Team P10

Docket No. 22-123

IN THE

Supreme Court of the United States

THE 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 FORDHAM CIRCUIT

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED

I. Whether a high-level executive tasked with recruiting potential investors may be held primarily liable under Rule 10b-5(a) and (c) when she used her position to knowingly order the dissemination of fraudulent information to investors.

II. Whether the *Affiliated Ute* rebuttable presumption of reliance applies to mixed cases of omissions and affirmative misrepresentations when the plaintiff focuses the complaint on the omissions, and it would be too burdensome to require proof of reliance.

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INTRODUCTION

Federal securities laws begin and end with consumers. Following the 1929 stock market crash, the federal government passed the Securities and Exchange Act of 1934 to effectuate a transparent marketplace that incentivizes participation in public and private markets. Specifically, under Section 10(b)-5 of the Exchange Act, individuals are prohibited from withholding material information and making or disseminating false information to investors during the purchase or sale of securities. Gordon attempts to evade scrutiny under Section 10(b)-5 on technicalities that the federal government did not intend to be available to civil litigants. This Court should hold firmly to their previous rulings in *Lorenzo* and *Affiliated Ute*, finding Gordon primarily liable for fraudulent misstatements and omissions of material facts to investors.

STATUTORY AND REGULATORY PROVISIONS

This case first presents a question as to whether an individual who directs the dissemination of false information may be primarily liable under 15 U.S.C. § 78j(b) (1934) ("Section 10(b)-5" or "Exchange Act") and 17 C.F.R. § 240.10b-5 (1934) (Securities and Exchange Commission ("SEC") "Rule 10b-5"). The second question focuses on whether the *Affiliated Ute* presumption applies in "mixed" cases of omissions and misrepresentations, under Section 10(b)-5 and Rule 10b-5. The relevant text is reproduced in the appendix.

STANDARD OF REVIEW

Under the pleading standard established by this Court in *Ashcroft v. Iqbal*, Rule 12(b)(6) of the Federal Rules of Civil Procedure ("12(b)(6)") only

requires that plaintiffs present facts, "accepted as true, to state a claim for relief that is plausible." 556 U.S. 662, 678 (2009); F.R.C.P. 12(b)(6). Appellate review of the district court's granting of defendant's motion to dismiss must be reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

1. Statement of Facts

The Purchase and Success of Gemstar. In January 2017, Grace Underwood ("Underwood") and Danielle Scott ("Scott") decided to purchase a manufacturing business together. R. at 2. A business broker introduced them to McGrath, Inc., a manufacturing tool business, which they ultimately agreed to purchase for $75 million. R. at 2. In January 2018, the sale of McGrath, Inc. went through. R. at 3. Following the acquisition, Underwood and Scott changed the name of the company to "Gemstar." R. at 3. Underwood was then appointed as Chief Operating Officer and Scott as President. R. at 3. Underwood and Scott appointed Maya Neuberger as Vice President of Operations. R. at 3. Finally, the team brought on Katie Gordon ("Gordon") as Vice President of Investors. R. at 5.

In the three years that Underwood and Scott owned Gemstar, its presence in the manufacturing industry skyrocketed. R. at 4. One of their biggest purchasers was Silberfarb Solutions and their most popular product was SwiftMax. R. at 4. This tool was used as a fastener for large-scale machinery like cargo jet aircrafts. R. at 4.

The Internal Preparation to Resell Gemstar. After their short time owning Gemstar, both Underwood and Scott decided it was time to sell. Underwood and Scott brought in experts to handle the transition and advise them on the sale. R. at 4. One of these experts was Allison Ritter ("Ritter"), someone who specialized in mid-market mergers, acquisitions, and capital markets. R. at 4. Underwood and Scott voiced their desire to sell the company, retain no role or equity, and use the proceeds to buy another company. R. at 4. However, after reviewing the company's financials, Ritter suggested that they sell 80% of Gemstar's stock in a private placement and retain 20% equity in the company. R. at 4. They ultimately agreed to the private placement. R. at 5.

The Private Placement Memorandum. As Vice President of Investor Relations, Gordon was tasked with organizing and regulating the relevant internal and external parties for the placement. R. at 5. She oversaw the attorneys, financial advisors, auditors, engineering firms, and other experts who provided the information that would make up the Private Placement Memorandum ("the Memo"). R. at 5. The Memo was issued to investors to decide whether purchasing securities was in their best interest. R. at 5.

In May 2021, Keane & Company ("Keane"), an engineering firm that Gordon hired to audit Gemstar's production line, delivered its report ("the Report") on the structural integrity of Gemstar's assets and products. R. at 5. The Report provided an in-depth review of Gemstar products. R. at 5. It included material information about Gemstar products that private investors would want to know prior to the purchase of securities. R. at 5. Importantly,

the Report included a letter ("the Trade Letter") which notified Gordon of a defective composite in SwiftMax that could result in microscopic cracks in the product when under significant stress. R. at 5. The Trade Letter specifically stated that an aircraft taking off could cause such stress. R. at 5. After receiving this information, Gordon met with Underwood and Scott to decide whether to include the Trade Letter in the Memo to investors. R. at 6. Underwood wanted to conceal it, Scott reluctantly agreed, and Gordon ultimately withdrew the Trade Letter. R. at 6.

In August 2021, Gordon finalized the Memo, stating that Gemstar disclosed all contingent liabilities, and that all assets were in reasonable condition absent any material defects. R. at 8. Without the Trade Letter, the Memo did not otherwise contain information about the defective composite in Gemstar's most-sold product, SwiftMax, R. at 6. With her authority as Vice President of Investors, Gordon directed her associate to distribute the Gemstar Memo to twenty-six non-bank financial institutions. R. at 6.

The Sale of Gemstar Based on the Memo. In October 2021, the private placement was completed. Sixteen of the institutional investors who received the Memo from Gordon purchased 80% of Gemstar's common stock, at twenty-seven dollars a share. R. at 7. The plaintiff, the Fordham Public Employees Investment Fund ("the Fund") purchased 3,000,000 shares. R. at 7. At the time of the sale, the Fund knew of Gordon's role in the private placement. R. at 7.

The Seaboard Airlines Explosion. In December 2022, a Seaboard Airline cargo jet took off at the John F. Kennedy airport. R. at 7. After takeoff,

the left side of the plane exploded, and the plane made an emergency landing. R. at 7. During the Federal Aviation Association ("FAA") investigation into the explosion, they found that the fasteners could not hold the engine under the stressful conditions placed on them, resulting in the engine's explosion. R. at 7. Silberfarb Solutions, a returning client of Gemstar, serviced this aircraft before takeoff using Gemstar's SwiftMax on the aircraft fasteners. R. at 7. The FAA report shows that these fasteners developed microscopic fractures due to the high stress circumstances of the takeoff, as Keane predicted. R. at 7.

In February 2022, after the FAA report disclosed SwiftMax as the cause of the explosion, Gemstar's stock plummeted. R. at 7. The Fund sold their 3,000,000 shares for four dollars a share. R. at 7. This resulted in a $58,000,000 loss. R. at 7.

2. Procedural History

The District Court. In March 2022, the Fund filed a complaint under Section 10(b)-5 of the Exchange Act and SEC Rule 10b-5 in the United States District Court for the District of Fordham. R. at 8. The Fund claimed that Gemstar and its three executives, Underwood, Scott, and Gordon, committed securities fraud by engaging in a deceptive practice to conceal information about the defective composite. R. at 8. The Fund sought $68,000,000 in damages. R. at 8.

In September 2022, after Gemstar settled with the Fund, each of the three executives filed separate 12(b)(6) motions to dismiss. R. at 8. In Gordon's 12(b)(6) motion, she argued that (1) she could not be held primarily liable

under Section 10(b)-5 and Rule 10b-5 because she did not "make" or "disseminate" the deceptive statements and (2) even if she could be held liable, the Fund failed to show they relied on any deceptive conduct in deciding to purchase Gemstar's stock. R. at 8–9.

In October 2022, the District Court for the District of Fordham denied Gordon's motion, holding her primarily liable under Rule 10(b)-5 because she disseminated deceptive information and omitted material facts about the defective composite. R. at 9. The court also held that the Fund need not show reliance because its complaint focused on the omitted Trade Letter, thus invoking the rebuttable presumption of reliance established in *Affiliated Ute Citizens of Utah v. United States*. R. at 9; 406 U.S. 128, 153 (1971).

The Appellate Court. On appeal, the Fordham Circuit Court of Appeals ("Fordham Circuit") affirmed the District Court's holding in part, finding Gordon primarily liable under Rule 10b-5. R. at 17. The Fordham Circuit reversed the District Court's holding in part, finding that the *AU* presumption of reliance did not apply. R. at 23. The Fordham Circuit thus granted Gordon's 12(b)(6) motion. R. at 23.

The Fund subsequently filed a petition for writ of certiorari for the Fordham Circuit. R. at 30. On January 9, 2023, this Court granted the petition to determine (1) whether an individual is a "disseminator" of information if she neither makes nor personally distributes the information and (2) whether the *Affiliated Ute* rebuttable presumption of reliance ("*AU* presumption") applies in "mixed" cases of omissions and misrepresentations. R. at 30.

SUMMARY OF ARGUMENT

This Court should find that Rule 10b-5(a) and (c) applies to Gordon's conduct, making her primarily liable as a disseminator of false or misleading statements. Here, Gordon is attempting to take advantage of a narrow reading of Rule 10b-5 to circumvent primary liability. However, plain readings of the text, legislative intent, public policy rationales, and this Court's recent jurisprudence do not support such a reading. As Vice President of Investor Relations, Gordon authorized an associate to disseminate the Memo she knew was fraudulent. Without her instruction, the Memo would have never been sent out. This is by definition engaging in a fraudulent scheme that falls within the course of Gemstar business.

Further, this Court should find that both prongs of the *AU* presumption analysis are present because (1) Gordon owed a duty of disclosure to the Fund, and (2) the complaint focuses on the omitted Trade Letter. As Vice President of Investor Relations, Gordon owed a duty to disclose material information to the Fund because of her significant involvement in the private placement process. Further, the *AU* presumption applies because it would be overly burdensome and contrary to the intended purposes of the Exchange Act.

As such, this Court should affirm the lower court's holding in relation to the reading of Rule 10b-5(a) and (c) and reverse the *AU* presumption holding. Following the reversal of the motion to dismiss, this Court should remand this case to the district court for further fact finding in discovery.

ARGUMENT

I. UNDER RULE 10b-5(a) AND (c), GORDON IS PRIMARILY LIABLE AS A DISSEMINATOR OF FALSE AND MISLEADING STATEMENTS TO INVESTORS.

This case presents an opportunity to cement this Court's decision in *Lorenzo v. Securities and Exchange Commission* and protect private plaintiffs against securities fraud. 139 S. Ct. 1094, 1096 (2019). Here, the controlling statutory language comes from Section 10(b)-5 of the Exchange Act. Section 10(b)-5 establishes a framework which makes it unlawful 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." 15 U.S.C. § 78j(b) (1934).

Rule 10b-5 derives its enforcement authority from Section 10(b)-5 and defines specific prohibitions under subsection (a), (b), (c). However, Rule 10b-5(b) is not applicable for fraudulent dissemination matters. Rule 10b-5(a) bars "employ[ing] any device, scheme, or artifice to defraud." *See* 17 C.F.R. § 240.10b-5(a). Rule 10b-5(c) bars "engag[ing] in any act, practice, or course of business which operates as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(c).

As the Fordham Circuit correctly held, Gordon's conduct falls under a straight-forward interpretation of Rule 10b-5. R. at 17. When Gordon instructed her associate to disseminate the fraudulent memo, she engaged in a "device, scheme, or artifice to defraud" and an "act, practice, or course of business which operates as a fraud." 17 C.F.R. § 240.10b-5(a) and (c). To hold

otherwise would create a loophole to Rule 10b-5 liability and, as this Court emphasized in *Lorenzo*, "[there is no reason] why Congress, or the [SEC] would want to disarm enforcement in this way." 139 S. Ct. at 1301.

A. Plain Readings of the Text, Legislative Intent, and Public Policy Rationales Support a Finding that Gordon Is Primarily Liable for the Dissemination of False and Misleading Statements.

To determine whether Congress and the Commission intended a specific reading of a statute, this Court has historically looked at the statutory language, legislative history, and public policy considerations of the law in question. *See generally Kaiser Aluminum & Chem. Corp. v. Bonjorno*. 494 U.S. 827 (1990) (explaining this Court's statutory interpretation approach). These canons of statutory interpretation support an expansive interpretation of Rule 10b-5(a) and (c) to hold primarily liable those who order the dissemination of fraudulent information. If interpreted as such, courts could hold parties, like Gordon, primarily liable for their material involvement in defrauding potential investors.

Courts turn first to the plain meaning of a statute to determine the scope of its applicability. *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989). When interpreting the plain meaning of a statute, if the text is unambiguous, courts should not invent a new interpretation of the text. *See e.g.*, *Matal v. Tam*, 137 U.S. 1744, 1751 (2017) (holding that courts' inquiries into the meaning of a statute cease when the statutory language is unambiguous); *BedRoc Ltd. L.L.C. v. United States*, 541 U.S. 176, 180 (2004) (holding that a court's statutory interpretation inquiry ends if the text is

unambiguous). However, if the text is ambiguous, courts turn to the other canons of statutory interpretation. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 159 (2010).

1. The plain text of the rule supports an expansive application of Rule 10b-5(a) and (c).

The text of Rule 10b-5(a) and (c) is not ambiguous. 10b-5(a) and (c) state that "[i]t shall be unlawful for any person, directly or indirectly . . . (a) [to] employ any device, scheme, or artifice to defraud, . . . [or] (c) [to] engage in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(a) and (c). Turning first to the language preceding subsection (a), "directly" is defined as "immediate; by shortest course, without circuity; operating by an immediate connection or relation, instead of operating through a medium . . . in the usual or natural course or line." *Directly*, BLACK'S LAW DICTIONARY (9th ed. 2009). Conversely, indirectly is defined as "in opposition to 'direct,' [commonly couched] with terms such as 'collateral' and 'cross." *Indirectly*, BLACK'S LAW DICTIONARY (9th ed. 2009). Further, "employ" means "to engage in one's service; to use as an agent or substitute in transacting business; to commission and entrust with the management of one's affairs." *Employ*, BLACK'S LAW DICTIONARY (9th ed. 2009).

First, it is clear that Gordon's conduct reflects a "direct" involvement. As Vice President of Investor Relations, Gordon "operat[ed] . . . [in] immediate connection" with potential investors to provide material information about Gemstar products. *Directly*, BLACK'S LAW DICTIONARY (9th ed. 2009).

Additionally, as an executive, she served investors without material oversight from other Gemstar executives. As such, her job duties and her autonomy within Gemstar equates to "*directly* . . . employ[ing] . . . [or] engag[ing]" in a fraudulent scheme. 17 C.F.R. § 240.10b-5(a) and (c) (emphasis added).

Even if Gordon ordering the dissemination of the Memo does not fall within the "direct" language, it can be governed by the "indirect" language. Using the information created and organized by the experts she hired, Gordon *indirectly* used her authority to "employ [a] device" or "engage a[n] act, practice, or course of business" to defraud potential investors when she distributed the Memo without the Trade Letter. *Id.* The executives, Underwood and Scott, expressed their interest in selling the company, and Gordon constructed and finalized the Memo with the information that made the sale possible. R. at 4. Believing that Gordon understood the necessary steps to successfully make it through the sale, Underwood and Scott entrusted Gordon with the administrative authority to orchestrate the sale. R. at 5. This falls plainly within the scope of "indirectly" performing the prohibited acts enumerated in subsection (a) and (c). *See* 17 C.F.R. § 240.10b-5(a) and (c).

Finally, Gordon's actions comfortably fall under the "employ" language of subsection (a). Gordon "used an agent in transacting business" and "commission[ed] and entrust[ed]" this agent to disseminate the Memo she constructed. R. at 6-7; *Employ*, BLACK'S LAW DICTIONARY (9th ed. 2009). Observing the plain meaning of "directly," "indirectly," and "employ" illustrates

that the plain meaning of Rule 10b-5(a) and (c) implicates those who instruct the dissemination of fraudulent information in primary liability.

2. Drafters intended for Rule 10b-5(a) and (c) to be applied expansively when the regulation was promulgated.

Even if it is determined that the language within Rule 10b-5 is ambiguous, the drafters intended to apply the rule to those who authorize agents to disseminate fraudulent information. The development of federal securities fraud law was motivated in large part by the financial tragedy created by the stock market crash of 1929. 69 S.E.C. ANN. REP. 2003. Because of the substantial role that fraudulent market activities had in the eventual market crash, the Roosevelt Administration made it a priority to invoke new market regulations on a federal level. *Id.* Accordingly, Congress enacted the Securities Act of 1933 and the Securities and Exchange Act of 1934 with the following objectives in mind: "(1) to require investors to receive financial and other significant information about potential securities they buy from a public sale; and (2) to prohibit deceit, misrepresentations, and other fraud in the United States." Registration Under the Securities Act of 1933 and the Securities Exchange Act of 1934, (proposed Dec. 7, 1934) (to be codified at 17 CFR § 240.10b-5).

In addition to the SEC's commentary to the Exchange Act, the Senate Report accompanying this legislation further demonstrates the intent of Congress and the Commission to establish an expansive and flexible regulatory framework. S. REP. NO. 792, at 8-9, 18 (1934); *Sec. & Exch. Comm'n v. W.J. Howey Co.*, 328 US 293, 299 (1946) ("Fraudulent conduct comes in various

shapes and sizes, a fact Congress and the SEC recognized when adopting the broad language contained in § 10(b).”). Importantly in the present case, such instruction to “disseminat[e] . . . false information” is an example of a “device[ ]” that is “subjected to regulation by the Commission.” S. REP. NO. 792, at 8-9, 18 (1934). In other words, when Rule 10b-5 was enacted, Congress and the Commission intended for the one using their authority to instruct the dissemination of fraudulent information as constituting a violation. Using an agent or employee to disseminate fraudulent information on one’s behalf should not be distinguished by this Court as outside the scope of liability. To otherwise create an avenue to escape liability by way of an agent detracts from the language of the statute Congress and the Commission worked to construct in such broad terms.

3. Public policy necessitates a broader application of Rule 10b-5(a) and (c).

Finally, public policy surrounding the securities fraud regulatory scheme justifies applying Rule 10b-5(a) and (c) expansively in this context. Consumers turn to both public and private entities to engage in the purchase of securities. In doing so, they rely on federal laws to protect them from company leadership misrepresenting or omitting material facts. The right to recover their economic losses by way of a civil suit is a large part of this protection. If, however, federal securities laws do not effectively protect their private economic interests, consumers will retreat from the market.

This is best exemplified by the 2008 United States economic depression, where over half of the affected investors were American consumers. U.S.

Bureau of Labor Statistics; "Consumer spending and U.S. employment from the 2007–2009 recession through 2022." (Oct. 2014), https://www.bls.gov/opub/mlr/2014/article/consumer-spending-and-us-employment-from-the-recession-through-2022.htm. Following the 2008 stock market crash, Congress gathered to discuss how best to protect consumers and prevent consumers' retreat from the securities markets. *Enhancing Investor Protection and the Regulation of Securities Markets*: Hearing before S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. 2-5 (2009) (statement of Rep. Dodd, Chairman, S. Comm. on Banking, Housing and Urban Affairs). There, congressmembers reviewed proposed bills offering a balance between economic growth and consumer protection. *Id.* They found that the main issue in 2008 was a lack of transparency and responsibility in the market, as indicated by the unspoken policy among Wall Street advisors of "don't ask, don't tell." *Id.* at 4. the forefront of their discussions, Chairman Christopher J. Dodd emphasized that "had the Fed simply regulated the mortgage lending industry, as Congress directed with the [securities laws' amendments of] 1994, much of [the crash] could have been averted. But, . . . the Fed refused to act." *Id.*

This case provides the Court with an opportunity to act where federal institutions did not in 2008. If parties like Gordon are permitted to evade enforcement of Rule 10b-5 by using agents to deceive investors, the "don't ask, don't tell" policy would revive itself. As a result, these consumers would once again retreat from the market like they did in 2008. To sufficiently protect consumers and influence market stimulation through the purchase of

securities, this Court should expand the 10b-5 landscape to include those who instruct the dissemination of fraudulent information to investors.

B. Gordon's Conduct Falls Within the Scope of Rule 10b-5(a) and (c).

Considering the broad language in the statute, this Court should find Gordon primarily liable under Rule 10b-5(a) and (c). Using her position as Vice President of Investor Relations, Gordon engaged in a scheme to defraud potential investors by ordering the dissemination of a memorandum she knew contained false and misleading information.

1. Gordon is a primary violator under this Court's interpretation of Rule10b-5(a) and (c).

This Court defined "primary liability" in *Lorenzo.* 139 S. Ct. at 1099. There, a director of investment banking at a brokerage firm sent emails to prospective investors, stating that the company's worth was about $1 million, when he knew the worth was $400,000. *Id.* at 1103. Another executive supplied the material facts about the company to the director, while the director was only charged with consolidating and communicating this information to the investors. *Id.* at 1099. This Court held that the director was primarily liable by disseminating false or misleading information with the intent to defraud potential investors, even though he did not make the misstatement himself. *Id.* at 1104.

The facts of *Lorenzo* are like the present case. Gordon was hired as Gemstar's Vice President of Investor Relations, a role which authorized Gordon to synthesize the information provided to her and relay this information to potential investors. R. at 5. Specific to the sale of Gemstar securities, Gordon

was responsible for "coordinating the attorneys, financial advisors, auditors, engineering firms and other [Gemstar] experts" to construct a memorandum for the potential investors. R. at 5. These parties then provided Gordon with information which made up the Memo, including information on Gemstar "products, facilities, capital machinery, and . . . files containing material deficiencies with respect to such items." R. at 6. This would have, in theory, included the material deficiencies about SwiftMax's fasteners. R. at 7. However, the final decision to remove any information regarding SwiftMax deficiencies was made by Gordon—not the third parties, Underwood, or Scott. Gordon knowingly ordered this inaccurate information to be sent to investors without reference to the defective composite.

Moreover, Gordon's position as Vice President of Investor Relations provides her a similar authority as the director in *Lorenzo*, where this Court found that by withholding information, "Lorenzo 'employ[ed]' a 'device,' 'scheme,' and 'artifice to defraud' within the meaning of subsection (a) of the Rule. . . . By the same conduct, he "'engage[d] in a[n] act, practice, or course of business' that 'operate[d] . . . as a fraud or deceit' under subsection (c) of the Rule.'" 139 S. Ct. at 1096 (quoting *Aaron v. Sec & Exch. Comm'n*, 446 U.S. 680, 686 (1980). Without her authority as Vice President of Investor Relations, the misrepresentations and omission about Gemstar's products would not have been relayed.

2. This Court should follow the majority of circuits in the wake of *Lorenzo*, finding Gordon primarily liable for instructing the dissemination of fraudulent information.

By contrast, Gordon argues that she cannot be held primarily liable because she did not personally disseminate the Memo, and the Fund is a private plaintiff. Gordon relies on *Janus Capital Group, Inc. v. First Derivative Traders*, a Supreme Court case decided before *Lorenzo*, and *Securities and Exchange Commission v. Rio Tinto*, a Second Circuit Court decision following *Lorenzo*. *Janus*, 564 U.S. 135 (2011); *Rio Tinto*, 41 F.4th 47 (2022). Both cases held that directors who disseminated fraudulent information were not primarily liable when sued by private plaintiffs. 564 U.S. at 138; 41 F.4th at 48.

However, since the *Janus* decision, this Court in *Lorenzo* and the majority of circuits that have addressed this issue hold that using one's authority to disseminate fraudulent information should fall within "primary liability" under Rule 10b-5(a) and (c). *In re Alphabet, Inc. Sec. Litig.,* 1 F.4th 687, 709 (9th Cir. 2021); *Lorenzo*, 139 S. Ct at 1106; *Malouf v. Sec. & Exch. Comm'n*, 933 F.3d 1248, 1260 (10th Cir. 2019); *Sec. & Exch. Comm'n v. Morrone*, 997 F.3d 52, 56 (1st Cir. 2021).

For purposes of this Court's review, Gordon using her authority to disseminate fraudulent information should be treated as analogous to dissemination. This analogous treatment is recognized by the First Circuit in *Morrone*. 997 F.3d at 56. There, a company executive knew there were additional fees not disclosed to investors but did not disclose this information when he helped prepare and assist the dissemination of this misleading

information. *Morrone*, 997 F.3d at 55. Like Gordon, this executive was not the only party who took part in the dissemination of misleading information. *Id.* at 62. Regardless, the court held that the executive should be primarily liable as a disseminator of fraudulent information. *Id.*

Additionally, the Ninth and Tenth Circuits reaffirmed *Lorenzo* in *Malouf* and *In re Alphabet*. *In re Alphabet*, 1 F.4th at 709; *Malouf*, 933 F.3d at 1260. They held that disseminators may be held primarily liable for their role in the dissemination of fraudulent information to potential investors. 1 F.4th at 671; 933 F.3d at 1253. *In re Alphabet* is particularly relevant here, given that the Ninth Circuit found a disseminator primarily liable to private plaintiffs, a point which Gordon argues should preclude the Fund from recovery in this case. 1 F.4th at 691. Barring recovery based on plaintiff status is in direct contention with the Tenth Circuit and notions of equitable recovery that the Exchange Act was founded upon.

Ultimately, the First, Ninth, and Tenth Circuit holdings all demonstrate that the distinction between disseminating and instructing the dissemination of fraudulent information is immaterial to a Rule 10b-5(a) and (c) analysis. It is consistent with the purpose of 10b-5(a) and (c) to hold primarily liable those who actively participate in a scheme to defraud investors. Considering the similarities between *Lorenzo*, the majority of circuits, and the present case, this Court should affirm the lower court's decision pertaining to the scope of Gordon's primary liability and remand for discovery.

II. THE FUND IS ENTITLED TO THE *AFFILIATED UTE* REBUTTABLE PRESUMPTION OF RELIANCE WHEN BOTH OMISSIONS AND AFFIRMATIVE MISREPRESENTATIONS ARE ALLEGED, AND THE OMISSIONS ARE THE CRUX OF THE COMPLAINT.

Not only is Gordon primarily liable under Rule 10b-5, but the Fund need also not prove reliance at the pleading stage because the *AU* presumption applies here. SEC Rule 10(b)-5 forbids manipulation and deceit in securities exchanges. 17 C.F.R. § 240.10b-5. While there are six different elements that a private plaintiff must prove to prevail in a 10(b)-5 action, the "reliance upon the misrepresentation or omission" element is the only one at issue here. R. at 18; *Stoneridge Inv. Partners, L.L.C. v. Sci.-Atlanta*, 552 U.S. 148, 157 (2008) (citing *Dura Pharms., Inc. v. Broudo,* 544 U.S. 336, 341–42 (2005) (the other elements are materiality, scienter, connection between the deceit and securities exchange, economic loss, and causation). Reliance is an essential aspect of a 10(b)-5 action because it dictates whether there is a proper connection between the omission or misrepresentation and the plaintiff's injury. *Erica P. John Fund, Inc. v. Halliburton*, 563 U.S. 804, 810 (2011) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

When misrepresentations are at issue, a plaintiff typically proves reliance by demonstrating awareness of the misrepresented statement and explaining how the statement helped induce the transaction. *See Halliburton*, 563 U.S. at 810. However, when a party omits material information, it is practically impossible for the other party to prove reliance on something the party had no knowledge of at the time of the transaction. A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 8.6(1), at 209 (1985) ("In

nondisclosure cases, reliance has little if any rational role."). Thus, in *Affiliated Ute Citizens of Utah v. United States,* this Court solved this problem and held that a rebuttable presumption of reliance shall be afforded to plaintiffs when (1) the deceitful party has a duty to disclose and (2) the transaction *primarily* consists of a failure to disclose. 406 U.S. 128, 153 (1971). When the *AU* presumption applies, the burden shifts to the defendant to prove that the undisclosed information would not have changed the plaintiff's willingness to move forward with the transaction. *See Rifkin v. Crow,* 574 F.2d 256, 262 (5th Cir. 1978).

In the present case, all conditions for the *AU* presumption are met. First, Gordon's position as Vice President of Investor Relations, her control over the Memo, and the Fund's knowledge of Gordon's role in the private placement illustrate the duty of disclosure she owed the Fund. R. at 5. Second, the complaint primarily consists of omissions because the omitted Trade Letter was the main form of deceit. R. at 6. Nonetheless, exemplified by the District Court and Fordham Circuit disagreement, a case that contains both omissions and misrepresentations ("mixed case") has led to inconsistent holdings among the lower courts. R. at 21–23. To harmonize these inconsistencies, this Court should reverse the Fordham Circuit's holding, and in doing so, reemphasize the policy of full disclosure that the Exchange Act, Rule 10(b)-5, and this Court's holding in *Affiliate Ute* were built upon.

A. As Vice President of Investor Relations, Gordon Owed a Duty to Disclose Material Information to the Fund.

A duty to disclose "arises when one party has information 'that the other [party] is entitled to know because of a . . . relation of trust and confidence between them.'" *Chiarella v. United States*, 445 U.S. 222, 230 (1980) (citing Restatement (Second) of Torts § 551 (1977)). While there is no strict category as to who owes a duty of disclosure, the duty has traditionally attached to "corporate 'insiders,' particular officers, directors, or controlling stockholders." *Chiarella*, 445 U.S. at 227 (citing *Cady, Roberts & Co.*, 40 S.E.C. 907, 911 (1961)). Nonetheless, simply because an individual is an insider or officer does not solidify the duty of disclosure; the analysis is based on the totality of the circumstances of the transaction. *Affiliated Ute*, 406 U.S. at 151. In interpreting this Court's analysis in *Affiliated Ute*, the Ninth Circuit, in *White v. Abrams*, constructed a more rigid framework to decide when an individual has a duty to disclose. 495 F.2d 724, 731 (9th Cir. 1974). This analysis requires balancing the following four factors ("*Abrams* factors"): "(1) relationship between the defendant and plaintiff; (2) the defendant's access to information as opposed to the plaintiff's access; (3) the defendant's awareness of whether the plaintiff was relying upon their relationship in making his investment decisions; and (4) the defendant's activity in initiating the securities." *Id.*

This Court should adopt the *Abram* factors balancing test because it would solve the inconsistencies among courts and, in doing so, would not disrupt this Court's holding in *Affiliated Ute*. 406 U.S. at 153. There, this Court held that a bank's two assistant managers breached their duty of disclosure to

the Ute Distribution Corporation's ("UDC") shareholders. *Affiliated Ute*, 406 U.S. at 153–54. The duty first began to form when a bank agreed to act as the transfer agent for UDC shares, and two assistant managers were assigned to twelve of these shareholders. *Id.* at 145–46. The shareholders knew nothing about the market for UDC shares, so they relied upon the assistant managers to facilitate the transactions. *Id.* at 152. During the transactions, the assistant managers told the shareholders that they were receiving the prevailing market price. *Id.* They did not, however, inform the shareholders that the assistant managers benefited from the transactions because of the more lucrative, secondary market they created behind the scenes. *Id.* Thus, while not explicitly enumerating the *Abrams* factors, this Court put great emphasis on the relationship, access to information, awareness of the plaintiff's reliance, and defendant's activity in holding that the assistant managers owed a duty of disclosure. *See id.* at 152.

Here, the *Abram* factors apply similarly. Gordon, the Vice President of Investor Relations, was tasked with handling the private placement process. R. at 5–6. Even though her name was not on the Memo, the Fund was still aware that she was facilitating the private placement. R. at 6–7. The Fund had no way of knowing about the defective composite Trade Letter, whereas Gordon had complete access to the Trade Letter. R. at 6–7. Furthermore, given that she is the one that sent the Fund the Memo and was primarily facilitating the transaction, Gordon was also well aware that the Fund was relying on her to provide all material information about Gemstar's products. R. at 6–7. Moreover,

out of all the executives and employees at Gemstar, Gordon was the main actor initiating securities: she coordinated with all Gemstar experts, solicited interest from "twenty-six of the country's largest non-bank financial institutions," and personally withdrew the Trade Letter from the Memo. R. at 6–7.

In deciding that Gordon did not owe a duty of disclosure, the Fordham Circuit disregarded the vast similarities between Gordon and the assistant managers in *Affiliated Ute*. The Fordham Circuit also erroneously likened Gordon to various secondary actors whose job duties did not require them to deal with investors, let alone deliver any information to them. R. at 20; *See Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 377, 385 (banks involved in Enron fraud had no duty to disclose because shareholders never expected any information from them); *Stoneridge Inv. Partners, L.L.C. v. Sci.-Atlanta*, 552 U.S. 148, 154 (2008) (No duty of disclosure for company that aided and inflated revenue schemes because investors never expected information from the aiding company). Perhaps if Gordon did not work for Gemstar and aided the fraud from afar, she would not have a duty to disclose. *See e.g.*, *In re Credit Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 26 (D. Mass. 2008) (no duty to disclose because defendant "dealt with investors at arms' length"). However, as the Fordham Circuit Court acknowledged, this was not the case and the Fund "was aware that [Gordon] had control over the Memo's dissemination." R. at 23. Furthermore, simply because Gordon had one of her employees deliver the Memo does not relieve her of her duty to disclose. The employee was simply acting as Gordon's agent.

B. The Fund Is Entitled to the *Affiliated Ute* Rebuttable Presumption of Reliance Because This Case Primarily Deals with Omissions.

Since *Affiliated Ute*, lower courts have struggled with determining whether the *AU* presumption should apply to mixed cases. *See* 43 A.L.R. Fed. 3d Art. 3 (2019) (explaining how some courts have switched their approach over the years). To avoid jury confusion as to who has the burden of proof to show reliance, courts classify mixed cases as only an "omission case" *or* a "misrepresentations case." *See Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *see also Sharp v. Coopers & Lybrand,* 649 F.2d 175, 188 (3d Cir. 1981) (explaining the inherent difficulty of dual instructions).

As *Affiliated Ute* instructs, when deciding whether to classify a case as an "omissions case" or "misrepresentation case," courts take a case-by-case approach to determine whether the complaint focuses on omissions or misrepresentations. *See e.g.*, *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 215 (D.C. Cir. 2010) (misrepresentation case because "gravamen" of complaint focused on misrepresentations); *Joseph v. Wiles*, 223 F.3d 1155, 1162 (10th Cir. 2000) (explaining that courts should assess whether allegations focus "primarily [on] omissions or misrepresentations").

Though courts all do as *Affiliated Ute* initially instructs, they differ in how they define a case as an omission case or a misrepresentation case.

Some courts take a policy-driven approach and determine whether the facts impose the difficult task on the plaintiff of proving a "speculative negative (I would not have bought [the securities] had I known)"—the overall purpose

behind the *AU* presumption. *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975); *Affiliated Ute*, 406 U.S. at 153; *see e.g.*, *Sharp*, 649 F.2d at 188 ("[T]he proper approach . . . is to analyze the plaintiff's allegations, in light of the likely proof at trial, and determine the most reasonable placement of the burden of reliance.") Under this approach, if the omissions are so substantial that it would make it overly burdensome for the plaintiff to show reliance, then the case classifies as an omissions case—no matter the type of omission. *See e.g.*, *Blackie*, 524 F.2d at 908 (omissions case because the omissions were so prominent that it would "impose a difficult evidentiary burden" on the plaintiff to prove reliance).

Conversely, other courts take a stringent approach and analyze whether the "omission is simply the inverse of the affirmative misrepresentation." *In re Volkswagen "Clean Diesel" Mktg.*,2 F.4th 1199 (9th Cir. 2021), 2 F.4th at 1208. In other words, the type of omission is significant; if an omission only corrects the misrepresentation, then it is not viewed as a true omission, and the case is classified as a misrepresentation case. *See e.g.*, *id.* (misrepresentation case because omission only revealed statements were misrepresentations); *Wilson v. Comtech Telecomms. Corp.*, 648 F.2d 88, 89 (2d Cir. 1981) (misrepresentation case because omission showed previous earnings projections to be inaccurate).

This Court should dismiss the stringent approach because it departs from *AU* presumption's underlying rationale and rests on a misconstrued reading of *Affiliated Ute*. This Court should instead adopt the policy-driven approach because it is consistent with the pragmatic reasoning behind the *AU*

presumption. Applied here, the policy-driven approach reveals that this is an omissions case. Thus, the *AU* presumption should apply.

1. This Court should adopt the policy-driven approach because it promotes the *Affiliated Ute* presumption's policy justifications, whereas the stringent approach contradicts *Affiliated Ute's* holding and imposes a high burden on plaintiffs.

In holding that this is a misrepresentation case, the Fordham Circuit took the stringent approach and followed the Second Circuit's analysis in *Waggoner v. Barclays PLC*, stating that the "omissions merely 'exacerbated the misleading nature'" of the false statements in the Memo. R. at 22 (citing *Waggoner*, 875 F.3d 79, 96 (2d. Cir. 2017)). However, the Second Circuit's analysis in *Waggoner* demonstrates how the stringent approach is based on an improper reading of *Affiliated Ute*.

In *Waggoner*, the court explained that the fraud in *Affiliated Ute* did not consist of any "positive statements" and was thus an omissions case. 875 F.3d at 95–96 (quoting *Wilson*, 648 F.2d at 93). But this is not true; *Affiliated Ute* was actually a mixed case of both omissions and misrepresentations. 406 U.S. at 146, 153 (defendants lied to plaintiffs that they received the best value for their shares and failed to disclose the more lucrative, secondary market for plaintiffs' shares).

Additionally, *Waggoner* further contradicted *Affiliated Ute* when it enacted a strict definition for "omission" by emphasizing that omissions which only correct misstatements should be classified as misrepresentations. *See* 875 F.3d at 95–96. In *Affiliated Ute*, the assistant bank managers prepared stock transfer documents that stated the sellers "were receiving not less than the

price at which the shares had been offered to" the other stockholders. *Affiliated Ute*, *id.* at 146. This is the direct inverse of the undisclosed lucrative, secondary market—the primary omission in the case. *Id.* at 153. Accordingly, *Affiliated Ute* intended for a more expansive definition of "omission."

While the Second Circuit misconstrued the facts and holding in *Affiliated Ute*, the stringent approach ultimately fails because it disregards the policy behind the Exchange Act and the *AU* presumption. In *Securities and Exchange Commission v. Capital Gains Research Bureau*, this Court explained that a "fundamental purpose [of the Exchange Act] was 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." 375 U.S. 180, 186 (1963) (citing H.R. REP. NO. 85, 73rd Cong., 1st Sess. 2). To accomplish this goal, this Court established the *AU* presumption to deter omissions by placing the burden of proof on defendants when they fail to disclose material information. *Affiliated Ute*, 406 U.S. at 161. Limiting the definition of "omission" only provides a legal loophole for fraudsters to exploit rather than promote an environment of full disclosure. This would allow fraudsters to hide inverse misrepresentations in lengthy transfer papers, imposing an unrealistic burden on plaintiffs if litigation transpires.

Conversely, the policy-driven approach is perfectly in line with *Affiliated Ute* because it requires courts to consider the policy that drove this Court to establish the *AU* presumption—to alleviate the burden of proving reliance on something unknown. *Joseph*, 223 F.3d at 1162. Under this approach, it does

not matter whether the omission is the inverse of prior misrepresentations. If the complaint consists primarily of misrepresentations, then the AU presumption should not apply because it would be fair to ask the plaintiff to prove reliance on statements that were the focus of the complaint. *See Joseph*, 223 F.3d at 1162. On the other hand, if the omissions are the crux of the complaint, it would be unfair to place the burden to prove reliance on the plaintiff. *See Sharp*, 649 F.2d at 188 (explaining that if logical to do so, *AU* presumption should apply).

2. Under the policy-driven approach, this is an omissions case because the omitted Trade Letter is the focal point of the complaint, and the few misstatements render it difficult for the Fund to prove reliance.

As this Court demonstrated in *Affiliated Ute*, the proper way to decide whether a case primarily consists of omissions or misrepresentations is to analyze the facts on a case-by-case basis. 406 U.S. at 128. The facts here indicate that this is an omissions case because (1) the omission at issue is not merely the failure to disclose a fraudulent scheme, (2) the omission outweighs the misrepresentations, and (3) it is overly burdensome to require the Fund to prove reliance.

Under the policy-driven approach, courts do not classify failures to disclose fraudulent activity itself as an omission. *See e.g.*, *Joseph*, 223 F.3d at 1163 (Defendants failing to disclose the "existence of the unlawful scheme" was not an omission); *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 193 (3d Cir. 2001) ("This claim should not be transformed into an omission simply because the defendants failed to disclose that the . . . misleading fact was untrue.") If

courts did so, then every case would be an omissions case because in order to commit fraud, it is necessary to conceal the scheme itself. *Joseph*, 223 F.3d at 1163. Here, there is no such omission at issue—the Fund is not arguing that Gordon failed disclose that she was hiding material information. To the contrary, the Trade Letter is a true omission that reveals the defects in Gemstar's most lucrative product, SwiftMax. R. at 5–6.

Additionally, the size and value of the undisclosed Trade Letter outweigh the three misrepresentations. *See e.g.*, Blackie, 524 F.2d at 894, 905–06 (omitted facts from financial reports carried significant value and thus outweighed the various misrepresentations in the reports); *In re Volkswagen*, 2 F.4th at 1206 (nine pages of misrepresentations outweigh the one omission). The Memo contained three false sentences and one significant omission—the Trade Letter about the defective composite. R. at 8. However, the three sentences were a small part of an entire private placement memorandum whereas the Trade Letter was a memorandum in and of itself that Gordon removed from the file. R. at 6. And while the record does not state how long the Memo was, private placement memoranda typically consist of over 100 pages. *See e.g.*, Private Placement Memorandum from The SIF Group on 5531 Nicholson Lane Redevelopment (2011) (514-page memorandum); Private Placement Memorandum from the PHT Opportunity Fund LP on investment offering in the PHT Fund (Aug. 26, 2021) (140-page memorandum); Private Placement Memorandum from Impact Finance Fund on investment offering in the Impact Finance Fund (July 2021) (52-page memorandum). Accordingly, the

three misrepresentations are even smaller than the omission gin the grand scheme of things, despite there being only one omission.

Lastly, given the more impactful Trade Letter, it is unfair to require the Fund to prove they would have acted differently had they known the Trade Letter existed. Moreover, as one "of the country's largest non-bank financial institutions," it is highly likely that the Fund would have acted differently had they known Gemstar's most lucrative product was defective. R. at 6. Accordingly, to require the Fund to prove reliance on the three misstatements would run contrary to the *AU* presumption's goal to lessen the burden on plaintiffs in mixed cases.

CONCLUSION

For the reasons stated, Petitioner respectfully requests this Court affirm the decision of United States Court of Appeals for the Fordham Circuit in part, holding Gordon primarily liable for instructing the dissemination of fraudulent information to investors. This Court should reverse in part, holding that the Fund is entitled to a rebuttable presumption of reliance.

Dated: February 15, 2023

Respectfully Submitted,

/s/

Team P12
Attorney of Record for Petitioner

APPENIDIX

APPENDIX A

15 U.S.C. § 78j(b) ("Section 10(b)-5")

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, 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.

17 CFR § 240.10b-5 ("Rule 10b-5")

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> **(a)** To employ any device, scheme, or artifice to defraud,
>
> **(b)** To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> **(c)** To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,