Team No. P09

Docket 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 Fordham Court of Appeals

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. WHETHER A CORPORATE EXECUTIVE IS PRIMARILY LIABLE AS A "DISSEMINATOR" UNDER RULE 10b-5(a) AND (c) WHEN SHE (1) CONCEALED MATERIAL INFORMATION FROM INVESTORS AND (2) INSTRUCTED AN ASSOCIATE TO DISTRIBUTE TO INVESTORS A MEMO THAT SHE KNEW CONTAINED FALSE AND MISLEADING STATEMENTS.

II. WHETHER THE *AFFILIATED UTE* PRESUMPTION OF RELIANCE SHOULD EXTEND TO "MIXED" ALLEGATIONS, INVOLVING BOTH OMISSIONS AND MISREPRESENTATIONS, WHEN (1) A CORPORATE EXECUTIVE'S POSITION CREATES A DUTY TO DISCLOSE MATERIAL INFORMATION, (2) THE EXECUTIVE WITHHOLDS MATERIAL INFORMATION FROM INVESTORS, AND (3) INVESTORS ARE UNABLE TO PROVE RELIANCE ON THAT OMISSION.

STATEMENT OF THE CASE

This case was granted cert by the Supreme Court after the Circuit Court's reversal of the District Court for the District of Fordham's ruling in favor of the Fordham Public Employees Investment Fund (hereinafter "Petitioner") (R. 23, 30). The Circuit Court granted the Rule 12(b)(6) motion to dismiss Petitioner's claim against Gemstar's Vice President of Investor Relations, Katie Gordon ("Respondent"). (R. 23). The Circuit Court held that Petitioner did provide positive proof of reliance and was not entitled to a rebuttable presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), thus Respondents' 12(b)(6) motion for failure to state a claim was granted. (R. 21, 23). Petitioner's writ of certiorari was granted on January 9, 2023. (R. 30).

Gemstar's Origins

Gemstar is a manufacturing company founded by Grace Underwood ("Grace") and Danielle Scott ("Danielle") that sells sophisticated machine tools, including fasteners for the structural applications of cargo jet aircrafts. (R. 1, 4). Grace and Danielle met in 2014 and decided to pool their respective inheritances for a total of $50 million and search for an underperforming manufacturing company in which they could invest. (R. 1–2). After a three-year search, a business broker introduced them to McGrath, Inc., a large manufacturer that was selling its sophisticated machine tool business. (R. 2).

Grace and Danielle hired Forsyth Financial ("Forsyth") to review McGrath's market and management, and engineering firm MMD, Inc., ("MMD") to examine McGrath's equipment and property to ensure it was in suitable condition. (R. 3). MMD's report stated that McGrath's physical assets were in "satisfactory condition for their intended use." (R. 3). However, MMD's report noted that one of the composites in McGrath's best-selling machine had been flagged in trade literature as having the potential to develop of microscopic cracks under stress over time. (R. 3).

After due diligence review, in which the risk of microscopic cracks was either overlooked or found unimportant, Grace and Danielle finalized the terms of the transaction. (R. 3). The deal closed in January 2018, and the new company was called Gemstar. (R. 3). Grace and Danielle agreed to share responsibility for all executive decisions, with Grace serving as Chief Executive Officer and Danielle serving as President. (R. 3).

<u>Grace and Danielle Plan Their Exit</u>

In three years, Gemstar became a major player in the sophisticated machine tools sector, but Grace and Danielle began to consider other business pursuits. (R. 4). To that end, Grace enlisted a friend from business school Allison Ritter ("Allison"), a Junior Managing Director at Carter Capital, to assist in their exit from Gemstar. (R. 4). In January 2021, Grace and Danielle met with Allison and explained their desire to structure a transaction where they would sell Gemstar to either a private equity firm in partnership with management or to a strategic partner and use the proceeds to purchase a technology company. (R. 4).

After reviewing Gemstar's financial condition, Allison proposed a private placement via an 80 percent sale of Gemstar's common stock to institutional investors, while Grace and Danielle maintained control of Gemstar by retaining 20 percent of its super voting shares. (R. 4). Allison explained that this private placement would maximize Grace and Danielle's return. (R. 4–5). Grace and Danielle were hesitant to maintain their position at Gemstar, given that they wanted to pursue other business ventures. (R. 5). Allison explained that Grace and Danielle would have to retain their position to market the transaction to investors. (R. 5). Grace and Danielle eventually agreed to the private placement and instructed Allison to pursue the transaction in February 2021. (R. 5).

<u>The Private Placement</u>

Gemstar's Vice President of Investor Relations, Katie Gordon ("Katie"), was tasked with organizing the private placement and coordinating the flow of information between Gemstar, Carter Capital, and other stakeholders such as investors. (R. 5). To do so, Katie coordinated with attorneys, financial advisors, and engineering firms (collectively "Gemstar's experts") to construct the Private Placement Memo ("the Memo"), which would be used to market Gemstar's common stock to potential investors. (R. 5).

In May 2021, the engineering firm Keane & Company ("Keane") delivered its report ("the Report") on the structural integrity of Gemstar's assets to Katie. (R. 5). The Report included a memorandum ("Trade Letter") by a former structural engineer, stating Gemstar's most popular product, the SwiftMax, used a composite (the "defective composite") that could develop microscopic cracks over time when used under stressful conditions, such as an aircraft takeoff. (R. 6). Initially, Katie was alarmed but was assuaged when she realized the Trade Letter was over three years old. (R. 6). Katie then decided to withhold action until she discussed the Trade Letter with Grace and Danielle. (R. 6).

At Katie, Grace, and Danielle's meeting, Grace argued in favor of removing the Trade Letter from Keane's report, calling the discussion a "waste of time" because the "outdated" Trade Letter was "clearly written in error." (R. 6). Danielle expressed concern that Gemstar's experts may be entitled to review the Trade Letter. (R. 6). However, Grace argued that auditors "make mountains out of molehills," and Danielle eventually agreed that the Trade Letter should be removed. (R. 6). After the meeting, Katie removed the Trade Letter from the Report that she delivered to Gemstar's Experts. (R. 6). Katie was reluctant to remove the Trade Letter but decided that she could "live with it." (R. 6).

In August 2021, the Memo was completed without reference to the Trade Letter or the SwiftMax's defective composite. (R. 6). Katie instructed an associate who worked under her to send the Memo to several large, non-bank financial institutions on Gemstar stationary. (R. 6). The Memo did not identify Katie as Vice President of Investor Relations or offer investors the chance to inquire about the contents of the Memo. (R. 6).

The private placement was finalized in October 2021. (R. 7). Gemstar's common stock was sold to sixteen institutional investors at $27 a share. (R. 7). One of those investors, the Fordham Public Employees Investment Fund ("the Fund"), purchased 3 million shares at $27 per share, totaling an $81 million investment. (R. 7). Despite the Memo not identifying Katie, the Fund was aware of Katie's role in the transaction. (R. 6, 7).

A Near Disaster and Price Crash

In December 2021, an explosion occurred on a Seaboard Airlines jet as it accelerated for takeoff at Kennedy International Airport in New York City. (R. 7). Luckily, the pilot was able to maintain control of the aircraft and brought it to a stop 200 yards from the end of the runway. (R. 7).

The Seaboard Airlines jet was routinely serviced by Silberfarb Solutions, one of Gemstar's "crown jewel customers." (R. 4, 7). An investigation by the Federal Aviation Administration discovered that the explosion occurred because an engine had become partially dislodged from the engine's left wing. (R. 7). The engine dislodged because two fasteners were unable to support the engine's weight. (R. 7). Silberfarb Solutions manufactured the fasteners at issue using Gemstar's most popular product, the SwiftMax. (R. 4, 7). Further investigations conclusively determined that the fasteners developed microscopic cracks over time due to the extreme stress generated by takeoffs, the very possibility raised by the Trade Letter. (R. 3, 5, 6, 7).

By February 2022, the price of Gemstar's common stock had fallen to $4. (R. 7). The Fund sold its entire Gemstar holdings at a loss of $68 million. (R. 7).

Section 10(b) and Rule 10b-5 Claim

In March 2022, the Fund filed a lawsuit in the United States District Court for the District of Fordham. (R. 8). The Fund alleged that Gemstar and its executives, Grace, Danielle, and Katie, violated Section 10(b) of the

Securities Exchange Act of 1934 and Rule 10b-5 "by engaging in a deceptive scheme to conceal material liabilities relating to the defective composite." (R. 8). The Fund sought $68 million in damages from Gemstar and its executives in connection with its purchase of Gemstar's common stock in reliance on false and misleading statements and material omissions in the Memo. (R. 8). Particularly, the Fund pointed to three statements: (1) "Gemstar's physical assets are in reasonable condition for their intended use;" (2) "[n]one of Gemstar's products are materially defective;" and (3) "[t]here are no material undisclosed contingent liabilities relating to Gemstar's products." (R. 8). In August 2022, the Fund settled its claim against Gemstar. (R. 8).

In September 2022, Gemstar's executives each filed separate Rule 12(b)(6) motions to dismiss. (R. 8). Specifically, Katie argued that she could not be held liable as a primary violator under Section 10(b) or Rule 10b-5 because she did not "make" or "disseminate" the Memo. (R. 9). Further, Katie argued that the Fund did not allege reliance on the Memo in its decision to purchase Gemstar's common stock. (R. 9).

In October 2022, the District Court for the District of Fordham denied Katie's motion to dismiss, ruling that Katie was subject to primary liability as a disseminator and that the Fund was entitled to a presumption of reliance under *Affiliated Ute.* (R. 9). While the Circuit Court agreed that Katie was primarily liable, it reversed the District Court's decision with regard to the *Affiliated Ute* presumption of reliance and granted Katie's motion to dismiss. (R. 17, 23). This Court then granted the Fund's petition for certiorari.

SUMMARY OF THE ARGUMENT

Petitioner respectfully requests that this Court reverse the Circuit Court's granting of Respondent's motion to dismiss and hold that instructing an employee to distribute investor materials known to contain false and misleading information is a primary violation of Rule 10b-5(a) and (c). Petitioner additionally requests that this Court reinstate the District Court's decision and hold that the *Affiliated Ute* presumption of reliance extends to "mixed" cases involving both omissions and misrepresentations.

Katie Gordon is primarily liable as a disseminator under Rule 10b-5(a) and (c). By removing the Trade Letter from the Report used to produce Gemstar's Memo, Katie acted to ensure that investors were unaware of all information relevant to the company stock issuance. She achieved this result when she received the completed Memo, noted its deficiencies, and then ordered its nationwide distribution. This conduct directly contravenes Section 10(b) and Rule 10b-5, and therefore Katie should be held primarily liable.

The Fund is entitled to a presumption of reliance because the Fund's claim satisfies the three requirements set forth in *Affiliated Ute*: (1) a duty to disclose, (2) materiality, and (3) reliance that is impossible to prove. As Vice President of Investor Relations, Katie was a corporate insider with a duty to disclose material information to potential investors, namely, the Fund. The omitted information was material to reasonable investors such as the Fund by altering the total mix of information and, therefore, factored into Fund's decision to invest in Gemstar. Finally, because the Fund cannot prove reliance on the information Katie omitted, reliance is impossible to prove. Applying the presumption of reliance announced in *Affiliated Ute* to "mixed" cases would further the fundamental purpose of the securities laws: providing investors with full disclosure. Therefore, a presumption of reliance under *Affiliated Ute* should extend to the Fund's claim.

STANDARD OF REVIEW

Appellate courts review *de novo* a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Shara v. Maine-Endwell Cent. Sch. Dist.*, 46 F.4th 77, 82 (2d Cir. 2022). In its review, the Court must accept all factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Id.* To survive a motion to dismiss, a plaintiff must allege facts sufficient "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when its factual content "allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Twombly*, 550 U.S. at 556.

ARGUMENT

I. KATIE IS LIABLE AS A PRIMARY VIOLATOR OF RULE 10b-5(a) AND (c) FOR DIRECTING AN ASSOCIATE UNDER HER CONTROL TO DISTRIBUTE THE MISLEADING PRIVATE PLACEMENT MEMORANDUM.

Given Katie's position as Gemstar's Vice President of Investor Relations, and the fact that she knew the information in the Memo was false and misleading, she is a primary violator of Rule 10b-5(a) and (c). Section 10(b) of the Securities Exchange Act of 1934 confers to the Securities and Exchange

Commission (the "SEC") the authority to issue rules prohibiting the use of "manipulative or deceptive device[s] or contrivance[s] . . . in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). Consistent with this purpose, Rule 10b-5 was promulgated as a coextension of Section 10(b), making it unlawful for any person to misrepresent or omit material facts in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5. This Court has recognized within the Rule an implied right of action for private plaintiffs to bring a claim for securities fraud against primary violators. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

In *Lorenzo*, this Court held that the capacious words and "expansive language" used in subsections (a) and (c) of Rule 10b-5 "capture a wide range of conduct." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101–02 (2019). Specifically, under subsection (a), "[a] device . . . is simply that which is devised, or formed by design; a scheme is a project, plan, or program of something to be done; and an artifice is an artful stratagem or trick." *Id.* at 1101 (citations and internal quotation marks omitted). Likewise, the word "act" in subsection (c) was defined as "a doing or a thing done" and a "practice" as an "action or deed." *Id.* at 1101 (citations and internal quotation marks omitted). Viewed through this lens, the Rule "readily embraces" those who "disseminate false or misleading statements to potential investors with the intent to defraud." *Id.* at 1099.

Here, Katie engaged in a deceptive practice when she conspired with Grace and Danielle to conceal from Gemstar's experts the Trade Letter detailing the SwfitMax's structural instability. (R. 6). As a result, the Memo omitted key information regarding the financial well-being of Gemstar's assets. (R. 6). Katie's efforts to defraud investors continued when she reviewed the completed Memo, noted that it did not reference the SwiftMax's defective composite, and ordered an employee to distribute it to twenty-six of the country's largest non-bank financial institutions. (R. 6). "Under the[se] circumstances," this Court made clear, "it is difficult to see how [Katie's] actions could escape the reach of" Rule 10b-5(a) and (c). *See Lorenzo*, 139 S. Ct at 1101.

A. Because Katie Directed an Associate to Distribute the Memo to Investors, While Knowing That It Contained Material Misstatements and Omissions, She Is Primarily Liable as a "Disseminator" of That Information.

This Court should extend the rule announced in *Lorenzo* and find that Katie is primarily liable as a disseminator of fraudulent information. Guided by "[p]urpose, precedent, and circumstance," this Court held unequivocally that "[t]hose who disseminate false statements with intent to defraud are primarily liable under Rule 10b-5(a) and (c)." *Lorenzo*, 139 S. Ct. at 1104. Here, Katie used her power as Vice President of Investor Relations to remove the Trade Letter from the file used to develop Gemstar's Memo and then ordered an employee to distribute the misleading information to investors. (*See* R. 6). In both instances, Katie's conduct violated Rule 10b-5(a) and (c), and, as a result, this Court should hold that she is a primary violator.

In *Lorenzo*, this Court held that the words used in Rule 10b-5 and Section 10(b) of the Securities Exchange Act are "sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud." *Id.* at 1101. Lorenzo was an investment banker who sent two e-mails containing information he knew to be false and misleading. *Id.* at 1099. Though Lorenzo did not write the e-mails, he carried out the act of sending the messages and included with them both his signature block, which identified himself as "Vice President—Investment Banking," and a note stating that he could be contacted with any questions. *Id.* at 1099. Having compared these actions to Rule 10b-5's text, this Court concluded that subsections (a) and (c) encompass "a wide range of conduct," including the act of "disseminating false or misleading information to prospective investors with the intent to defraud." *Id.* at 1101.

Here, Katie is liable as a disseminator because she ordered an employee to distribute information she knew to be false and misleading. Similar to Lorenzo, Katie's responsibilities as Vice President of Investor Relations included managing the flow of information between Gemstar, its experts, and prospective investors. (R. 5). However, Katie abused this authority when, after consulting Grace and Danielle, she agreed to remove the Trade Letter from the materials used in developing the Memo. (R. 6). By actively participating in this meeting, Katie employed an "artful stratagem or a plan, devised to defraud an investor." *Lorenzo*, 139 S. Ct at 1101 (internal quotation marks omitted); *see* 17 C.F.R. § 240.10b-5(a). She further implicated herself in this deceit when she instructed an associate to distribute the Memo that she knew omitted key information. (R. 6). This is plainly "a[n] act, practice, or course of business" prohibited by Rule 10b-5(c). *Lorenzo*, 139 S. Ct at 1101; 17 C.F.R. § 240.10b-

5(c). Because Katie's conduct is virtually the same as Lorenzo's, this Court should find that she is also a primary violator.

This conclusion is unaffected by the fact that Katie acted through her associate in disseminating the Memo. (*See* R. 6). A central tenet of agency theory holds that "a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of his apparent authority." *Am. Soc. of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 556 (1982) (citation omitted). "In a wide variety of areas, the federal courts, like this Court . . . have imposed liability upon principals for the misdeeds of agents acting with apparent authority." *Id.* at 569. Here, Katie acted as the principal when she used her position as a corporate officer to order an employee to distribute the Memo. (*See* R. 6). As such, liability for the resulting harm should be attributed to Katie as if she completed the act herself. *See Hydrolevel*, 456 U.S. at 556. This holding does not overextend *Lorenzo*'s scope to include "actors tangentially involved in dissemination" because it was through Katie's conduct alone that the misleading information reached Gemstar's prospective investors. *See Lorenzo*, 139 S. Ct. at 1101.

If, however, this Court finds that Katie is not primarily liable as a disseminator, it should adopt the Second Circuit's view that dissemination is sufficient, but not necessary, for an actionable scheme liability claim. *See SEC v. Rio Tinto PLC,* 41 F.4th 47 (2d Cir. 2022). In *Rio Tinto*, the Second Circuit sought to determine whether *Lorenzo* abrogated its longstanding rule "that misstatements and omissions cannot form the 'sole basis' for liability under the scheme subsections." *Id.* at 53 (quoting *Lentell v. Merrill Lynch* & Co., 396 F.3d 161, 171 (2d Cir. 2005)). In holding that it had not, the court reasoned that "misstatements or omissions were *not* the sole basis for scheme liability in *Lorenzo*," but rather "[t]he *dissemination* of those misstatements was key." *Id.* at 53 (emphasis in original). The resulting rule thus holds that an "actionable scheme liability claim also requires something *beyond* misstatements and omissions, *such as* dissemination." *Id.* at 49 (second emphasis added).

Here, this "something beyond" requirement is satisfied by Katie's plainly fraudulent behavior. Not only was she an active participant at a meeting devised to conceal the Trade Letter, but Katie effectuated that plan when she delivered an incomplete file to Gemstar's experts. (*See* R. 6). By doing so, Katie eclipsed the experts' ability to produce a memo that accurately depicted Gemstar's financial well-being and engaged in conduct that "was inherently deceptive when performed." *SEC v. Kelly*, 817 F.Supp.2d 340, 344 (S.D.N.Y. 2011). Even without considering her role as a disseminator, this behavior is a primary violation of Rule 10b-5(a) and (c) and is consistent with the Second Circuit's jurisprudence that "liability . . . hinge[] on the performance of an inherently deceptive act that is distinct from an alleged misstatement." *Fogel v. Vega*, 759 F. App'x 18, 25 (2d Cir. 2018).

B. Imposing Primary Liability for Katie's Active Role in Defrauding Gemstar's Investors Preserves the Distinction between Primary and Secondary Liability.

This Court has held that primary liability under Section 10(b) does not extend to those who merely aid in the commission of a primary violation. *See*

Cent. Bank of Denver, 511 U.S. at 169. However, this principle is not implicated here. Rather, Katie's own conduct—concealing information and ordering distribution of the Memo—is expressly proscribed by Section 10(b) and Rule 10b-5. Holding Katie primarily liable under these circumstances both preserves the essential balance between primary and secondary liability and is supported by this Court's precedent.

In *Central Bank*, this Court defined the scope of private civil liability under Rule 10b-5. *Id.* at 191. At the outset, this Court noted that primary liability includes only that conduct proscribed by Section 10(b) of the Securities Exchange Act: "the making of a material misstatement (or omission) or the commission of a manipulative act." *Id.* at 177; 15 U.S.C. § 78j(b). In observing that Section 10(b) provides no indication of Congress' intent to create a private right of action for conduct not involving deception or manipulation, this Court declined to expand its boundaries to include actors who render "substantial assistance" during the commission of a primary violation. *Central Bank*, 511 U.S. at 169, 177 (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473 (1977)). Instead, only the SEC may pursue liability for these secondary violators. *Id.* at 187. Still, even in "[t]he absence of § 10(b) aiding and abetting liability," [a]ny person . . . may be liable as a primary violator . . . assuming all of the requirements for primary liability . . . are met." *Id.* at 191.

The line separating primary and secondary violators was further refined in *Janus Capital Group, Inc. v. First Derivative Traders. See generally* 564 U.S. 135 (2011). There, this Court rejected primary liability for an investment advisor who assisted in drafting misstatements later distributed by its "legally independent" client because the advisor did not possess "ultimate authority over . . . whether and how" the statements were communicated. *Id.* at 142. Without this control, the advisor could "merely suggest what to say, not 'make' a statement in its own right." *Id.* This division was illustrated by an analogy to a speaker and their speechwriter: "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." *Id.* at 143. This Court cautioned that holding actors, such as the speechwriter, primarily liable for statements "made" by another would extinguish the foundation on which secondary liability rests. *Id.* at 144. To that end, *Janus* contemplates the distinction between primary and secondary liability only as it applies to *making* an untrue statement under subsection (b) of Rule 10b-5. *See id.* at 141–43. However, where the relevant conduct involves *disseminating* false information, *Lorenzo* applies. *See Lorenzo*, 139 S. Ct. at 1101.

Lorenzo further illuminates the line separating primary and secondary liability: "[t]hose who disseminate false statements with intent to defraud are primarily liable under Rule 10b-5(a) and (c) . . . even if they are secondarily liable under Rule 10b-5(b)." *Id.* at 1104. In rejecting Lorenzo's argument that ascribing primary liability to him would "erase" the distinction between primary and secondary liability, this Court compared his conduct to Rule 10b-5's text. *See id.* at 1103. By sending e-mails he knew contained material untruths, Lorenzo both "employed a device, scheme, and artifice to defraud within the meaning of subsection (a)" and "engaged in an act, practice, or course of business that operated as a fraud or deceit under subsection (c)." *Id.* at 1101 (internal quotation marks omitted). Under this view, Lorenzo's conduct fell well within Rule 10b-5's "expansive language," and the decision to impose primary liability was far from difficult. *See id.* at 1101–02.

Here, Katie's actions are similarly embraced by Rule 10b-5(a) and (c)'s text. After informing Danielle and Grace of the Trade Letter, Katie agreed to remove it from the Report used by Gemstar's experts to produce the Memo. (R. 6). Though this undertaking was designed so that investors remained unaware of information relevant to Gemstar's common stock issuance, it was Katie who guaranteed this result when she instructed her employee to distribute the Memo to those investors. (R. 6). Simply put, Katie actively participated in a "scheme" or "plan" intended to defraud investors, which she accomplished by engaging in an "act" or "course of business." (*See* R. 6); *Lorenzo*, 139 S. Ct at 1101 (defining Rule 10b-5(a) and (c)'s terms); 17 C.F.R. § 240.10b-5(a) and (c). Each of these steps are a direct violation of Rule 10b-5, for which Katie should be held primarily liable. This conclusion does not threaten to "blur" the distinction between primary and secondary liability, but rather it preserves the clear line drawn by this Court's precedent. (*See* R. 16); *Central Bank*, 511 U.S. at 191 ("Any person . . . who employs a manipulative device . . . may be liable as a primary violator under 10b-5.").

C. Holding Katie Primarily Liable Effectuates the Policy Goals of the Securities Laws and Ensures That Private Plaintiffs Can Recover.

Holding Katie primarily liable for disseminating fraudulent information to Gemstar's investors promotes Congress' purpose for enacting Section 10(b) of the Securities Exchange Act—"to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 390 (2014). To hold otherwise would vitiate this purpose and weaken the private right of action recognized by this Court.

After rampant abuses in the securities industry culminated in the 1929 stock market crash, Congress enacted a series of statutes designed "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). Among these laws, Section 10(b) of the Securities Exchange Act has had the greatest impact on the integrity of the securities markets. *See* 15 U.S.C. § 78j(b). This provision does not, however, provide an express civil remedy for its violation. *See id.* Thus, the SEC responded by promulgating Rule 10b-5, through which it derives the power to enforce securities fraud violations. *See* 17 C.F.R. § 240.10b-5.

In addition to the administrative and injunctive actions available to the SEC, this Court through judicial interpretation has recognized the right of private plaintiffs to bring a claim under Section 10(b) and Rule 10b-5. *See Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). This Court observed that in enacting Section 10(b), Congress sought not to regulate "corporate mismanagement" but to "bar deceptive devices and contrivances" from all securities transactions. *Id.* at 12. This purpose, coupled with the statute's "in connection with" requirement, allowed this Court to imply from Section 10(b)'s text a private right of action for defrauded investors. *See* 15 U.S.C. § 78j(b). Though decades of jurisprudence, "legislative acquiescence, and the passage of time" has cemented its existence, *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988), this Court has emphasized the need to narrowly define this right. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 167 (2008). Subsequent interpretations of Rule 10b-5's scope—and, as a result, the extent of rights it affords private plaintiffs—have thus been informed by its "language, precedent, and purpose." *Lorenzo*, 139 S. Ct. at 1100.

Most recently, in *Lorenzo*, this Court rejected arguments favoring secondary liability for disseminators of false information. This Court explained that, despite having intentionally misled investors, a disseminator, like Lorenzo, who has not primarily violated other parts of Rule 10b-5, might then escape liability altogether. *Id.* at 1104. While this outcome would not only obviate Congress' explicit desire to protect investors, it would likewise seem antithetical to the securities laws' basic purpose: "to achieve a high standard of business ethics in the securities industry." *Id.* at 1103 (quoting *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186 (1963)).

Holding Katie primarily liable is consistent with these goals. The expansion to primary liability announced in *Lorenzo* acts to deter market participants from engaging in deceptive behavior, which, as a result, fortifies confidence in securities transactions. Extending the same liability to Katie augments these benefits and sends an unmistakable signal that, in addition to SEC enforcement and criminal liability, those who distribute fraudulent materials to investors may also be subject to suit by private plaintiffs. Not only would this holding give pause to bad actors like Katie, but its effect for private plaintiffs would be tangible: finding that Katie is a primary violator of Rule 10b-5(a) and (c) provides the Fund with the ability to pursue damages against her for the $68 million loss it incurred. This outcome is essential to promoting investor confidence and ensuring the integrity of the securities markets. *See Troice*, at 404 (Kennedy, J., dissenting) ("Investor confidence indicates fair dealing and integrity in the markets. It also is critical to achieving an efficient market." (citations omitted)).

II. THE FUND IS ENTITLED TO A PRESUMPTION OF RELIANCE UNDER *AFFILIATED UTE* BECAUSE KATIE HAD A DUTY TO DISCLOSE INFORMATION THE FUND WOULD CONSIDER IMPORTANT, THE INFORMATION OMITTED FROM THE MEMO WAS MATERIAL, AND RELIANCE IS IMPOSSIBLE TO PROVE.

The Fund is entitled to a presumption of reliance under *Affiliated Ute*. Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of "any manipulative or deceptive device" related to the "purchase or sale of any security." 15 U.S.C. § 78j(b). To that end, Rule 10b-5 was promulgated to prohibit "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. §

240.10b-5. In *Affiliated Ute*, this Court extended a presumption of reliance where: (1) there is an "obligation to disclose," (2) "a reasonable investor might have considered" the undisclosed information important, (3) the fraud is "primarily a failure to disclose," an omission. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153–54 (1972). Here, Katie is a corporate insider with a duty to disclose information to those she deals with, namely, the Fund. Additionally, the information in the omitted Trade Report is material because the Fund would have considered it important in its decision to purchase Gemstar's common stock. Finally, the Fund's reliance on omissions from the Memo is impossible to prove and not simply the inverse of the information contained in the Memo. Therefore, the *Affiliated Ute* presumption of reliance should apply to "mixed" claims such as the Fund's claim against Katie.

A. Katie Had a Duty to Disclose Information in the Trade Letter Because She Stands in a Relationship of Trust and Confidence to the Fund.

Katie had a duty to disclose the information contained in the Trade Letter because she is a fiduciary. Katie is a corporate insider with a duty to disclose information to those with whom she deals. Here, Katie stands in a relationship of trust and confidence to the Fund, and the Fund understood her role in the private placement transaction. Therefore, Katie had a duty to disclose information that would have affected the Fund's investment decision.

A duty to disclose arises from either a fiduciary relationship or a similar relationship of "trust and confidence" between two parties. *Chiarella v. United States*, 445 U.S. 222, 228 (1980). Additionally, the duty to disclose arises from "the existence of a relationship affording access to inside information intended to be available only for a corporate purpose." *Id.* at 227. An affirmative duty to disclose is "traditionally imposed on corporate insiders," such as officers and directors of a corporation. *Id.* (citation omitted). These corporate insiders have a duty to disclose material facts to stockholders and persons "with whom they deal with and which, if known, would affect their investment judgment. *Id.* (citation omitted). One with a duty to disclose "may not stand mute" while they facilitate a fraudulent transaction. *Affiliated Ute*, 406 U.S. at 153.

In *Affiliated Ute*, this Court held that there was a duty to disclose where two bank managers facilitated the transfer of Ute Development Corporation ("UDC") stock in two separate markets, one market for Ute tribe members, and another, more lucrative market for non-tribe members. *Id.* at 147. Rather than acting as mere transfer agents, this Court held that both bankers were "active in encouraging a market for the UDC stock" among non-tribe members and stood to receive commissions for facilitating the more lucrative market. *Id.* at 152. The bankers acted as "market makers," both for their personal purchases of UDC stock and facilitating sales for others. *Id.* at 153.

Here, Katie stands in a relationship of trust and confidence to the Fund and had an affirmative duty to disclose the information in the Trade Letter. Katie, serving as Vice President of Investor Relations for Gemstar, plainly fits the conventional definition of "corporate insider" as an officer or director of Gemstar under *Chiarella.* (R. 5); *see also Chiarella,* 445 U.S. at 227.

Furthermore, as a traditional corporate insider, Katie had an affirmative duty to disclose information to with whom she dealt, namely, investors such as the Fund. *See Chiarella*, 445 U.S. at 227. Like the bankers in *Affiliated Ute*, Katie was facilitating information between stakeholders in the transaction (R. 5). Katie's discretion on what information to include in the Memo had a significant impact on the market value of the Fund's investment. (R. 6). Although the Memo did not identify Katie as Vice President of Investor Relations for Gemstar, as opposed to *Affiliated Ute* where the bankers were explicitly mentioned, she was primarily responsible for and actively facilitated the private placement transaction. (R. 5–6). Despite not being explicitly mentioned, the Fund was well aware of Katie's role in the private placement and could reasonably expect Katie to disclose information that would factor into its decision to purchase Gemstar's common stock. (R. 7).

Therefore, Katie had an affirmative duty to disclose the information contained in the Trade Letter to the Fund.

B. The Omitted Trade Report Is Material Because Information About the SwiftMax's Possible Defects Alters the Total Mix of Information Regarding the Fund's Decision to Invest in Gemstar.

The omitted information from the Trade Report is material because the Fund would have considered it relevant in its decision to purchase Gemstar's common stock. Information is material if there is a likelihood that the omitted information "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information." *Basic*, 485 U.S. at 231–32. Here, possible deficiencies in the SwiftMax would have significantly altered the calculus in the Fund's decision to purchase Gemstar's common stock. Therefore, the omitted information in the Trade Letter, not included in the Memo, is material.

In a Section 10(b) or Rule 10b-5 claim, information is material if "there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information." *Id.* at 231–32; *see also Affiliated Ute*, 406 U.S. at 153–54 (stating that defendants are entitled to a presumption of reliance where "facts withheld [are] material in the sense that a reasonable investor might have considered them important in" making the decision to invest).

In *Affiliated Ute*, this Court held that the existence of a secondary, more lucrative market for UDC stock was material to tribe members who were induced to sell their UDC stock. *Affiliated Ute*, 406 U.S. at 153. Although the two bankers made no affirmative representations about the existence of a secondary, more lucrative market, this Court reasoned that all that is necessary for an omitted fact to be material is "that a reasonable investor might have considered [it] important" in his or her decision to invest. *Id.* at 153–54.

Here, information regarding possible defects in the SwiftMax is plainly material to investors such as the Fund. The SwiftMax was Gemstar's best-selling product. (R. 4, 5). One of Gemstar's "crown jewel customers," Silberfarb Solutions, used the SwiftMax to manufacture fasteners for cargo jets. (R. 4, 7). The possibility that Gemstar's most in-demand product, which is used by one of its most important customers, may be defective under high-risk conditions such as airplane takeoff, plainly alters the total mix of information in Gemstar's private placement transaction. *See Basic*, 485 U.S. at 231–32; (R. 4, 5, 7). Furthermore, a reasonable investor, such as the Fund, would have considered the information in the Trade Letter important in its decision to purchase Gemstar's common stock. *See Affiliated Ute*, 406 U.S. at 153–54; (R. 5, 7).

Therefore, Katie's decision to omit the Trade Report from the Memo is material because the Fund would have considered it relevant in their decision to purchase Gemstar's common stock.

C. The Fund's Reliance on Omitted Information Regarding the SwiftMax's Defects Is Impossible to Prove, and the Omission Is Not the Inverse of Misrepresentations Made by Gemstar.

The *Affiliated Ute* presumption of reliance should be extended to the Fund's claim against Katie and Gemstar because without the presumption it is impossible for the Fund to demonstrate its reliance on Katie's conduct. Positive proof of reliance is not required where a claim primarily involves a failure to disclose. *See Affiliated Ute*, 406 U.S. at 153. Here, despite the Fund's claim containing both misrepresentations and omissions, reliance should be excused because it is impossible to prove. This evidentiary burden would threaten to defeat a valid claim of securities fraud: Katie and Gemstar's clear deception. Furthermore, the omission of the Trade Report is not merely the inverse of any misrepresentation made by Gemstar, nor is it an instance where the only omission is the truth that Gemstar's Memo misrepresents. Therefore, the *Affiliated Ute* presumption of reliance should be extended to "mixed" cases of misrepresentations and omissions such as the Fund's.

In cases "involving primarily a failure to disclose, positive proof of reliance" is not required. *Affiliated Ute*, 406 U.S. at 153. Rule 10b-5 prohibits the omission of "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. In such cases, this Court has "dispensed with a requirement of positive proof of reliance, where a duty to disclose material information had been breached" because "the necessary nexus between the plaintiffs' injury and the defendant's wrongful conduct had been established." *Basic*, 485 U.S. at 243.

The rationale for the *Affiliated Ute* presumption of reliance is that in deceptions of omission, "reliance as a practical matter is impossible to prove." *Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981). This evidentiary burden "threatens to defeat valid claims" and undermines "the enforcement of securities laws." *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975) (citation omitted). Due to "the difficulty of proving 'a speculative negative' – that the plaintiff relied on what was not said," courts have embraced the *Affiliated Ute* presumption in omissions cases. *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (quoting *Blackie*, 524 F.2d at 908).

Categorizing cases as either a "misrepresentation" or "omission" is "of little help" because, in many cases, "an omission to state a material fact relates back to an earlier statement." *Waggoner v. Barclays PLC*, 875 F.3d 79, 95 (2d Cir. 2017) (quoting *Wilson*, 648 F.2d at 93). In other words, "all misrepresentations are also nondisclosures, at least to the extent that there is a failure to disclose which facts in the representation are not true." *Little v. First California Co.*, 532 F.2d 1302, 1304 n.4 (9th Cir. 1976).

In *Affiliated Ute*, this Court held that positive proof of reliance was not required in a deception regarding the nondisclosure of a secondary market for UDC stock. 406 U.S. at 153. Despite standing purchase orders from non-tribe members and UDC stock selling to non-tribal members for as much as $700, the bank and its employees induced tribe members to dispose of their shares for as little as $300. *Id.* at 147. The bank managers did not disclose the value of secondary sales to non-tribe members or give them access to the more lucrative market. *Id.* This Court reasoned that the bank managers "may not stand mute" while they facilitate sales in a less lucrative market. *Id.* at 153. Therefore, the "obligation to disclose and [the] withholding of a material fact" are enough to presume reliance. *Id.* at 154.

In *Blackie*, the Ninth Circuit did not require positive proof of reliance because "the requirement imposes an unreasonable and irrelevant evidentiary burden." *Blackie*, 425 F.2d at 907. A class of investors alleged that Ampex Corporation violated Section 10(b) and Rule 10b-5 after previously undisclosed financial reporting errors led to investing losses. *Id.* at 894–95. The court explained the class members' claims were "cast in omissions or nondisclosure terms" of facts and figures necessary to make their Ampex's financial reporting not misleading. *Id.* at 905. Therefore, an evidentiary burden requiring proof of reliance on omission would "threaten[] to defeat valid claims" and "the enforcement of securities laws." *Id.* at 908.

However, in *In re Volkswagen*, the Second Circuit denied the *Affiliated Ute* presumption of reliance because the plaintiff alleged that it relied on Volkswagen's affirmative misrepresentations. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2 F.4th 1199, 1206 (9th Cir. 2021). Plaintiffs alleged a material omission from the automaker Volkswagen after it failed to disclose that it installed its "clean diesel" line of cars with "defeat devices" to cheat emissions tests and mask unlawfully high carbon emissions. *Id.* Despite omissions "loom[ing] large" over the plaintiffs' claim, those omissions were "simply the inverse of affirmative misrepresentations" described by the plaintiff. *Id.* 1206, 1208. The court reasoned the *Affiliated Ute* presumption did not apply because the plaintiff could "prove reliance through ordinary means by demonstrating a connection between the alleged misstatements and its injury." *Id.*; *see also Waggoner*, 875 F.3d at 96 (denying the *Affiliated Ute* presumption of reliance to "misstatements whose only omission is the truth that the statement represents").

Here, in the Fund's claim, reliance is impossible to prove. Without the *Affiliated Ute* presumption of reliance, the Fund would have to prove a "speculative negative:" that they relied on what was not said. Namely, that Gemstar's most in-demand product may have had serious deficiencies and it was in use by one of Gemstar's "crown jewel customers." (R. 4, 5, 6, 7); *Blackie*, 524 F.2d at 908. Reliance is impossible to prove because the nexus of the fraud is not any positive representation but the omitted information contained in the Trade Letter from the Memo. (R. 6). The Fund is unlikely to rely on standard disclosures such as Gemstar's assets being in a reasonable condition or there being no undisclosed liabilities relating to Gemstar's products for an $81 million investment. (R. 8). However, the Fund has no way of proving they relied on what was not said: that the SwiftMax may fail in extremely high-profile conditions and lead to a near total loss on investment. (R. 7).

Additionally, requiring proof of reliance simply because there are three misstatements imposes "an unreasonable and irrelevant evidentiary burden" on the Fund's claim. *Blackie*, 425 F.2d at 907. Like the nondisclosure of financial reporting errors in *Blackie*, the Fund's claim is cast in terms of an omission, that the SwiftMax used a defective composite subject to failure under stressful conditions, that would make the Memo circulated to investors not misleading. (R. 6–7); *see also Blackie*, 425 F.2d at 894–95. An evidentiary burden requiring positive proof of reliance on an omission of the information in the Trade Letter threatens to defeat valid claims of securities fraud and undermine the enforcement of securities laws. (R. 5–6).

Furthermore, Katie's removal of the Trade Letter does not just loom large over the Fund's claim, nor is it the inverse of any representations made by Gemstar. *See In re Volkswagen*, 2. F.4th at 1206. Rather than the nine pages of affirmative statements in *Volkswagen*, the Fund's claim is based on Katie's removal of the Trade Letter and omission of information regarding the defective composite. (R. 6). The omission of the Trade Letter in the Memo is not simply the truth that Gemstar's Memo represents. *See Waggoner*, 875 F.3d at 96.

Two of those statements may in fact be true; Gemstar's assets may have been in reasonable condition for their intended use, and none of Gemstar's products may have been materially defective prior to the SwiftMax's failure at Kennedy International Airport. (R. 7, 8). Gemstar's third statement, that there were no material undisclosed contingent liabilities in Gemstar's products, was buried within a multi-page document with financials and sophisticated technical information produced by Gemstar's experts. (R. 5, 6, 8). Requiring proof that the Fund relied on one statement, characterized in the record itself as "boilerplate," for an $81 million investment threatens to defeat a valid claim of securities fraud. (R. 5, 7).

Finally, *Affiliated Ute*, where the presumption of reliance was created, was itself a mixed case where bankers made both affirmative misrepresentations and omissions. *Affiliated Ute*, 406 U.S. at 147. This Court created a presumption of reliance where there is "primarily a failure to disclose," not exclusively a failure to disclose. *Id.* at 153. Denying the Fund's presumption of reliance because of three sentences would leave the Fund with no recourse for the loss of $68 million. (R. 7, 8). This denial, solely based on the fact that the fraud is mixed with misstatements and omissions, undermines the "fundamental purpose" of the securities laws: "a philosophy of full disclosure." *Id.* at 151.

Underlying the Securities Exchange Act of 1934 was a belief that "there cannot be honest markets without honest publicity" and "[m]anipulation and dishonest practices . . . thrive upon mystery and secrecy" *Basic*, 485 U.S. at

230 (citation omitted). Indeed, Gemstar is withholding information that may have discouraged investors so its insiders could secure their lucrative private placement. (R. 6–7). Grace and Danielle both knew the removal of the Trade Letter from the Memo was questionable at best and yet moved forward to secure their lucrative private placement. (R. 6, 7).

Therefore, the *Affiliated Ute* presumption of reliance should be extended to the Fund's "mixed" claim because reliance is impossible to prove, and the alleged omission is not simply the inverse of any representations made by Gemstar. Thus, the Circuit Court's denial of the presumption of reliance should be overruled under *Affiliated Ute*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Circuit Court's granting of Respondent's Rule 12(b)(6) motion to dismiss and hold (1) that Respondent may be held primarily liable for instructing an associate to distribute investor materials she knew to be false and misleading, and (2) that Petitioner is entitled to a presumption of reliance because the deceptive conduct involved primarily an omission of material information.