Team No. P14

Docket No. 22-123

IN THE

Supreme Court of the United States

FORDHAM PUBLIC EMPLOYEES INVESTMENT FUND

Petitioner,

v.

KATIE GORDON

Respondent.

On Writ of Certiorari to the United States Court of Appeals

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether an individual who neither "makes" nor distributes false or misleading statements can be subject to primary liability as a "disseminator" under Rule 10b-5(a) and (c), for instructing an employee to distribute the statements to investors.
2. Whether the rebuttable presumption of reliance under *Affiliated Ute* applies where the plaintiff asserts "mixed" allegations involving both omissions and affirmative misrepresentations.

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STATUTORY AND REGULATORY PROVISIONS

This case arises out of §10(b) and Rule 10b-5 of the Securities Act of 1933 and ask whether individuals may be primarily liable for fraud when they orchestrate the dissemination of an incomplete memo containing both omissions and affirmative misrepresentations. 17 C.F.R. § 240.10b-5. The relevant text is reproduced in the Appendix.

INTRODUCTION

Securities fraud is often a story of powerful interests abusing the marketplace for their own gain. The victims of these crimes may include sophisticated investors—but they often also include those society, and public policy, should most seek to protect. Workers' retirements are invested as pension funds, universities' donations are invested as endowment funds, and churches and other non-profits may also hold their assets as investments that could be susceptible to securities fraud. The SEC exists to police this market, so investors small and large can confidently invest in a secure and transparent way. The respondent's actions harmed regular people. People who need to be made whole would be denied relief if this Court finds in favor of respondents. Furthermore, a finding in the respondent's favor would severely impair both future private *and* SEC actions against clear and harmful fraud. Potential defrauders would be able to knowingly distribute false and misleading statements and inoculate themselves against liability by simply mimicking the respondent's actions.

STATEMENT OF THE CASE

I. Statement of Facts

Gordon hides information from experts and investors. Katie Gordon was Gemstar's Vice President of Investor Relations. R. 5. As such, she was tasked with organizing a private placement through which 80% of Gemstar would be sold to institutional investors. R. 4-5. She marketed the offering by constructing a Private Placement Memorandum ("the Memo"), and was in charge of "coordinating the flow of information" with attorneys, financial advisors, auditors, engineering firms, and others. R. 5, 16.

While creating the Memo, Gordon became aware of a three-year-old letter ("the Trade Letter") written by one of the company's engineers that indicated that SwiftMax—Gemstar's most in demand product—used a defective composite which could develop microscopic cracks under extreme conditions, such as an airplane takeoff. R. 5-6. The Trade Letter also included an article that supported the hypothesis. R. 6.

Initially alarmed at the discovery, Gordon informed Gemstar's two owners about the issue. R. 6. One owner was cautious and wondered if the auditors should review it, but capitulated to the other owner who argued that the Trade Letter should be removed from the Memo. R. 6. Gordon agreed with the owners and she ultimately chose to remove the Trade Letter from the Memo before delivering it to Gemstar's experts. R. 6. Her actions bothered her, yet she decided that she could live with the consequences. R. 6.

As such, the final version of the Memo did not reference the possibility of microscopic cracks in SwiftMax's composite. R. 6. It did say, however, that Gemstar's property, plant, and equipment were in reasonable condition for their intended use; that there were no material defects in the products sold to customers; and that there were no material undisclosed contingent liabilities related to its products. R. 6.

Gordon oversees distribution of the incomplete Memo. Gordon, knowing that the Memo did not include a warning about the composite, instructed one of her associates to distribute the Memo to twenty-six of the country's largest non-bank financial institutions. R. 6. The Memo did not identify Gordon as Vice President of Investor Relations. R. 6. Nor did it invite investors to inquire about the contents of the memo. R. 6.

The Fund is harmed because of Gordon's actions. The Fordham Public Employees Investment Fund ("the Fund") purchased 3 million shares of Gemstar's stock for $27 per share. R. 7. The Fund was aware of Gordon's role in the private placement, but it is unknown whether anybody at the Fund had read the Memo before purchasing the shares. R. 7.

Only two months later, an airplane engine exploded as the pilot was taking off. R. 7. The FAA concluded that the explosion occurred because two fasteners were unable to support the engine's weight. R. 7. The fasteners were built by Silberfarb Solutions—one of Gemstar's "crown jewel customers"—using SwiftMax. R. 4, 7. The fasteners had conclusively developed microscopic fissures over time due to the pressure of takeoffs. R. 7. One month after the FAA released its findings, the Fund sold its entire position in Gemstar for $4 per share, incurring a loss of $68 million. R. 7.

II. Nature of the Proceedings

The District Court. The Fund commenced this action against Gordon in the U.S. District Court for the District of Fordham. R. 8. The Fund alleged that Gordon committed securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder by concealing the potential liabilities relating to the defective composite. R. 8. The Fund's claim was based on its reliance on the allegedly false and misleading statements and material omissions from the Memo. R. 8.

Gordon filed a 12(b)(6) motion to dismiss claiming that she could not be held liable as a primary violator because she did not "make" or "disseminate" the misleading statements in the Memo. R. 8. She further argued that even if she could be liable as a primary violator, the Fund failed to allege that it relied on her allegedly deceptive conduct when deciding to purchase Gemstar's shares. R. 8-9.

The District Court denied the motion, holding that Gordon was the "disseminator" of the allegedly false statements or material omissions and therefore could be liable. R. 9. In addition, the court held that the Fund primarily alleged omissions and was therefore entitled to a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). R. 9. Gordon appealed. R. 9.

Appellate Review. On appeal, the court found, once again, that Gordon could be liable under Rule 10(b)-5 for instructing an employee to distribute the misleading Memo. R. 10.

The court, however, reversed the trial court's decision that the Fund was entitled to a presumption of reliance under *Affiliated Ute*. R. 17. The court held that the Fund's allegations primarily involved expressly affirmative conduct, not an omission, because Gordon instructed an associate to distribute the misleading statements. R. 21-22. As the Fund failed to provide positive proof of reliance, the court granted Gordon's 12(b)(6) motion to dismiss the case. R. 23.

This Court granted certiorari on the issues of whether (1) Gordon can be found primary liable as a "disseminator" under 10b-5 and (2) the Fund is entitled to an *Affiliated Ute* presumption of reliance while asserting both omissions and affirmative misrepresentations. R. 30.

SUMMARY OF THE ARGUMENT

This Court should find Gordon subject to 10b-5 primary liability as a disseminator of false and misleading statements. A disseminator, under *Janus* and *Lorenzo*, must be the individual who ultimately controls the distribution of the false and misleading statements. Gordon, in her role as Vice President of Investor Relations, oversaw the process of distributing fraudulent information to potential investors. She guided the compiling of the distributed memo, initiated conversations with Gemstar to exclude damaging information, and directed a subordinate to send out the incomplete product. Gordon controlled the dissemination process. Refusing to hold Gordon liable because she did not physically send out the information herself creates a path for fraudulent actors to escape liability by simply directing an unsuspecting subordinate to do so.

This Court should also find the Fund entitled to an *Affiliated Ute* presumption of reliance. Harmed plaintiffs cannot be required to do the impossible—prove a reliance on the omission of statements they didn't know existed. Under *Affiliated Ute*, if the primary failure of the defendant is omitting information the plaintiff is entitled to the presumption—regardless of if it is a "mixed" case of both omissions and affirmative misrepresentations. Gordon's primary failure was the omission of the damaging Trade Report from the Memo she disseminated to investors. Failure to provide a presumption of reliance because the Memo also contained boilerplate affirmations effectively overrules *Affiliated Ute* because fraudulent actors could avoid liability by omitting key information while substituting generic affirmations that the plaintiff can't prove they relied on.

ARGUMENT

I. Gordon's control over the distribution of false and misleading statements to investors subjects her to "disseminator" primary liability.

The SEC promulgated Rule 10b-5 under § 10(b) of the Securities Exchange Act of 1934 to protect the public from "any manipulative or deceptive device." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 156 (2008). While 10b-5 does not explicitly create a private right of action, this Court has long recognized an implied one. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (citing *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971)). This private right serves as an important enforcement mechanism and deterrent against fraud. However, private 10b-5 actions can only be brought against primary offenders—individuals whose fraud falls squarely under the text of the statute. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *see also*, *Stoneridge Inv. Partners, LLC*, 552 U.S. at 166 (explaining that only the SEC can bring actions against those with secondary liability—individuals who aid and abet the fraud).

In *Janus*, this Court outlined one type of primary offender by ruling who can be a "maker" of false or misleading statements under 10b-5(b). *Janus Cap. Grp., Inc.*, 564 U.S. at 142 (holding that the "maker" of a false statement is the one with "ultimate authority" over it). Then, in *Lorenzo*, this Court found that other conduct involving false statements besides being a 10b-5(b) "maker" can create primary liability if it violates other provisions of the rule. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019). This Court ruled that the "disseminators" of false or misleading statements violate 10b-5(a) and (c)—and form another category of primary offenders. *Id.* at 1101 (Justice Breyer's finding of liability for disseminators did not rest on a single word such as "maker" but instead came from (a) and (c)'s broad language which includes prohibitions against fraudulent devices, schemes, and practices). The Court found that the defendant in *Lorenzo* violated 10b-5(a) and (c) by sending an email containing false and misleading statements to potential investors. *Id.* at 1099 (because his boss supplied the content and directed him to send the emails, he could not be a "maker" of the statements under 10b-5(b)). His role of disseminating the emails as Vice President of Investing Banking was central enough to the fraud that subjecting him to primary liability was appropriate. *Id.* at 1101.

This case is this Court's first time defining the contours of a "disseminator" since the term's introduction in *Lorenzo.* Respondents seek to overturn the circuit court's finding that Gordon was a "disseminator." R. 14. They advocate creating a rule where individuals cannot be "disseminators" if they directed an associate to distribute the false and misleading statements instead of physically sending them out themselves. This test contradicts past precedent defining 10b-5 primary liability and harms public policy. *Janus's* reasoning that ultimate authority over the making of a statement is required for a "maker" should apply to "disseminators" as well. 564 U.S. at 142. The "disseminator" is not who physically sent out the statements, but who ultimately controlled the distribution process.

Gordon is subject to primary liability as a "disseminator" under the law established in *Lorenzo* and *Janus*. Gordon was responsible for the dissemination of the fraudulent information. She both directly compiled the Memo—including removing the damaging report—and directly instructed her subordinates to distribute it. R. 6. Without Gordon's actions, the fraud would not have occurred. As Vice President of Investor Relations, she was tasked by Gemstar's owners to direct the entire process of attracting investors. R. 5. Gordon directing her associate to distribute The Memo to certain investors does not shield her from primary liability—it creates it. She is a primary offender.

Additionally, if this Court declines to find Gordon to be a "disseminator," the purpose of the Securities Exchange Act will be undermined. Not only will The Fund be unable to seek a remedy in this case, both the SEC and private parties will lose the ability to bring claims in future situations even where there is clear and egregious fraud. *Lorenzo* noted that the statutory scheme "insists there be a primary violator" for anyone in the fraud to be secondarily liable under 10b-5. 139 S. Ct. at 1104. Thus, even in the face of obvious fraud, if no party is liable as either a "maker" or "disseminator" then parties could escape 10b-5 altogether. As *Lorenzo* explains, not all "makers" are subject to primary liability—often because they lack the required intent. *Id.* And if individuals in Gordon's position cannot be liable as "disseminators" simply because they did not press send on the final email, neither the SEC nor harmed parties will be able to bring actions in countless future cases. Such a rule creates perverse incentives. Companies engaged in clear fraud could escape liability by keeping their "makers" in the dark and handing off the dissemination to mailroom clerks for whom primary liability is inappropriate. Fraudsters would have an easy path to shield themselves from any liability. "Disseminators" ultimately responsible for the distribution of false and misleading statements—like Gordon—must be primary violators or the SEC's future enforcement will be seriously handicapped.

A) Gordon is subject to primary liability as a "disseminator" of false or misleading statements because her conduct and position demonstrated that she controlled the dissemination process.

"Disseminator" liability is not limited to parties who physically send out false and misleading statements. This Court should affirm the Second Circuit's decision finding Gordon subject to primary liability because "[u]ltimately, she was responsible for disseminating the Memo to investors." R. 17.

Courts, in line with past 10b-5 primary liability cases, should look to both an individual's conduct and position to determine if they had a role where they were ultimately responsible for the dissemination and thus subject to primary liability. In *Stoneridge*, this Court found that only conduct that made fraud "necessary or inevitable" could establish primary liability under 10b-5. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 161 (2008). Then in *Janus*, this Court found that an investment advisory group's relationship as a separate legal entity—without ultimate authority over the statements—meant they could not be subject to primary liability. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). Finally, in *Lorenzo*, this Court ruled the defendant to be in control of the dissemination process because he sent emails to investors in his role as Director of Investment Banking—signing his own name and inviting the recipients to follow up with questions. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019).

Similarly, this Court should hold Gordon subject to primary liability as a disseminator because her conduct and role demonstrated her control over the distribution process.

1) <u>Gordon is subject to primary liability because her conduct as Vice President of Investor Relations made the fraud necessary and inevitable.</u>

In *Stoneridge*, petitioners sought to impose primary liability on respondents—companies whose transactions helped facilitate another company called Charter's false representations. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 152–53 (2008) (respondents acted "both as customers and suppliers, agree[ing] to arrangements that allowed the investors' company to mislead its auditor and issue a misleading financial statement affecting the stock price"). Respondents were willing participants in this arrangement, and it enabled Charter's ability to report inflated revenues and a miscalculated customer base. *Id.* at 153. However, this relationship was insufficient to establish primary liability. *Id.* It was Charter that *chose* to mislead auditors and Charter that *chose* to file fraudulent financial statements. *Id.* at 161 (specifically finding that "respondents had no role in preparing or disseminating" the fraudulent financial statements). None of the respondents' conduct or choices made it "necessary or inevitable for Charter to record the transactions as it did." *Id.* This same "necessary or inevitable" language was repeated by this Court in *Janus* three years later. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144 (2011). Under *Janus*, a party must have ultimate authority over the content of a statement to have primary liability as a "maker." *Id.* This is because any party not ultimately responsible for the statement can never make the fraud "necessary or inevitable" as *Stoneridge* requires. The entity who *does* have ultimate authority is the one who determines if the fraud happens. *Id.* This same logic applies to "disseminators."

The party ultimately in control over the dissemination can decide to make fraud "necessary or inevitable" as the final decision maker.

The defendant in *Lorenzo* provides an example of a "disseminator" whose actions combined with his position in the company made fraud "necessary and inevitable." *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). Lorenzo, fully aware that his client's assets were worthless, had sent prospective investors emails soliciting investment—containing claims that the company assets were worth $10 million. *Id.* at 1099. The content of the email had been supplied by his boss, but this Court still found him liable for the dissemination because he was the one who controlled the dissemination. *Id.* Lorenzo's choice to send the email—which he knew contained false and misleading statements—made fraud inevitable because once that email was sent, the fraudulent statement was distributed. He also had control over the process, demonstrated by signing his own name to the statement and inviting potential investors to follow up with *him* if they had questions. *Id.* While his boss may have had ultimate authority over the content, Lorenzo had ultimate control over the distribution as the Director of Investor Relations. *Id.* His role made him the final—and ultimately responsible—decision maker and once he chose to send the statements to investors the fraud was "necessary and inevitable."

Additionally, *Lorenzo* cannot stand for respondent's proposition that a party who directs a subordinate to send out the false and misleading statements cannot be a "disseminator." The determination that Lorenzo sent the email directly to investors was only one of several reasons behind his liability for dissemination. *Lorenzo*, 139 S. Ct. at 1101. In fact, this Court explicitly stated that for "mailroom clerks"—individuals who certainly fit the mold of physically distributing the statements—liability would be inappropriate. *Id.* The key fact thus cannot be who physically sent out the information. It instead hinges on who was the final decision maker in the distribution. Such a ruling would also contradict this Court's finding in *Janus*. 564 U.S. 135. Justice Thomas's opinion was clear that the "maker" was not who physically wrote the speech, or even who arranged the words. *Id.* at 143. Only the speaker—not the speechwriter—could be subject to "maker" primary liability because the speaker is the one who *chooses* to say the false and misleading statements. *Id.* Similarly, the "disseminator" must be the one who *chooses* to distribute the false and misleading statements, not the subordinate who is asked to send out a letter.

Gordon's choices made Gemstar's fraud inevitable. She made both the final decision to remove the Trade Report from the Memo before distributing it to the company experts, and the final decision to send the Memo to potential investors. R. 6. As Vice President of Investor Relations, she was the final authoritative decision maker in the distribution of false and misleading statements. This is starkly different from the respondents in *Stoneridge* whose choices only enabled fraud and who had no final influence over how Charter decided to file its financial statements. 552 U.S. at 152–53. Gordon's position is much closer to Lorenzo's despite not physically mailing out the Memo herself.

R. 6. Like Lorenzo, she oversaw sending out the fraudulent information to investors and was the final link in the scheme to commit fraud. *Id.*

Gordon's conduct demonstrates that she controlled much of the process of creating the memo, and the entirety of disseminating it. She "coordinated the attorneys, financial advisors, engineering firms, and other experts, who were constructing" the Memo. R. 5. She is the one who initiated discussions with Gemstar's owners about removing the Trade Report. R. 6. She is the one who distributed the materials to the company experts with the Trade Report missing. *Id.* Gordon is the one who removed the damaging report. *Id.* And most importantly, she is the one who gave detailed instructions to a subordinate to distribute the Memo knowing it contained false and misleading statements. *Id.* Her dictating which twenty-six institutions received the Memo demonstrates the amount of control she had over the entire process. *Id.* Without any of these actions the fraud could not have happened. But with them, it was necessary and it was inevitable.

B) Holding Gordon not subject to primary liability will impair future victims' ability to be made whole by allowing fraudsters to shield themselves from liability.

This Court created 10b-5 claims because it recognizes that private enforcement of SEC rules "provides a necessary supplement to Commission action." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (quoting *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). These actions supplement SEC enforcement by compensating harmed victims and by providing additional deterrence from financial crimes. This only works if egregious violators are found liable. Holding Gordon not subject to primary liability prevents the Fund from being made whole. But it also harms all future victims of these sorts of financial crimes by providing precedent shielding those directly engaged in fraud from liability—defeating the purpose of private 10b-5 claims.

Holding Gordon to not be a "disseminator" in this case also substantially weakens the SEC's enforcement ability. *Lorenzo* is clear that the statutory scheme requires a primary offender for *any* aiders or abettors to be liable. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019). And because some "makers" lack the intent to be primary offenders, cases of clear fraud without a "disseminator" may be unenforceable under 10b-5. *Id.* If Gordon cannot be a "disseminator" because she directed an associate to send out the false and misleading statements—while still overseeing the distribution process—"disseminator" liability is severely narrowed. The SEC will have no options in cases of clear crime. This also provides a perverse incentive for fraudsters to simply instruct secretaries and mailroom clerks to send out the statements—knowing that they now escape primary liability themselves and eliminate secondary liability for the entire scheme.

Respondents argue holding Gordon subject to primary liability effectively eliminates the category of secondary liability. The Court dismissed this same argument in *Lorenzo*. *Id.* at 1102–04. Holding Gordon liable does not expand the scope of primary liability—there is still generally only one "disseminator" per case. It simply clarifies that the one "disseminator" is simply the party with ultimate control over the dissemination—a much more workable standard than holding whichever employee pressed send on the email liable.

II. The Fund is entitled to an *Affiliated Ute* presumption of reliance because Gordon stood mute and withheld key information from Gemstar.

Plaintiffs bear the burden to establish a 10b-5 claim. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345-46 (2005). To prevail, plaintiffs must show: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014). The second question of this appeal asks whether the Fund is entitled to a rebuttable presumption of the fourth element: reliance on the misrepresentation or omission.

Plaintiffs are entitled to a rebuttable presumption of reliance in cases involving (1) a withholding of relevant information (2) by someone with an affirmative duty to disclose such information. *Affiliated Ute*, 406 U.S. at 153-54. In mixed cases—where both the withholding of information and affirmative misrepresentations are alleged—*Affiliated Ute* instructs that the rebuttable presumption applies in cases that involve "primarily a failure to disclose." *Id.* at 153.

Such omission cases do not require positive proof of reliance because of the "difficulty in proving a 'speculative negative'—that the plaintiff relied on what was not said." *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (quoting *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975)). Requiring such positive proof of reliance would amount to an "unnecessarily unrealistic evidentiary burden." *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988).

In this case, the Fund is entitled to an *Affiliated Ute* presumption of reliance because Gordon's misleading behavior was primarily what she did not say—standing mute by omitting the Trade Letter from the Memo. By so doing, Gordon withheld material facts that the Fund reasonably would have considered important to deciding whether to invest. Thus, forcing the Fund to show reliance would be unfairly prejudicial due to the impossibility of proving a speculative negative.

As such, anything less than a reversal of the lower court's decision would send a highly visible, detrimental signal that this Court has retreated from its ruling in *Affiliated Ute*.

A) The Fund is entitled to an *Affiliated Ute* presumption because the Fund reasonably would have relied on the Trade Letter had it been included in the Memo.

1) <u>The *Affiliated Ute* analysis applies to mixed cases as well as pure omissions.</u>

The *Affiliated Ute* presumption of reliance applies in cases "involving primarily a failure to disclose." *Affiliated Ute*, 406 U.S. at 153. In *Affiliated Ute*, two bank officials bought stock from members of the Ute Indian tribe. *Id.* at 146-47. Because of their unique position, the officials had a duty to disclose the shares' accurate market price to the Indians. *Id.* at 153. And yet, they misrepresented the price to the tribe members by saying that the prevailing price was lower than it actually was. *Id.* at 152. After buying the discounted shares, the officials would immediately sell the shares to non-tribe members for a higher price. *Id.* at 146-47, 152. The Court held that the tribe members were entitled to a presumption of reliance because the officials had an affirmative duty to disclose the resale market and omitted important information. *Id.* at 153-54.

Since *Affiliated Ute*, courts have grappled with whether the presumption of reliance should apply in "mixed" cases—cases involving both omissions and affirmative misrepresentations. *See, e.g., Waggoner v. Barclays PLC*, 875 F.3d 79, 95-96 (2d Cir. 2017), *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2 F.4th 1199, 1204-06 (9th Cir. 2021).

However, such splitting of hairs between pure omissions and mixed cases is unnecessary given that *Affiliated Ute* was a mixed case. *See Affiliated Ute*, 406 U.S. at 152-54. There, the Court acknowledged the existence of both affirmative misrepresentations concerning the prevailing price and an omission regarding the existence of the secondary market. *Id.* The Court set the standard for cases—including mixed cases—that the presumption of reliance applies in situations "involving *primarily* a failure to disclose." *Affiliated Ute*, 406 U.S. at 153 (emphasis added).

The case at hand is also a mixed case. Like how the officials omitted information about the secondary market, Gordon omitted information regarding the issue with the SwiftMax composite. And just as the *Affiliated Ute* officials misrepresented the prevailing market price for the shares, the Memo likewise broadly misrepresented that all of Gemstar's assets were in satisfactory condition. R. 8. Thus, as omissions and affirmative misrepresentations are present in both cases, *Affiliated Ute* guides the analysis as to whether the Fund is entitled to a presumption of reliance on Gordon's fraudulent conduct.

2) The Fund is entitled to an *Affiliated Ute* presumption because Gordon's primary failure was omitting the Trade Letter when she disseminated the Memo.

The *Affiliated Ute* presumption of reliance applies when a market maker's primary fraud is to omit important information. *Affiliated Ute*, 406 U.S. at 154. In *Affiliated Ute*, the two officials had a duty to disclose the secondary market to the Indians because the officials were "market makers" for the resale of the stock. *Id.* at 153. In that role, they were "'active in encouraging" the sales and had acted more than "merely a transfer agent." *Id.* at 152.

The officials' fraud was predominately in their "stand[ing] mute" by failing to disclose the existence of the resale market. *See id.* at 153. They sought to profit from the non-disclosure of the resale market even though they were "fully familiar" with it. *Id.* The Court reasoned that, due to such omissions, the case preeminently dealt with a failure to disclose, even though the officials also affirmatively misrepresented the prevailing market price. *See id.*

In such circumstances, plaintiffs are entitled to a rebuttable presumption if "the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* at 153-54. Knowing of the existence of the resale market would have been important to the Indians in deciding whether to sell their shares to the officials. *See id.* Because the Indians had "the right to know," the Court held that they were entitled to a rebuttable presumption of reliance. *See id.*

The Court created the presumption of reliance to align with Section 10b-5's purpose "to substitute a philosophy of full disclosure for the philosophy of caveat emptor" and thus embrace "a high standard of business ethics in the securities industry." *Id.* at 151 (quoting *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 186 (1963)).

The Fund is entitled to an *Affiliated Ute* presumption of reliance because Gordon's primary failure was to omit the Trade Letter from the Memo.

Gordon was a market maker with a duty to disclose SwiftMax's issues to investors. Like *Affiliated Ute*, where the bank officials had a duty to disclose the secondary market for tribal stock, Gordon—as Vice President of Investor Relations—had a duty to disclose SwiftMax's issues. R. 5. She was in charge of "coordinating the flow of information" to potential investors. R. 16.

What is more, Gordon's decision to stand mute regarding SwiftMax's potential issues make this case primarily about a failure to disclose. Like the *Affiliated Ute* bank officials, who hid the resale market from tribe members, Gordon removed the Trade Letter from the Memo, stating that "she could live with" concealing the information from the public. R. 6. While the Memo did falsely claim that all Gemstar assets were in satisfactory condition, the Memo did not discuss SwiftMax's condition specifically. And importantly, upon learning of the potential issue, Gordon left the rest of the Memo exactly as it was—not adding affirmative misrepresentations about SwiftMax. The most meaningful action Gordon took after learning of the potential problem was choosing to omit the Trade Letter from the final version.

In addition, omitting the Letter was material to the Fund's determination of whether to invest in Gemstar because SwiftMax was Gemstar's "most popular product." R. 4. The product was relied on by Silberfarb, one of Gemstar's two "crown jewel" customers. *Id.* Thus, the long-term success of SwiftMax was important for reasonable investors to decide whether to invest in Gemstar. The Fund, like the tribe members in *Affiliated Ute*, had a right to know the information being withheld from them.

Finally, it would be unrealistic to expect the Fund to show reliance on Gordon's affirmative misdeeds. Like how the *Affiliated Ute* tribe members could not show that they would have relied on the bank officials had they been honest, the Fund is unable to prove the speculative negative—that they would have relied on Trade Letter were it included in the Memo. While the Fund was aware of Gordon's involvement in the placement generally, her name was not included anywhere on the Memo cover page. R. 7. Nor did the Memo invite investors to inquire regarding its contents. R. 6. And the Memo was distributed by Gordon's associate, not by Gordon herself. *Id.* Thus, the Fund had no reasonable way of knowing Gordon's misdeed, making it practically impossible for them to show that they relied on her actions in choosing to invest in Gemstar.

For these reasons, the Fund is entitled to a presumption of reliance under *Affiliated Ute.*

3) Providing the Fund with an *Affiliated Ute* presumption is aligned with other circuit court decisions; the lower court's overly narrow interpretation undermines the presumption's purpose.

The *Affiliated Ute* presumption applies in mixed cases when the omission is more than just "simply the inverse of the affirmative misrepresentations." *See In re Volkswagen*, 2 F.4th at 1208. Volkswagen employed defeat devices in some of its vehicles to cheat on emissions tests. *Id.* at 1202. Afterwards, the company made over nine pages of affirmative misrepresentations regarding the emissions levels of their vehicles in a bond offering memo. *Id.* at 1206. The specific false statements included, among other things, statements about NOx emissions, emissions-control technology, compliance with regulatory standards. *Id.* The Ninth Circuit held that the *Affiliated Ute* presumption did not apply because the omissions about the defeat devices were merely the inverse of the false statements in the bond offering memos. *Id.*

Other courts have found that the *Affiliated Ute* presumption does not apply if the omission merely "exacerbate[s] the misleading nature" of a plaintiff's affirmative conduct. *Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017) (quoting *Starr ex rel. Est. of Sampson v. Georgeson S'holder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005)). In *Waggoner*, Barclays fraudulently claimed that its private trading platform was transparent and safe from predatory trading activities. *Id.* at 87-88. Plaintiff shareholders, who sued after the bank's misdeeds came to light, argued that the bank's failure to disclose its improper behavior were an omission that warranted an *Affiliated Ute* presumption. *See* *id.* at 95-96. The Second Circuit disagreed, noting that the omissions were not the original cause of the problem. *See id.* at 96. Instead, the omissions only exacerbated the already fraudulent behavior—the original misrepresentations were "made more misleading by subsequent omissions." *Id.* at 96. And because the plaintiffs' complaint had even alleged numerous affirmative misrepresentations, it was not that case that "reliance as a practical matter [wa]s impossible to prove." *Id.* at 95 -96 (quoting *Wilson v. Comtech Telecomm. Corp.*, 648 F.2d 88, 93 (2d Cir. 1981)).

Granting the Fund a presumption of reliance aligns with circuit court decisions regarding mixed case because the omitted Trade Letter was more than the inverse of the affirmative misrepresentations in the Memo. Unlike *Volkswagen*, where the offering memos included more than nine pages of affirmative misrepresentations, Gemstar's report contained only three statements relative to the conditions of its product offerings. R. 8. Additionally, Volkswagen's misleading statements were very specific to its emissions, emission-control technology, and compliance with regulatory standards, which was the exact inverse of the omitted defeat devices. Gemstar's Memo, on the other hand, contained only a few broad, vague statements such as that Gemstar's "physical assets" were in reasonable use and that "none of Gemstar's products" were materially defective. R. 8. The Memo did not include information specifically about SwiftMax's functionality. R. 6. Thus, Gemstar's omission was more than simply the inverse of the affirmative misrepresentations in the memo.

What is more, a too-broad application of *Volkswagen's* inverse analysis would effectively swallow the *Affiliated Ute* presumption for omissions. Allowing Gemstar's boilerplate misrepresentations in the memo to overcome its looming omission creates a clear path for others to avoid liability for fraudulent behavior. Companies would have perverse incentives to make vague affirmative misrepresentations that are narrow enough to be the inverse of the omission, and yet broad, ambiguous, and generalized enough that it becomes practically impossible to show reliance. Such statements could inoculate bad actors from liability for omitting critical information. That cannot be. It directly contradicts the purpose of the Securities Act to create a philosophy of full disclosure and achieve a high standard of business ethics.

In addition, Gordon's omissions—the original source of her misconduct—did more than exacerbate her affirmative conduct. Unlike *Waggoner*, where the fraud began with affirmative misrepresentations, Gordon's fraud began with the exclusion of the Trade Report. Her other actions, like affirmatively instructing her associate to distribute the Memo, were dependent on the omission; there would have been nothing wrong with distributing the Memo if Gordon had not omitted the Trade Letter. Thus, the situation is reversed from *Waggoner*. Where omissions in *Waggoner* merely exacerbated affirmative misconduct, here, the affirmative misconduct exacerbated the original omission of the Trade Letter.

Because omitting the Trade Letter was the root cause of Gordon's fraud—not the inverse and not an exacerbation of her affirmative misrepresentations—

the Fund is entitled to an *Affiliated Ute* presumption in this mixed case.

B) The lower court's unworkable rule for mixed cases convolutes the analysis for and effectively nullifies the *Affiliated Ute* analysis.

The lower court's unmanageable rule for mixed cases contradicts precedent—under its test, the *Affiliated Ute* plaintiffs would not have been entitled to an *Affiliated Ute* presumption.

The lower court confused the standard for when a case primarily deals with an omission. The lower court held that the *Affiliated Ute* presumption did not apply because Gordon engaged in "expressly affirmative conduct" by instructing an associate to distribute the misleading statement. R. 22. The court misses the mark. Such a far-reaching interpretation of affirmative conduct would swallow omissions cases—almost every fraudulent activity necessarily deals with such associated affirmative actions.

Take *Affiliated Ute*, for example. The bank officials participated in expressly affirmative conduct by physically accepting the stocks in exchange for cash. *See Affiliated Ute,* 406 U.S. at 145-47. In fact, without that physical exchange, the fraud would not have occurred. And yet, the physical act was not the fraud. There was nothing inherently wrong with affirmatively consummating a transaction. Instead, the officials' fraud was to stand mute about the resale market while the transaction was being completed.

In the same way, there is nothing inherently wrong with Gordon directing a subordinate to distribute a memo. It was only wrong because Gordon knew that the memo contained an omission. She, like the *Affiliated Ute* bank officials buying the stocks, stood mute while directing her associate to distribute the memo. That omission was the fraud.

What is more, the appellate court held that it was not an unrealistic burden for the Fund to show positive proof of reliance: "The Fund either relied on Gordon's affirmative conduct as Vice President of Investor Relations, or it did not." R. 23. But that is not the test. What if this Court in *Affiliated Ute* asked whether the tribe members relied on the bank officials' affirmative conduct? The tribe members did of course. They believed that they were receiving the prevailing market price because the officials made affirmative misrepresentations to that effect. But those misrepresentations were only ancillary to what they did not say. The heart of the fraud was that they omitted to say that there was a secondary market.

Similarly, did the Fund rely on Gordon's affirmative misconduct in deciding whether to invest? Perhaps. But that is not what *Affiliated Ute* asks. The question is: "Would the Fund have invested in Gemstar had Gordon included the omitted Trade Letter?" And the Fund cannot practically answer that question, which is precisely why the *Affiliated Ute* presumption exists.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court reverse the decision of the appellate court.

Respectfully Submitted,

____________________/s/ Team P14

Counsel of Record for Petitioner

APPENDIX

Appendix A

17 C.F.R. § 240.10b-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,

in connection with the purchase or sale of any security.