Team No. P20

Docket No. 22-123

IN THE

Supreme Court of the United States

FORDHAM PUBLIC EMPLOYEES INVESTMENT FUND

Petitioner,

v.

GORDON, KATIE, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fordham Circuit

BRIEF FOR PETITIONERS

QUESTIONS PRESENTED

I. Whether individuals should be held accountable and thus subject to primary liability as a "disseminator" under Rule 10b-5 (a) and (c) for using an employee as a scapegoat and instructing them to distribute false or misleading statements to its investors.

II. Whether the rebuttable presumption of reliance under Affiliated Ute applies when a plaintiff's complaint centers almost entirely around a material omission and includes only a single instance of affirmative conduct which took place completely outside the plaintiff's view.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATUTORY AND REGULATORY PROVISIONS 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I. This Court should find that individuals who use third parties to distribute false or misleading statements to investors should be subject to primary liability as a disseminator under Rule 10b-5 (a) and (c). 8

A. This Court's precedent insinuates that individuals can be subject to primary liability as disseminators under Rule 10b-5 (a) and (c) for instructing their employees to distribute false or misleading statements. 10

B. Lower courts have already recognized that actions akin to Ms. Gordon's may be subject to primary liability under Rule 10b-5 (a) and (c) 14

C. If this Court allows individuals to escape primary liability under Rule 10b-5 (a) and (c) by using third parties, then this Court's decision would run counter to the legislative intent behind the Rule's creation. 17

II. This Court should apply the Affiliated Ute presumption to this mixed case because Congress intended for the Securities Exchange Act of 1934 to cover Ms. Gordon's conduct and because requiring positive proof of reliance would impose an unrealistic burden on the Fund. 19

A. This Court employed the Affiliated Ute presumption specifically to help fulfill Congress's intent of encouraging corporate actors such as Ms. Gordon to disclose material information. 21

B. This Court has continually applied a presumption of reliance when deceptive conduct, such as Ms. Gordon's failure to disclose the Trade Letter, renders the reliance element difficult to prove for Rule 10b-5 plaintiffs. 23

C. Refusing to attach the Affiliated Ute presumption to Ms. Gordon's conduct will render the presumption inapplicable in almost every future mixed case. 25

D. The Court of Appeals erred in analogizing the facts of this case to In re Volkswagen. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Aaron v. S.E.C., 446 U.S. 680 (1980) 18

Affiliated Ute Citizens of Utah v. U.S., 406 U.S. 128 (1972) 20, 21, 22, 23, 28

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) 23, 24

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 9, 10, 12, 16

Chem. Bank v. Arthur Anderson & Co., 726 F.2d 930 (2d Cir. 1984)..... 18

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 12, 18

Halliburton Co. v. Eric P. John Fund, 573 U.S. 258 (2014) 20

In re Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804 (S.D. Tex. 2004) 10, 14, 15, 16

In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549 (S.D. Tex. 2002) 10, 14, 15

In re Interbank Funding Corp. Sec. Litig., 629 F.3d 213 (D.C. Cir. 2010)..25, 26

In re Paramalat Secs. Litig., 376 F. Supp. 2d 472 (S.D.N.Y. 2005) 17

In re Volkswagen "Clean Diesel" Mktg., Sales Prac., and Prod. Liab. Litig., 2 F.4th 1199 (9th Cir. 2021) 20, 23, 25, 26, 28, 29

Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011)..... .....9, 10, 11

Lorenzo v. S.E.C., 139 S.Ct. 1094 (2019).....9, 10, 12, 17, 18

S.E.C. v. Cap. Gains Rsch. Bureau, 375 U.S. 180 (1963).....15, 18, 21, 23

S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946)..... 17

Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981) 24

Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971)..... 9

Waggoner v. Barclays PLC, 875 F.3d 79 (2d Cir. 2017)..... 28

West Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc., 845 F.3d 384 (8th Cir. 2016). 10, 14, 16, 17

Wilko v. Swan, 346 U.S. 427 (1953) 17

Regulations

15 U.S.C. § 78j 9

17 C.F.R. § 240.10b-5..... 1, 9

Miscellaneous

S.E.C. Release No. 2330 (May 21, 1942)..... 18

STATUTORY AND REGULATORY PROVISIONS

17 C.F.R. § 240.10b-5 provides:

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.

INTRODUCTION

This case is about taking responsibility for one's actions. The Securities and Exchange Commission created Rule 10b-5 to ensure honest securities markets and promote investor confidence. Now this Court has the opportunity to uphold this Rule's long-standing intent. On the one hand, this Court may allow individuals to use their subordinates and not apply the Affiliated Ute presumption to permit these individuals to evade liability on technicalities. On the other hand, this Court could continue to honor the S.E.C.'s intentions,

hold individuals primarily liable for their direct orders to their subordinates, and apply the Affiliated Ute presumption of reliance so that the individuals who primarily fail to disclose material information will not escape liability.

STATEMENT OF THE CASE

Petitioner asks this Court to affirm the Court of Appeals' ruling that Ms. Gordon can be held primarily liable under Rule 10b-5 (a) and (c). Additionally, Petitioner asks this Court to reverse the Court of Appeals' ruling that the Fund is not entitled to the Affiliated Ute rebuttable presumption of reliance.

In February 2021, Grace Underwood and Danielle Scott decided to sell eighty percent of their company, Gemstar, to institutional investors in a private placement. (R. 4-5). To help market the private placement, Ms. Underwood and Ms. Scott entrusted Katie Gordon, Gemstar's Vice President of Investor Relations, with the duty of managing the construction of the Private Placement Memorandum. (R. 5). Through this Memorandum, Ms. Gordon was tasked with organizing large amounts of information coming from attorneys, engineering firms, and others and then sending it to potential investors. (R. 5). In May 2021, the principal engineering firm, Keane & Company, delivered a fifty-six page report to Ms. Gordon which analyzed the structural integrity of Gemstar's products. (R. 5). Notably, Keane & Company's report included a memorandum ("Trade Letter") which clearly indicated that the SwiftMax, Gemstar's highest selling product, utilized a defective composite which could develop microscopic cracks over time when exposed to aircraft takeoff. (R. 5-6). Though over three years old, the Trade Letter included a supplementary article supporting its

findings, leaving little room for doubt that the defective composite could cause serious issues. (R. 6).

Ms. Gordon subsequently spoke with Ms. Underwood and Ms. Scott regarding the defective composite. (R. 6) Although Ms. Gordon and Ms. Scott justifiably expressed their reservations about omitting the Trade Letter, Ms. Underwood ultimately convinced them both to leave it out. (R. 6). Thus, despite knowing that investors would want evaluate the Trade Letter before purchasing shares of Gemstar, Ms. Gordon sent Keane & Company's report to Gemstar's experts without including it. (R. 6).

Gemstar completed the Private Placement Memorandum in August of 2021. (R. 6). This final version included boilerplate disclosures that Gemstar's physical assets were in reasonable condition for their intended use, that none of their products were materially defective, and that there were no material undisclosed contingent liabilities relating to its products. (R. 6). However, it entirely omitted any information regarding the defective composite. (R. 6). Additionally, it did not identify Ms. Gordon. (R. 6). Ultimately, Ms. Gordon, acting in her capacity as Vice President of Investor Relations and in charge of the information sent to institutional investors, directed an associate to distribute the Private Placement Memorandum. (R. 6).

One of the institutional investors, the Fordham Public Employees Investment Fund ("the Fund"), purchased 3,000,000 shares of Gemstar stock at twenty-seven dollars per share. (R. 7). Though the Fund was aware of Ms. Gordon's role in crafting the Private Placement Memorandum, it had no

knowledge of the defective composite or of Ms. Gordon's decision to tell an associate to distribute the incomplete Memorandum. (R. 7). Then, only a few months after the Fund's substantial investment in Gemstar, an explosion occurred on a cargo jet as it took off from Kennedy International Airport in New York City. (R. 7). In its investigation of the incident, the FAA concluded that the explosion occurred because two fasteners manufactured using Gemstar's SwiftMax proved unable to support the engine's weight. (R. 7). Further investigation also revealed that the fasteners developed microscopic cracks over time from airplane takeoffs, just as described in the omitted Trade Letter. (R. 7). Due to the FAA's findings, the Fund was forced to sell its entire position in Gemstar at a loss of $68,000,000.

The Fund subsequently brought suit in March 2022 against Ms. Gordon and others in the United States District Court for the District in Fordham. (R. 8). As to Ms. Gordon, the District Court issued an opinion denying her motion to dismiss the Fund's cause of action under section 10(b) of the Securities Exchange Act of 1934. (R. 9). Specifically, the court ruled that Ms. Gordon could be subject to primary liability under Rule 10b-5 (a) and (c) because she served as the "disseminator" of the misleading Private Placement Memorandum. (R. 9). Additionally, although the Fund did not plead reliance pursuant to Rule 10b-5 (b), it ruled that the Fund was entitled to the Affiliated Ute rebuttable presumption of reliance because its complaint primarily alleged omissions. (R. 9).

Ms. Gordon timely filed an appeal to the Court of Appeals. (R. 9). In its decision, the Court of Appeals affirmed the District Court's ruling that Ms. Gordon could be subject to primary liability under Rule 10b-5 (a) and (c). (R. 17). However, it granted Ms. Gordon's motion to dismiss because it held that the Fund was not entitled to the Affiliated Ute presumption. (R. 23). To support its decision, the court ruled that the Fund's complaint primarily alleged affirmative conduct and that the Fund could realistically show it relied on Ms. Gordon's affirmative conduct. (R. 21-22).

The Fund respectfully requests this Court to affirm the Court of Appeals' ruling that Ms. Gordon could be subject to primary liability under Rule 10b-5 (a) and (c). Additionally, the Fund respectfully requests this Court to reverse the Court of Appeals' ruling that it was not entitled to the Affiliated Ute rebuttable presumption of reliance.

SUMMARY OF THE ARGUMENT

This case is not just about whether individuals who neither make nor distribute false or misleading statements can be subject to primary liability as a "disseminator" under Rule 10b-5 (a) and (c). Instead, the question here is more fundamental: may individuals be allowed to circumvent the securities laws by using their employees as scapegoats by instructing them to distribute the statements on their behalf.

This Court should affirm the Fordham Circuit's holding that individuals may be subject to primary liability as disseminators under Rule 10b-5 (a) and (c) for instructing employees to distribute false or misleading information to

investors. This Court's past precedent already insinuates that these individuals may be subject to primary liability under Janus, Cent. Bank of Denver, N.A., and Lorenzo. While individuals cannot be held liable under subsection (b) unless they were the maker of the statement, subsection (a) and (c) includes more expansive language that allows individuals to be held primarily liable for actions that exceed the scope of aiding and abetting.

Additionally, lower courts have previously relied on this Court's insinuated precedent and have held individuals primarily liable for creating a misrepresentation or committing manipulative and deceptive acts. So long as the conduct of the secondary actor meets the requirements for liability, they should be held primarily liable. These courts have appropriately understood that Rule 10b-5 (a) and (c) should be construed flexibly, not technically and restrictively, to effectuate its remedial purposes on individuals who directly or indirectly use or employ any manipulative device or contrivance concerning the purchase or sale of a security.

Furthermore, holding individuals accountable for their deceptive practices would be appropriately aligned with the legislative intent behind Rule 10b-5's creation. The Securities and Exchange Commission specifically formulated these rules to capture a wide range of intentional misconduct, with the intention that so that it may attain a high standard of business ethics in securities commerce. In contrast, permitting individuals to circumvent these securities laws would be counter to the ensuring honest securities markets and promoting investor confidence.

Moreover, this Court should reverse the Fordham Circuit's ruling that the Fund is not entitled to a rebuttable presumption of reliance under Affiliated Ute. Though the Fund alleged minimal affirmative conduct, its allegations center around Ms. Gordon's omission of material information regarding the defective composite from the Private Placement Memorandum, which cost the Fund $68,000,000. Thus, to adhere to its precedent in Affiliated Ute and to best effectuate Congress's "philosophy of full disclosure . . . in the securities industry," this Court should apply the rebuttable presumption of reliance to Ms. Gordon's conduct.

Additionally, the Affiliated Ute court promulgated the presumption of reliance due to the unrealistic task of demonstrating "positive proof of reliance" in cases "involving primarily a failure to disclose." More specifically, the Court recognized the inherent difficulties securities plaintiffs would face in attempting to prove a speculative negative, as it would require them to prove they would have relied on material information were they aware of it. Here, just like the plaintiffs in Affiliated Ute, the Fund would face the unrealistic task of proving a speculative negative: that they would have relied on information regarding the defective composite before purchasing shares of Gemstar stock. Therefore, this is precisely the type of case this Court envisioned the rebuttable presumption of reliance to apply to.

Further, the future of the Affiliated Ute presumption is at stake. If this Court refuses to apply the presumption in this case, one centering around an indisputably material omission and merely incidental affirmative conduct, then

the presumption will be unavailable in virtually every context hereafter. Additionally, the Fordham Circuit erred because while it purported to determine whether the Fund alleged primarily omissions or affirmative conduct, in reality, it sought to determine whether the Fund alleged any affirmative conduct at all. This approach contravenes Affiliated Ute, a case which itself dealt with affirmative conduct from the defendants.

Finally, the Fordham Circuit erred in analogizing the facts of this case to In re Volkswagen from the Ninth Circuit. In that case, the plaintiff "explicitly plead[ed] reliance on extensive, detailed, and specific affirmative misrepresentations." Yet, in this case, the Fund plead minimal affirmative conduct which included, at most, Ms. Gordon instructing an associate to distribute the Private Placement Memorandum and three boilerplate disclosures within the Memorandum itself. Therefore, this Court should reverse Fordham Circuit's ruling and hold that the Fund is entitled to the Affiliated Ute rebuttable presumption of reliance.

ARGUMENT

I. This Court should find that individuals who use third parties to distribute false or misleading statements to investors should be subject to primary liability as a disseminator under Rule 10b-5 (a) and (c).

This Court should affirm the decision of the United States Court of Appeals for the Fordham Circuit ("Fordham Circuit") and conclude that individuals may be subject to primary liability as a disseminator under Rule

10b-5 (a) and (c) for instructing an employee to distribute false or misleading statements to investors.

The Securities Exchange Act of 1934 provides that it is unlawful to (a) "employ any device, scheme, or artifice to defraud," (b) "make any untrue statement of a material fact," or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit" regarding the purchase or sale of any security. 17 C.F.R. § 240.10b-5 (2022). The Securities and Exchange Commission created this Rule per its authority under Section 10(b) of the Securities Exchange Act. 15 U.S.C. § 78j(b). While neither Rule 10b-5 nor section 10(b) expressly created a private right of action, this Supreme Court clarified this ambiguity and elaborated that a private right of action was recognized and implied under section 10(b) of the Securities Exchange Act. See Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 (1971).

This Court's precedent strongly indicates that individuals may be subject to primary liability under Rule 10b-5 (a) and (c) even if they did not make the statement if their conduct is more than merely aiding and abetting. See Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135, 142 (2011); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1994); Lorenzo v. S.E.C., 139 S.Ct. 1094, 1100–01 (2019). Because of this Court's indication, lower courts have also held secondary actors primarily liable for creating a misrepresentation, committing manipulative and deceptive acts in furtherance of a scheme, and compensating third parties to financially

provide misrepresentations on their behalf. See In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F. Supp. 2d 549, 592 (S.D. Tex. 2002); In re Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804, 915 (S.D. Tex. 2004); West Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc., 845 F.3d 384, 392–3 (8th Cir. 2016). Furthermore, the Securities and Exchange Commission carefully crafted the securities laws to capture the numerous schemes that individuals may use to acquire the money of others on the false promises of profits. Lorenzo, 139 S.Ct. at 1103. Thus, because this Court adhere to the precedent it set and the unambiguous legislative intent, this Court should affirm the Fordham Circuit's decision and hold that individuals may be subject to primary liability as disseminators under Rule 10b-5 (a) and (c) for instructing their employees to distribute statements to investors.

A. This Court's precedent insinuates that individuals can be subject to primary liability as disseminators under Rule 10b-5 (a) and (c) for instructing their employees to distribute false or misleading statements.

This Supreme Court's stare decisis strongly indicates that individuals may be subject to primary liability as a disseminator under Rule 10b-5 (a) and (c) for instructing employees to distribute false or misleading information to investors. While to be held primarily liable under Rule 10b-5 (b), the individual must have been the maker of the statement, subsection (a) and (c) of Rule 10b-5 include more expansive language that captures a broader range of activities. See Janus Capital Group, Inc., 564 U.S. at 142; Cent. Bank of Denver, N.A., 511 U.S. at 177; Lorenzo, 139 S.Ct. at 1100–01. This Court's precedent advocates holding individuals primarily liable under Rule 10b-5 even if they did

not directly make the statements. As such, this Court should hold that individuals may be subject to primary liability as disseminators for instructing personnel to distribute false or misleading information on their behalf under Rule 10b-5 (a) and (c).

Under subsection (b) of Rule 10b-5, individuals must have the "ultimate authority over the statement, including its content and whether and how to communicate it," to be considered the maker of a statement and subsequently be held liable. Janus, 564 U.S. at 142. In Janus, one of the petitioner's legally separate subsidiaries, also a petitioner, issued prospectuses that described the mutual fund's investment strategy and operations to investors. Id. at 138. The prospectuses characterized funds as unsuitable for market timing and implied that the subsidiary would implement policies to curb the practice. Id. at 138–39. The New York Attorney General filed a complaint against the petitioners, which alleged that the petitioners entered secret arrangements to permit market timing, and investors subsequently withdrew money from the subsidiary. Id. at 139. In its decision, this Court elaborated that when an individual lacks control, they can merely suggest what to say, not make a statement. Id. at 142. As such, an individual who contributed to the drafting of false statements created by another could not be liable in a private action under subsection (b). Id. at 145.

When this Court held that aiders and abettors are not liable for violations of section 10(b), it clarified that "the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act."

Cent. Bank of Denver, N.A., 511 U.S. at 177. In Cent. Bank of Denver, N.A., the petitioner was an indenture trustee for the Authority's bonds, which required the petitioner to determine the bonds' financial state. Id. at 167. Before the petitioner could complete an independent appraisal review, the respondents purchased the bonds, and subsequently, the Authority defaulted on the bonds. Id. at 167–68. In declining the expand the scope, this Court reviewed the statutory text in section 10(b), which controls the definition of conduct covered. Id. at 173. It observed that the text did not make any suggestions that Congress meant to proscribe any behavior that did not involve manipulation or deception. Id. at 177. Thus, since the respondents did not allege any fraud besides aiding and abetting in their complaint, this Court decided that the petitioners could not be liable under section 10(b). Id. at 191; see also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212 n.32 (1976) (holding that Rule 10b-5 subsections cannot create liabilities aside from those authorized by the statutory text).

Nevertheless, this Court already decided that individuals may still be primarily liable as a disseminator under Rule 10b-5 (a) and (c), even though they did not make the statements. Lorenzo, 139 S.Ct. at 1100–01. In Lorenzo, the petitioner sent two emails to prospective investors on behalf of his employer, who supplied the content and approved the messages. Id. at 1099. These emails contained false information about investment opportunities. Id. In reaching its decision that the petitioner was liable, this Court articulated that Janus only considered subsection (b) of the Rule, which prohibited making an

untrue statement of a material fact. Id. at 1103. However, it did not discuss the Rule's application to disseminating false or misleading information. Id. When it reviewed the petitioner's actions, this Court noticed that the petitioner sent the emails with the intent to deceive, manipulate, or defraud prospective investors. Id. at 1101. This Court further illuminated that the words in the provisions of Rule 10b-5 are "sufficiently broad." Lorenzo, 139 S.Ct. at 1101. As such, actions that "employed" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of the Rule and individuals who "engaged in an act, practice, or course of business" that "operated as a fraud or deceit" within the meaning of subsection (c) may be subject to liability. Lorenzo, 139 S.Ct. at 1101 (highlighting that the provisions of Rule 10b-5 embody a broad spectrum of conduct).

As this Court previously indicated, individuals may still be primarily liable as a disseminator even if they did not make the false or misleading statements so long as their actions are more than those of aiders and abettors. Cent. Bank of Denver, N.A., 511 U.S. at 167; Lorenzo, 139 S.Ct. at 1100–01. Thus, while Ms. Gordon is not a primary violator under Rule 10b-5 (b) because she did not make false or misleading statements to investors, the expansive language of subsections (a) and (c) perfectly captures Ms. Gordon's actions. (R. 14). Because Ms. Gordon was the Vice President of Investor Relations, she was responsible for delivering and disseminating the Private Placement Memorandum to investors. (R. 15). And as Vice President of Investor Relations, she not only participated in but furthered the deceptive plan to conceal the risk

of the microscopic cracks in Gemstar's composite when she delivered the report to Gemstar's experts and instructed an employee to disseminate the memorandum to potential investors on her behalf. (R. 14). Therefore, Rule 10b-5 (a) and (c) should allow individuals to be held accountable for instructing their employees to distribute false or misleading statements to investors on their behalf.

B. Lower courts have already recognized that actions akin to Ms. Gordon's may be subject to primary liability under Rule 10b-5 (a) and (c).

Several courts have already established that individuals who disseminate false or misleading statements using third parties, such as employees, may still be subject to primary liability under Rule 10b-5 (a) and (c). See In re Enron Corp., 235 F. Supp. 2d at 549; In re Dynegy, 339 F. Supp. 2d at 804; West Virginia, 845 F.3d at 384. These courts accurately understood that unlike subsection (b), the application of Rule 10b-5 (a) and (c) was not as restrictive or limited and appropriately applied primary liability to individuals who engaged in manipulative and deceptive conduct and actions. See In re Enron Corp., 235 F. Supp. at 589; In re Dynegy, 339 F. Supp. 2d at 915; West Virginia, 845 F.3d at 392–3. Thus, this Court should view these cases as persuasive authority as these courts correctly understood how to apply Rule 10b-5 (a) and (c) regarding individuals who disseminate false or misleading information.

Secondary actors may be liable under Rule 10b-5 (a) and (c) as primary violators for creating a misrepresentation that investors rely upon. In re Enron Corp., 235 F. Supp. 2d at 592. In In re Enron Corp., the defendants engaged in

an enormous Ponzi scheme that involved generating false transactions with entities owned by the defendants to inflate its revenues and profits, conceal its growing debts, and maintain its artificially high stock prices and investment credit rating. Id. at 613. In holding that a secondary actor may be liable, the court elaborated that aside from Rule 10b-5 (b) claims, plaintiffs may also sue under Rule 10b-5 (a) and (c) for securities law violations for actions other than material misrepresentations or omissions. Id. at 687. Under Rule 10b-5 (a), individuals may be liable for employing a device to defraud, using a scheme to defraud, or employing an artifice to defraud. Id. at 589 n.31. Similarly, under Rule 10b-5 (c), individuals may be liable for engaging in an act that operates or would operate as a fraud or deceit, engaging in a practice that operates or would operate as a fraud or deceit, or engaging in the course of business which operates or would operate as a fraud or deception. Id. The court further emphasized Rule 10b-5 (a) and (c) should be "construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes" on individuals who "directly or indirectly" use or employ "any manipulative or deceptive device or contrivance" concerning the purchase or sale of a security. Id. at 589 (quoting S.E.C. v. Cap. Gains Rsch. Bureau, 375 U.S. 180, 195 (1963)).

When individuals commit manipulative and deceptive acts in furtherance of a scheme, they are primarily liable under Rule 10b-5 (a) and (c). In re Dynegy, 339 F. Supp. 2d at 915. In In re Dynegy, the plaintiff alleged that the defendant, Citibank, was primarily liable for structuring, funding, and executing two major series of transactions to hide its co-defendant's debt and

artificially inflate its co-defendant's net income and cash flows. Id. at 913–14. In dismissing the claim, the court reasoned that Cent. Bank of Denver, N.A., prohibits liability when a group of defendants acted together to violate the securities law unless each of the defendants separately committed a manipulative or deceptive act to further the scheme. Id. at 915. The court explained that a secondary actor might be liable for primary violations under an alleged scheme to defraud when the requirements for liability under Rule 10b-5 have been satisfied. Id.

It is deceptive conduct under Rule 10b-5 (a) and (c) for individuals to compensate third parties to provide misrepresentations on their behalf financially. West Virginia, 845 F.3d at 392–3. In West Virginia, the appellees not only funded the articles in medical journals that exaggerated the effectiveness of their drugs but were also heavily associated with the drafting, editing, and shaping process of the articles' contents. Id. at 388. In coming to its conclusion, the Eighth Circuit accentuated that a scheme liability claim must be based on conduct beyond misrepresentations or omissions that are actionable under Rule 10b-5 (b). Id. at 392. Though the appellees shaped the content of the medical journals by paying the physicians to conceal their drugs' adverse side effects and overstate the disadvantages of using alternative procedures, the court did not rest its decision upon the scope of control that appellees exercised. Id. at 393. Instead, the Eighth Circuit found that the "heart of the scheme liability claim" was paying third parties for their

involvement. Id. at 393 ("[T]he act of paying physicians to induce their complicity is the allegation at the heart of the scheme liability claim.")

C. If this Court allows individuals to escape primary liability under Rule 10b-5 (a) and (c) by using third parties, then this Court's decision would run counter to the legislative intent behind the Rule's creation.

This Court should affirm because permitting individuals to escape primary liability under Rule 10b-5 (a) and (c) by using third parties as scapegoats would be in direct opposition to the already recognized legislative intent behind the Rule's creation. This Court acknowledged that Congress desired to eliminate securities fraud and endorsed the Securities and Exchange Commission with the tools necessary to accomplish that task. Lorenzo, 139 S.Ct. at 1104. Using those tools, the Securities and Exchange Commission formulated the securities laws to "meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." Id. at 1103 (citing S.E.C. v. W.J. Howey Co., 328 U.S. 293, 299 (1946)).

Section 10(b) of the Securities Exchange Act was created after the market crash of 1929 to ensure honest securities markets and promote investor confidence. In re Paramalat Secs. Litig., 376 F. Supp. 2d 472, 493 (S.D.N.Y. 2005). The Act was passed "in response to a Presidential message urging that there be added to the ancient rule of caveat emptor the further doctrine of 'let the seller also beware.'" Wilko v. Swan, 346 U.S. 427, 430 (1953), overruled on other grounds by Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484 (1989). Thus, the Securities and Exchange Commission meant its creation to substitute the concept of caveat emptor for one of full disclosure,

with the primary goal of attaining a high standard of business ethics in securities commerce. Lorenzo, 139 S.Ct. at 1103 (referring to S.E.C. v. Cap. Gains Rsch. Bureau, 375 U.S. at 186); see also Chem. Bank v. Arthur Anderson & Co., 726 F.2d 930, 943 (2d Cir. 1984) (illuminating that the "purpose of § 10(b) and Rule 10b-5 is to protect persons who are deceived in securities transactions – to make sure that buyers of securities get what they think they are getting . . .").

The Securities and Exchange Commission further emphasized this goal by adopting new language into the rule to expand its applicability. S.E.C. Release No. 2330 (May 21, 1942). Thus, while the prior rule against securities fraud applied to only brokers and dealers, the expansive language closed this loophole by making it applicable to individuals or companies. Id.

Although subsections (a) and (c) are similar, this Court elaborated that subsection (a) was intended only to proscribe devices or contrivances to defraud. Aaron v. S.E.C., 446 U.S. 680, 681 (1980). In contrast, subsection (c) was not as limited and covered the effect of which is to result in "fraud or deceit." Id. While one may read the second and third subsections to proscribe unintentional misconduct, this Court previously held that this reading of Rule 10b-5 would exceed the statute's scope. Ernst & Ernst, 425 U.S. at 214. The Congressional intent behind these subsections was to prohibit intentional misconduct rather than mere negligence. Id., at 197–201.

Consequently, the legislative intent behind creating Rule 10b-5 correctly indicates that individuals should not be permitted to escape primary liability by

using their employees or other third parties as scapegoats. Ms. Gordon was Gemstar's Vice President of Investor Relations and was responsible for organizing and managing the flow of information to Carter Capital and other players. (R. 5). She organized the attorneys, financial advisors, auditors, engineering firms, and other experts composing the Private Placement Memorandum. (R. 5). In doing so, Ms. Gordon came across a Trade Letter that insinuated that Gemstar's highest demanded product, SwiftMax, may, over time, develop microscopic cracks under extreme stress conditions as aircraft takeoff. (R. 5–6). After a brief conversation between Danielle, the President, and Grace, the Chief Executive Officer, Ms. Gordon removed the Private Placement Memorandum from the file and delivered the Report to Gemstar's experts. (R. 6). Ms. Gordon later directed one of her associates to distribute the memorandum to twenty-six of the country's largest non-bank financial institutions under cover of Gemstar's stationery. (R. 6). Thus, allowing Ms. Gordon to avoid liability due to a minor technicality that she instructed her employee to distribute the false or misleading information would run counter to the legislative intent behind the Rule.

II. This Court should apply the Affiliated Ute presumption to this mixed case because Congress intended for the Securities Exchange Act of 1934 to cover Ms. Gordon's conduct and because requiring positive proof of reliance would impose an unrealistic burden on the Fund.

"Rule 10b–5 (b), enacted under section 10(b) of the Securities Exchange Act of 1934, makes it unlawful [t]o make any untrue statement of a material fact or to omit to state a material fact." In re Volkswagen "Clean Diesel" Mktg.,

Sales Prac., and Prod. Liab. Litig., 2 F.4th 1199, 1203 (9th Cir. 2021) (internal citations omitted). To prevail in an action under this rule, a plaintiff usually must demonstrate, among other things, "reliance upon [a defendant's] misrepresentation or omission." Id. (citing Halliburton Co. v. Eric P. John Fund, 573 U.S. 258, 267 (2014)). However, this Court previously recognized the inherent difficulties in proving reliance in cases "involving primarily a failure to disclose." Affiliated Ute Citizens of Utah v. U.S., 406 U.S. 128, 154 (1972). Thus, to effectuate Congress's intent (1) to encourage disclosure of material information within the securities industry, and (2) to allow courts to flexibly construe the Securities Exchange Act of 1934 flexibly to achieve that purpose, this Court crafted a presumption of reliance in such cases. Id. at 151-54. Accordingly, this Court has applied the presumption to cases involving a failure to disclose material information by someone with a duty to disclose such information. Id. at 154.

Here, Ms. Gordon failed to disclose material information regarding the defective composite in the Private Placement Memorandum and stood mute while the Fund spent millions of dollars purchasing Gemstar stock. Congress clearly intended the Securities Exchange Act of 1934 to cover such conduct, so this Court should not allow the reliance element to enable Ms. Gordon to escape liability under Rule 10b-5. Additionally, this is precisely the type of case that this Court intended the Affiliated Ute presumption to apply to because, without the presumption, the Fund would have to prove a speculative negative: that they would have relied on information regarding the defective composite

before purchasing shares of Gemstar stock. Moreover, if the Court refused to apply the presumption in this case, which deals almost entirely with the omitted Trade Letter and alleges very little affirmative conduct, then virtually no plaintiffs will be able to invoke the presumption hereafter. Finally, the Court of Appeals wrongly analogized the facts of this case to the facts in In re Volkswagen because, unlike the Fund, the plaintiff in that case alleged a number of detailed and specific affirmative misrepresentations. Therefore, this Court should reverse the Court of Appeals' ruling and hold that the Fund is entitled to the Affiliated Ute rebuttable presumption of reliance.

A. This Court employed the Affiliated Ute presumption specifically to help fulfill Congress's intent of encouraging corporate actors such as Ms. Gordon to disclose material information.

This Court promulgated the Affiliated Ute presumption of reliance in an effort to "embrace" the Securities Exchange Act of 1934's "philosophy of full disclosure . . . to achieve a high standard of business ethics in the securities industry." Affiliated Ute, 406 U.S. at 151-54 (quoting S.E.C. v. Cap. Gains Rsch. Bureau, 375 U.S. 180, 186 (1963)). In Affiliated Ute, a native American tribe formed a corporation and issued shares of stock to its "mixed-blood" members. Id. at 133-36. The bank acted as the sole transfer agent for the shares of stock, and the corporation provided the bank with specific instructions on how to act in the best interests of the mixed-blood members. Id. at 145-46. Nonetheless, two of the bank's employees, without informing the mixed-blood members, purchased several shares of stock and then sold those shares to non-tribe members at higher prices. Id. at 152.

To best effectuate Congress's intent, the Court ruled that "[u]nder the circumstances of the case . . . positive proof of reliance [wa]s not a prerequisite to recovery." Id. at 153. Instead, the Court simply required the plaintiffs to demonstrate that (1) an individual with a duty to disclose material information (2) failed to disclose such information. Id. at 154. Further, the Court established a low threshold for materiality, stating that "*[a]ll* that is necessary is that the facts withheld be material in the sense that a reasonable investor *might* have considered them important in the making of this decision." Id. at 153-54 (emphasis added). With this preference for disclosure in mind, the Court held that the employees could "not stand mute while they facilitate[d] the mixed-bloods' sales . . . in the non-Indian market." See id. at 153-54.

Here, Ms. Gordon knew that investors would likely consider a defect in the SwiftMax, Gemstar's highest-selling product, to be an important detail in deciding whether to purchase shares of stock. Additionally, as Gemstar's Vice President of Investor Relations, her duty was to ensure that investors received all material information before making their decision. Yet, she omitted information regarding the defective composite anyway, and the Fund incurred a $68,000,000 loss without any chance to evaluate the risk the defective composite posed. Just like the bank employees in Affiliated Ute, Ms. Gordon, a corporate actor with a duty to disclose material information, stood mute while the Fund spent millions of dollars on Gemstar stock. Therefore, this Court should continue to honor Congress's "philosophy of full disclosure . . . in the

securities industry" and apply the Affiliated Ute presumption to Ms. Gordon's conduct. Affiliated Ute, 406 U.S. at 151.

B. This Court has continually applied a presumption of reliance when deceptive conduct, such as Ms. Gordon's failure to disclose the Trade Letter, renders the reliance element difficult to prove for Rule 10b-5 plaintiffs.

In its decision to relieve the plaintiffs of their burden to demonstrate reliance, normally a fundamental element of a Rule 10b-5 claim, the Affiliated Ute Court noted that "Congress intended securities legislation . . . to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" Id. at 151 (quoting Cap. Gains Rsch. Bureau, 375 U.S. at 195). Therefore, it felt unrestrained to create a presumption of reliance in a case "involving primarily a failure to disclose." Id. at 153. More specifically, it realized that the plaintiffs faced the unrealistic task of "prov[ing] a speculative negative: that they would have relied on information about the secondary market before selling their stock had the bank disclosed it." In re Volkswagen, 2 F.4th at 1204 (citing id. at 133-39). Accordingly, the Court promulgated the presumption to prevent the traditional concept of reliance from shielding deceptive business practices from liability under Rule 10b-5. Id. at 153-54.

Several years later, this Court again recognized that "the presumption of reliance . . . by facilitating Rule 10b-5 litigation, supports . . . the congressional policy embodied in the 1934 Act." Basic, Inc. v. Levinson, 485 U.S. 224, 245 (1988). Although the Court applied the presumption of reliance under the separate "fraud-on-the-market" theory, it reiterated Affiliated Ute's rationale that "[r]equiring a plaintiff to show a speculative state of facts . . . place[s] an

unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff." Id. at 245 (internal citations omitted). Additionally, the Court reasoned that the presumption of reliance helped adapt Rule 10b-5 actions to the realities of "modern securities markets," which makes it difficult for plaintiffs to prove they relied on specific statements of companies or individuals. Id. at 242-45. Thus, the Court reaffirmed its willingness to utilize a presumption of reliance when inherent difficulties in proving the reliance element arise. Id.; see also Sharp v. Coopers & Lybrand, 649 F.2d 175, 188-89 (3d Cir. 1981) (ruling that a court should analyze a plaintiff's allegations and presume reliance if "the likely proof at trial" centers around a defendant's failure to disclose).

Here, the Fund's complaint centers around Ms. Gordon's failure to disclose information about the defective composite and, thus, the Fund's inability to evaluate that information before purchasing stock. Additionally, Ms. Gordon's name was not mentioned in the cover letter, adding to the Fund's difficulty in proving reliance on her conduct. Just like the plaintiffs in Affiliated Ute, the Fund faces an unrealistic task of proving a speculative negative: that they would have relied on information regarding the defective composite before purchasing shares of Gemstar stock. Therefore, this Court, in accordance with Congress's intentions, should apply the Affiliated Ute presumption to Ms. Gordon's conduct. Otherwise, the reliance requirement will enable deceptive conduct to escape liability under Rule 10b-5.

C. Refusing to attach the Affiliated Ute presumption to Ms. Gordon's conduct will render the presumption inapplicable in almost every future mixed case.

Even if a complaint mainly revolves around material omissions, the rule adopted by the Court of Appeals would "remove[] the availability of the Affiliated Ute presumption" merely "if some 'positive statement' or affirmative misrepresentation was also made." In re Volkswagen, 2 F.4th at 1209 (Wallace, C.J., dissenting). A similar ruling in a case involving an auditor's alleged failure to disclose a "Ponzi scheme" illustrates this point. In re Interbank Funding Corp. Sec. Litig., 629 F.3d 213, 215 (D.C. Cir. 2010). In In re Interbank, the plaintiffs alleged that an investment fund, through its financial statements, "misrepresented [its] financial position in order to attract new investors." Id. at 220. The defendant, an accounting firm tasked with auditing the investment fund, chose not to disclose the investment fund's misrepresentations. Id. Further, the defendant concealed the investment fund's "inter-fund transfers, loan losses, and lines of credit secured by a lien on some of the funds' assets." Id.

Despite the number and materiality of the defendant's omissions, the court refused to apply the Affiliated Ute presumption solely because "[the defendant] publicly attested to the accuracy of numerous . . . balance sheets as well as the fact that the balance sheets conformed with [generally accepted accounting principles]." Id. at 220-21. The court therefore viewed a single "express certification" on the financial statements, a boilerplate disclosure

presumably present each time the defendant completed an audit, as enough to "encompass[] the alleged omissions cited in the . . . complaint." Id. at 221.

Moreover, the Court of Appeals' "unfortunate reading" of the Affiliated Ute presumption paid lip service to the defendants' affirmative conduct within the Affiliated Ute case itself. In re Volkswagen, 2 F.4th at 1209 (Wallace, C.J., dissenting). In that case, the defendants assured the corporation that the "transfers were properly made" and that it "would be acting for the individual stockholders." Id. at 152. Additionally, the defendants, in purporting to carry out those general assurances, affirmatively misrepresented that they purchased the shares from the tribe members at "the prevailing market price." Id. Yet, even with these affirmative misrepresentations in the record, the Court still held that "the circumstances of the case . . . involv[ed] primarily a failure to disclose." Id. at 154. Specifically, it properly recognized that the plaintiffs' allegations centered instead around the secretive secondary market the employees developed to sell the shares to non-tribe members at higher prices. Id. at 151-54.

Here, the Court of Appeals pointed only to the fact that (1) Ms. Gordon instructed an associate to distribute the Private Placement Memorandum, and (2) the Fund knew Ms. Gordon controlled the Memorandum's dissemination. Thus, it held that a single affirmative act, occurring outside the Fund's view, encompassed the omission of the Trade Letter and rendered the presumption of reliance inapplicable. And while it purported to determine whether the Fund primarily alleged omissions or affirmative conduct, it, in essence, looked to

whether the Fund alleged any affirmative conduct at all. This approach goes directly against the holding in Affiliated Ute, itself a case involving affirmative conduct. Additionally, it threatens to swallow the Affiliated Ute presumption entirely, as future plaintiffs will almost always allege some form of "affirmative conduct" when recounting the communications and actions that facilitated a transaction.

Moreover, the three boilerplate disclosures within the Private Placement Memorandum should not render the Affiliated Ute presumption inapplicable to Ms. Gordon's conduct. The statements that Gemstar's physical assets were in reasonable condition for their intended use, that none of their products were materially defective, and that there were no material undisclosed contingent liabilities relating to its products only communicated to the Fund, at most, that it was not entering into an inherently unfair transaction. These boilerplate recitations, incidental to the transaction as a whole, do not change the heart of the Fund's allegations – that Ms. Gordon omitted the Trade Letter containing material information related to the defective composite from the Private Placement Memorandum. If this Court rules otherwise, it will enable corporate actors to evade the Affiliated Ute presumption simply by embedding all-encompassing, affirmative statements into the fine-print of their documents, no matter the amount or materiality of their future nondisclosures. Such a technical and restrictive approach to Rule 10b-5 actions would go squarely against the well settled principle that "securities legislation . . . be construed

flexibly" to encourage "full disclosure . . . in the securities industry." Affiliated Ute, 406 U.S. at 151 (internal citations omitted).

D. The Court of Appeals erred in analogizing the facts of this case to In re Volkswagen.

The facts of In re Volkswagen are easily distinguishable to the present case. In In re Volkswagen, the court refused to presume the element of reliance because the plaintiff "explicitly plead[ed] reliance on extensive, detailed, and specific affirmative misrepresentations." In re Volkswagen, 2 F.4th at 1208; see also Waggoner v. Barclays PLC, 875 F.3d 79, 96 (2d Cir. 2017) (noting that "Plaintiffs' complaint alleges numerous affirmative misstatements by the Defendants" and "focus their claims on those affirmative misstatements"). The plaintiff alleged that Volkswagen secretly installed defeat devices in millions of their diesel vehicles to "mask unlawfully high emissions from regulators and cheat on emissions tests." In re Volkswagen, 2 F.4th at 1202. Accompanying these alleged omissions, however, were "more than nine pages of affirmative misrepresentations that were made by Volkswagen." Id. at 1206.

These affirmative misrepresentations included, among other things, statements from Volkswagen claiming it prioritized research and development of low-emission engines, developed diesel engines whose "NOx emissions were within the legal limit," and "offer[ed] an extensive range of environmentally-friendly . . . vehicles . . . unparalleled in the industry." Id. at 1206-07. Citing to the number and specificity of Volkswagen's alleged misrepresentations, the court reasoned that the "[p]laintiff can prove reliance through ordinary means by demonstrating a connection between the alleged misstatements and its

injury." Id. at 1208 (internal citations omitted). Therefore, even though the defeat device "omission loom[ed] large over . . . [the] claims," the plaintiff could not "characterize[e] its claims as primarily alleging omissions." Id. at 1206-08.

Unlike the plaintiff in In re Volkswagen, the Fund did not plead extensive, detailed, and affirmative misrepresentations. Instead, the Fund pleaded, at most, that Ms. Gordon instructed an associate to distribute the Private Placement Memorandum and that the Memorandum contained three boilerplate disclosures. Therefore, this Court should reverse the Court of Appeals' ruling and hold that the Fund is entitled to the Affiliated Ute rebuttable presumption of reliance.

CONCLUSION

Because Rule 10b-5 (a) and (c) was intended to ensure honest securities markets and promote investor confidence, Petitioner respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Fordham Circuit regarding the first issue and hold that individuals may still be subject to primary liability as a "disseminator" under Rule 10b-5 (a) and (c) even though the individual did not make or distribute the false or misleading statement but instead used an employee to distribute the statements to investors.

Further, because Congress intended that courts construe securities legislation flexibly to effectuate a policy of full disclosure, this Court should reverse the decision of the United States Court of Appeals for the Fordham Circuit regarding the second issue and hold that a plaintiff is entitled to Affiliated Ute's rebuttable presumption of reliance because its allegations center around a material omission which led it to incur tens of millions of dollars in losses.

Respectfully Submitted,

_____/s/
Team P20
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