because of the difficulties associated with mixed cases. *See Joseph*, 223 F.3d at 1162; *Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981). In *Joseph*, the plaintiff's complaint alleged at most a combination of misrepresentations and omissions. *Joseph*, 223 F.3d at 1162. The Tenth Circuit noted its use of context-specific determinations to determine whether a case centers on omissions, and the burden of subjecting a jury to presume reliance regarding omitted facts, but not to presume reliance with misrepresented facts. *Id.* The court uses the characterizing approach in a

[4] The relative importance analysis follows from this Court's decision in *Affiliated Ute.* The bank misstated to the AUC that the stock transfers would be properly made and that the shares were sold at the prevailing market price. *Affiliated Ute*, 406 U.S. at 152. The tribe considered the bank to be familiar with the market for its shares and relied upon them when they wished to sell. *Id.* Thus, the case centered on omissions because the omissions would still have impact minus the statements from the bank. *See id.*

mixed case because every misstatement both advances false information and omits truthful information, making the labels themselves useless in mixed cases. *Id.* In *Wilson*, the Second Circuit denied the use of the presumption; however, the court agreed with the Tenth Circuit that labeling a case as an omission or misstatement is of little help due to the close relationship between omissions and misstatements. *Wilson*, 648 F.2d at 93-94. The court also noted that without a presumption under *Affiliated Ute*, reliance can become impossible to prove in cases of omissions. *Id.* at 93.

Conversely, other courts narrowly apply the *Affiliated Ute* presumption in mixed cases. *See, e.g., In re Volkswagen*, 2 F.4th at 1208. In *In re Volkswagen*, the Ninth Circuit addressed the presumption's applicability in mixed cases when the plaintiffs alleged that Volkswagen was secretly installing devices to conceal and cheat its emissions and that misstatements were made in an offering memorandum. *Id.* at 1206. Notably, the plaintiffs alleged nine pages of misrepresentations and stated that they relied upon them in their investment decision. *Id.* The Ninth Circuit decided that this fact pushed the case outside of *Affiliated Ute's* presumption. *Id.* In *Joseph*, the Third Circuit also illustrated when a mixed case could fall outside of *Affiliated Ute* if it is primarily based on misrepresentations. 223 F.3d at 1162-163. Although the Tenth Circuit has allowed plaintiffs to use the presumption in mixed cases, the court cautioned that some plaintiffs may artfully recharacterize a misstatement case as an omission case. *Id.* In *Joseph*, the crux of the plaintiff's complaint involved falsified financial statements, and the court concluded through a context-

specific determination that the plaintiffs case centered on misstatements because the misstatements were what the plaintiffs were protesting. *Id.* at 1163. *See also Johnston*, 265 F.3d at 193 (illustrating a plaintiff's attempt to recharacterize a misstatement into an omission when the case is meaningless without the misstatement). Lastly, the most restrictive application of *Affiliated Ute* occurred in the Fourth Circuit. *See Cox v. Collins,* 7 F.3d 394, 396 (4th Cir. 1993). In *Cox*, the Fourth Circuit stated that if a plaintiff alleges both omissions and misrepresentations, the *Affiliated Ute* presumption would be unavailable. *Id.*

Here, this Court should affirm the applicability of the relative importance analysis used by the Second, Third, and Tenth Circuits.[5] In *Johnston*, the existence of both misstatements and omissions did not end the Third Circuit's inquiry into applying *Affiliated Ute*. 265 F.3d at 193-94. Rather, the court determined that the relative importance of the misrepresentation controlled the case. *See id.* Alternatively, in *Sharp*, the Third Circuit arrived at the opposite conclusion. 649 F.2d at 202. There, both misrepresentations and omissions existed, but the additional conduct of the defendants in facilitating the transaction made the omissions more relevant in the case regarding reliance. *Id.* The Second and Tenth Circuits also use a context-based determination test

[5] The relative importance analysis shows that the present case centers on omissions. The Fund points to three misstatements in the Memo; however, the record does not indicate whether the Fund read Defendant's memo before the transaction. R. at 7-8. Further, Defendants facilitated the transaction by sending the Memo to twenty-six non-bank financial institutions, and the Fund was aware of Defendant's role in the offering. R. at 7.

and noted the difficulties associated with restricting reliance in a mixed case. *See Joseph*, 223 F.3d at 1162 (noting the difficult task of presuming reliance with omitted facts and not presuming reliance with misrepresented facts); *Wilson*, 648 F.2d at 93-94 (noting the close relationship between omissions and misstatements).

Furthermore, this Court should reject the narrow application of *Affiliated Ute* used by other circuits. In *Cox*, the Fourth Circuit stated that the presumption is inapplicable in mixed cases and that it applies only in cases of nondisclosure, "as in *Affiliated Ute*." 7 F.3d at 396. However, this reading of *Affiliated Ute* is misguided. This Court did not restrict the presumption to solely omissions, and *Affiliated Ute* included a misstatement from the defendant. *See* 406 U.S. at 152. In *In re Volkswagen*, the Ninth Circuit held that the presumption was not applicable in a case that included nine pages of misrepresentations in an offering memorandum, along with omissions of the defendant's conduct. 2 F.4th at 1206.[6] The Ninth Circuit restricted *Affiliated Ute*, compared to its previous decisions allowing the presumption in mixed cases. *Id.* at 1205-206. The dissenting opinion viewed the Ninth Circuit's past rulings on mixed cases differently and stated that *Affiliated Ute* should continue to apply in mixed cases if the "primary focus" of the plaintiff's claims relates to omissions, relating to the relative importance test used by other

[6] The present case is distinguishable from *In re Volkswagen* both in the number and importance of the misstatements alleged. In *In re Volkswagen*, plaintiffs allegedly relied on nine pages of misstatements. 2 F.4th at 1206. However, the Fund in this case only alleges three lines of misstatements, and the record does not indicate it relied on them. R. at 8.

circuits. *See id.* at 1209 (Wallace, J., dissenting). If the plaintiff's in *In re Volkswagen* relied on the misrepresentations, then reliance might need to be proven directly. But the presence of misrepresentations should not be fatal for the presumption because defendants could engage in other conduct to facilitate the transaction. *See Johnston*, 265 F.3d at 194. Plaintiffs in general could also not rely on or even read the misstatements before a transaction and rely on conduct instead. Therefore, this Court should affirm the test of relative importance in mixed cases and reject a rigid rule requiring solely omissions because misstatements alone do not determine where the plaintiff relied. The *Affiliated Ute* presumption is necessary in this case because the Fund still relied on Defendant's conduct even without the misstatements, showing that the case centered on omissions.

### C. Restricting *Affiliated Ute* to Solely Omissions Would Conflict with the Goals of Securities Law by Limiting Fraud Recoveries.

Securities legislation shall be construed "not technically and restrictively, but flexibly to effectuate its remedial purpose." *Affiliated Ute*, 406 U.S. at 151. Presumptions serve to assist courts in managing circumstances in which direct proof is difficult. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988). This Court allows presumptions of reliance in two circumstances due to the "unnecessarily unrealistic evidentiary burden" of proving actual reliance. *See Haliburton Co.*, 573 U.S. at 810; *Affiliated Ute*, 406 U.S. at 153. Section 10(b) and Rule 10b-5 are designed to "foster an expectation that securities markets are free from fraud – an expectation on which purchasers should be able to rely." *Blackie*, 524 F.2d at 907.

Courts have rejected applying the presumption narrowly because proving a "speculative negative" was held unnecessary in *Affiliated* Ute. *See, e.g.*, *id.* at 908. In *Blackie*, the Ninth Circuit applied the *Affiliated Ute* presumption in a mixed case and considered the purposes of securities law. *See id.* The court noted that it would be difficult for plaintiffs to prove a speculative negative without the presumption, meaning a plaintiff would have to prove that "I would not have bought had I known." *Id.* This proof would be a difficult evidentiary burden and would threaten to defeat valid claims due to the difficulty in ascertaining motivations. *Id.* Accordingly, the Ninth Circuit, and this Court in *Affiliated Ute*, rejected such proof because it would lead to underinclusive recoveries. *Id.*

Recovery in mixed cases will become more difficult without *Affiliated Ute* because plaintiffs will need to meet other requirements. In *Basic*, this Court outlined its presumption of reliance based on the fraud-on-the-market theory. 485 U.S. at 241-42. The *Basic's* presumption covers instances where plaintiffs allege misstatements, and the presumption is limited to shares that trade on well-developed markets. *Id.* Notably, this requirement would preclude plaintiffs from using *Basic* for misstatements in private offerings, like in the present case. Without a presumption in a mixed case, the difficult task of proving direct reliance would be imposed. *See Basic*, 485 U.S. at 245 (noting the "unnecessarily unrealistic evidentiary burden" of proving direct reliance).

In the present case, this Court should affirm *Affiliated Ute's* applicability in mixed cases considering the purpose of securities legislation. This Court has

used presumptions of reliance in securities cases because direct proof of reliance is difficult for plaintiffs to prove. *See Stoneridge*, 552 U.S. at 159. The close relationship between omissions and misstatements make mixed cases difficult, and adopting a rigid rule would cut against construing securities legislation flexibly. Therefore, the *Affiliated Ute* presumption should be applicable in mixed cases because this Court did not limit its holding to solely omissions, and the majority of circuits characterize cases to determine whether the presumption applies. The present case further illustrates the importance of having a relative importance analysis. The Fund alleged misstatements, but it relied primarily on Defendant's role and the facilitation of the offering memo. If this Court limits the presumption's applicability too narrowly, plaintiffs will face increased difficulty in recovering for fraud.

## **CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this Court REVERSE the decision of the Circuit Court to grant Defendant's 12(b)(6) motion to dismiss.

Respectfully Submitted,

_____/s/

Team P08

Counsel of Record for Petitioner