R.17

No. 22-123

In The

Supreme Court of the United States

February Term 2023

FORDHAM PUBLIC EMPLOYEES INVESTMENT FUND,

Petitioner,

v.

KATIE GORDON, ET AL.,

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS

BRIEF FOR RESPONDENT

Team #17 Counsel
for Respondent

Questions Presented

1. Whether an employee who neither makes nor disseminates false or misleading statements, but only follows direct orders from her superiors, is subject to primary liability under § 10b of the Securities and Exchange Act and SEC Rule 10b-5.

2. Whether Fordham Public Employees Investment Fund is entitled to a rebuttable presumption of reliance under *Affiliated Ute* despite misconstruing affirmative misinterpretations for omissions and being capable of proving its reliance on Katie's actions even when she had no duty to disclose.

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STATEMENT OF FACTS

In January of 2018, Grace Underwood and Danielle Scott completed their purchase of a machine tool business from McGrath, Inc. R. 3. The two named their business Gemstar and determined that they would share responsibility for all material executive decisions. R. 3. Gemstar's most profitable product was the SwiftMax, a machine tool used on cargo jet airplanes. R. 4. After three years Grace and Danielle decided to sell their business and started exploring avenues to do so. R. 4. The two began formulating a well curated plan that aligned with their business goals. R. 4. After consulting with Carter Capital, they decided on selling 80% of Gemstar in a private placement to sophisticated institutional investors, while retaining 20% in order to secure control over the business. R. 4.

They began the private placement process in February of 2021, tasking Katie Gordon, the Vice President of Investor Relations with organizing the private placement. R. 5. Katie's primary responsibility was acting as a liaison between Carter Capital and the experts who were constructing the Private Placement Memo (the "Memo"). R. 5.

In May of 2021, the engineering firm Keane & Company provided her with a report ("the Report") on Gemstar's assets and products. R. 5. Upon review, Katie did not notice anything materially deficient. R. 5. The Report included a memorandum ("Trade Letter") that suggested the SwiftMax used a composite that could potentially, overtime, develop deficiencies. R. 5–6. The Trade Letter was developed by a junior engineer who had since left Keane &

Company. R. 6. Additionally, the Trade Letter was over three years old and included only a single article supporting its hypothesis. R. 6. In fact, when Danielle and Grace originally purchased Gemstar, their audit turned up a similar letter which may have been deemed inconsequential by their experts. R. 4.

When Katie read the Trade Letter, she knew that she had to discuss the matter with Grace and Danielle, as Grace and Danielle "shared responsibility for making all material executive decisions." R. 3. Grace was adamant that the Trade Letter was written in error, "aggressively" saying that it was a complete waste of time discussing the letter. R. 6. Grace convinced Danielle to agree to hide the Trade Letter out of fear that the auditors "make mountains out of molehills." R. 6. At no point in this conversation did Katie speak up on her opinion of the Trade Letter. R. 6. Grace and Danielle explicitly instructed Katie to remove the Trade Letter from the Report. R. 6.

In August of 2022, the Private Placement Memorandum ("the Memo") was finished without the Trade Letter, and without any reference to the composite. R. 6. Katie then told one of her associates to distribute the Memo to institutional investors with Gemstar company letterhead. R. 6. The associate prepared a cover letter that did not identify Katie, nor did it provide her contact information for investors to ask her questions about the Memo. R. 6. After the private placement was complete, the Fordham Public Employees Investment

Fund ("the Fund") purchased 3,000,000 shares. R. 7. It is unclear whether the Fund had read the Memo before buying the shares in Gemstar. R. 7.

A few months later, a cargo jet taking off at Kennedy International Airport experienced a mechanical malfunction on the runway. R. 7. The pilot of the aircraft was able to slow the plane down at the end of the runway, and no one was injured during the incident. R. 7. An investigation revealed that the incident occurred when fasteners supporting the engine were unable to support its weight. R. 7. The fasteners were manufactured by Silberfarb Solutions using Gemstar's SwitMax machine. R. 7. At the conclusion of the investigation, the Fund sold all its shares of Gemstar at a loss. R. 7.

The Fund filed suit against Gemstar, as well as Grace, Danielle and Katie alleging securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. R. 8. The Fund settled with Gemstar, and each of the executives filed separate 12(b)(6) motions to dismiss for failure to state a claim. R. 8. Katie argued that she did not make or disseminate the Memo's false and misleading statements, and even if she could be liable, the Fund failed to allege reliance on the Memo in relation to their purchase of shares in Gemstar. R. 8-9. The District Court for the District of Fordham denied Katie's motion to dismiss her liable as a disseminator of the false statements. R. 9. The District Court also rejected the argument that the Fund failed to allege reliance. R. 9. Katie appealed to the Circuit Court who found that while Katie could be held liable, the Fund was not entitled to a presumption of reliance and thus failed to state a claim. R. 23.

SUMMARY OF ARGUMENT

Securities laws are drafted with the purpose of protecting investors. To guarantee this protection, they apply to violators broadly. But this recognized broad application of securities law causes confusion when courts are presented with borderline cases. In cases where an investor experiences loss, the inclination to hold violators responsible is warranted. But it is not without limit. Overstepping the bounds of securities laws has profound consequences for employees who, in acting in their regular employment, touch conduct that implicates liability for others. And so, a person who merely distributes false information made by others to investors, and who does not cause reliance should not be primarily liable.

I. Katie is not a "disseminator" under Rule 10b-5

First, Katie is not subject to primary liability because she neither employed any "device, scheme, or artifice" to defraud, nor did she engage in any "act, practice, or course of business" with the intent to defraud. 17 C.F.R. § 240.10b-5. Katie's actions—instructing an employee to circulate the Memo at the direction of her employer—did not equal a scheme. Her conduct was not devised or unscrupulously concocted. She simply acted on instruction. Nor did Katie intend to defraud: Katie's bosses, who made the decision not to include the Trade Letter, believed it was "outdated" and "clearly written in error."

Further, the Circuit Court's decision plainly defies precedent and congressional intent. The Circuit Court's decision blurs the line between primary and secondary violators of Rule 10b-5, even increasing instances of primary liability under the Exchange Act of 1934. This expansion goes against this Court's precedent. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-63 (2008). And because Congress used the word "disseminate" in other sections of the Exchange Act but did not include it in §10(b), the Circuit Court wrongfully read "disseminate" into §10(b). Had Congress intended to implement dissemination into Rule 10b-5, they would have done so.

II. The Fund is not entitled to a rebuttable presumption of reliance

Second, Petitioner is not entitled to a rebuttable presumption of reliance. Katie did not have an affirmative duty to disclose material information accurately. But even if she did, Katie's conduct constituted affirmative actions—not omissions. A rebuttable presumption of reliance under *Affiliated Ute* is confined to cases that allege omissions. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). If Katie engaged in both affirmative misstatements *and* omissions, a rebuttable presumption of reliance still would not apply, because the rebuttable presumption does not apply to "mixed" cases.

Additionally, even if Katie's actions were omissions, Petitioner is still not entitled to a rebuttable presumption of reliance under *Affiliated Ute* because

Petitioner is a sophisticated financial institution and must prove its reliance. Petitioner is one of the country's largest non-bank financial institutions, and as a sophisticated financial institution, it conducts due diligence before making large investments. Surely Petitioner has the resources and expertise to prove its reliance on the Memo.

ARGUMENT

I. KATIE IS NOT A DISSEMINATOR UNDER RULE 10b-5(a) AND (c) BECAUSE SHE DID NOT ENGAGE IN A SCHEME OR INTEND TO DEFRAUD, AND THEREFORE IS NOT SUBJECT TO PRIMARY LIABILITY.

A. KATIE IS NOT LIABLE UNDER RULE 10B-5 BECAUSE SHE DID NOT "MAKE" THE STATEMENTS CONTAINED IN THE MEMO, BECAUSE SHE DID NOT ENGAGE IN A DEVICE OR SCHEME, AND BECAUSE SHE DID NOT INTEND TO DECEIVE OR DEFRAUD.

Katie's conduct does not give rise to liability under Rule 10b-5. This Court should reverse the decision of the Circuit Court because Katie's conduct does not fall under any categories of conduct that give rise to liability under Rule 10b-5. C.F.R. § 240.10b-5. Katie cannot be held liable because she was not a "maker" of the Memo's false or misleading statements. *Id.* Nor did Katie employ a "device, scheme, or artifice to defraud." *Id.* And finally, Katie did not engage in an "act, practice or course of conduct" that "operate[d] as a fraud or deceit." *Id.*

1. Katie is not primarily liable because she did not "make" the statements contained in the Memo.

Rule 10b-5(b) provides that, "[I]t shall be unlawful for any person . . . [t]o 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." 17 C.F.R. § 240.10b-5(b). To "make" a false or misleading statement under Rule 10b-5(b), a person must have "ultimate authority" over that statement. *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. 135, 142 (2011). Only when a person controls a statement's contents, controls whether a statement is communicated, and controls how a statement is communicated do they wield "ultimate authority." *Id.* at 143-44.

A person may be involved in a statement's form and formation, and still not "make" that statement. *Id.* at 143. In *Janus*, the Court provided the example of the speechwriter to demonstrate who commands authority of a statement and how. *Id.* at 148 (holding that although the investment advisory firm prepared a client's prospectus, it was the client who "made" the statements contained in the prospectus, and the client who was liable for the misleading statements made in the prospectus). Although the speechwriter writes the words of the speech, the speaker controls the message and delivers the speech. *Id.* The speaker is lauded for the speech's merits—or blamed for its failures. *Id.* In this way, the speechwriter lacks "ultimate authority": they can claim neither the success of the speech, nor the failure. *Id.* at 242-43 ("[I]n the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by–and only by–the party to whom it is attributed.").

Here, although Katie assisted in the preparation of the Memo, she did not "make" any statements contained in the Memo. *Id.* Rather, her main duty was to "manage the flow of information" among the parties. R. 5. Katie did not have "ultimate authority" over the Memo. Instead, when it came time to make decisions regarding the Trade Letter and its applicability to the Memo, Katie merely brought the Trade Letter's contents to the attention of her supervisors, Ms. Underwood and Ms. Scott. R. 6. And acting on the instruction and "ultimate authority" of Ms. Underwood and Ms. Scott, Katie removed the Trade Letter from the Report, and subsequently, "manage[d] the flow of information" to Gemstar's experts. R. at 5-6; *see id.* at 143 ("One who prepares or publishes a statement on behalf of another is not a maker."). Thus, because Katie did not "make" the false and misleading statements in the Memo, she should not be subject to primary liability.

2. Katie is not liable because she did not engage in a scheme, nor did she intend to defraud

To protect investors, securities laws seek to prohibit a range of fraudulent conduct. *SEC. v. W.J. Howley Co.*, 328 U.S. 293, 299 (1946) (maintaining that the Securities Act of 1934 "embodies a flexible rather than a static principle"). Rule 10b-5(a) prohibits the use of "any device, scheme, or artifice to defraud." 17 C.F.R. § 240.10b-5; see also *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019)(quoting *Aaron v. SEC*, 446 U.S. 680, 696 n. 13 (1980))("A 'device' . . . is simply that which is devised, or formed by design; a 'scheme' is a project, plan, or program of something to be done; and an 'artifice' is an artful stratagem or trick.").

Rule 10b-5(c) similarly prohibits a person from engaging 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 purpose or sale of any security." 17 C.F.R. § 240.10b-5. And so, to be liable under Rule 10b-5, a violator must have intended to deceive. *Id.* Petitioner must demonstrate the requisite scienter: "a mental state embracing intent to deceive, manipulate, or defraud." *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir. 1988) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)).

This Court reasoned that the scope of Rule 10b-5 "may present difficult problems" in borderline cases, and cautioned against applying broad liability to those who are only "tangentially involved" in dissemination. *Lorenzo*, 139 S.Ct. at 1094, 1099–1100. As such, the Circuit Court wrongly analogized Katie's case to the facts of *Lorenzo*—unlike Lorenzo, Katie did not engage in any scheme, nor did she intend to defraud investors.

In *Lorenzo*, Lorenzo was a central actor to the fraud—he was far beyond "tangentially involved." *Id.* at 1101. Lorenzo sent emails to prospective investors that "he understood to contain material truths," boasting about $10 million in "confirmed assets" when actually the company had, and publicly stated that they had, $370,552 in total assets. *Id.* at 1099. Lorenzo signed the emails with his own name and title—VP. *Id.* And he invited the recipients of the email to “call with any questions.” *Id.* Through these actions, Lorenzo knowingly disseminated misleading information, or “‘engage[d] in a[n] act, practice or course of business’ that ‘operate[d] as a fraud or deceit” under Rule 10b-5(c). *Id.* at 1101. Unlike in *Lorenzo*, Katie’s conduct was not patently fraudulent. R. 6. Katie played only a minor role in the distribution of the Memo. R. 6. Ms. Underwood and Ms. Scott controlled the Memo’s contents. R. 6. One of Katie’s associates distributed the Memo. R. 6. And even if the Memo constituted a misstatement or omission, omissions and misstatements alone do not make a scheme under Rule 10b-5. *See SEC. v. Rio Tinto plc*, 41 F.4th 47, 49 (2d Cir. 2022) (“[M]isstatements and omissions can form part of a scheme liability claim, but an actionable scheme liability claim also requires something beyond misstatements and omissions.”)(citing *Lentell v. Merril Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005))(emphasis in original).

Nor did Katie intend to deceive, manipulate or defraud. *Cf. In re Alphabet, Inc. Securities Litig.*, 1 F.4th 687, 693 (9th Cir. 2021), cert. denied sub nom. *Alphabet Inc. v. Rhode Island*, 142 S.Ct. 1227 (2022) (finding intent to deceive, manipulate or defraud where Google and its parent company concealed a major leak and security vulnerabilities and instead disclosed cybersecurity risks generally); *see also Plumber & Steamfitters Local 773 Pension Fund, Boston Ret. Sys. v. Danske Bank A/S*, 11 F.4th 90, 105 (2d Cir. 2021) (holding that plaintiff failed to state a claim based on subsections (a) and (c) of Rule 10b-5 because they failed to “articulate with precision the contours of an alleged scheme to defraud investors” and instead relied on “conclusory assertion[s]”).

Katie did not know that the contents of the Memo constituted a misstatement or omission. *In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 401 n. 3 (6th Cir. 1997) ("It is clear that a violation of federal securities law cannot be premised upon a company's disclosure of accurate historical data."). Although her removal of the memorandum containing the Trade Letter from the Report "bothered her," and although she was a VP, Katie acted on the instruction of her employer, who believed the Trade letter was "outdated" and "clearly written in error." R. 6; *Danske Bank*, 11 F.4th at 101 ("Old information tends to become less salient to a prospective purchaser"); see also *Ross v. A.H. Robins Co., Inc.*, F. Supp. 904, 908 (S.D.N.Y. 1979) ("[L]ogic compels the conclusion that time may render statements immaterial.").

Katie did remove the Trade Letter from the Report, but she did not send or share the Memo herself, she instructed an employee to do so. R. at 6. And unlike in *Lorenzo*, where Lorenzo was liable because he was central to the act of distribution, sending and signing an email and inviting inquiries, the Memo here was on Gemstar stationery, with no reference to Katie, and invited no inquiries. R. 6; *Lorenzo,* 139 S.Ct. at 1099; *see also Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 53 (2d Cir. 1995) ("It is well settled that section 10(b) was not designed to regulate corporate mismanagement.")(internal quotation marks omitted).

For these reasons, Katie is not a disseminator and so cannot be liable under Rule 10b-5(a) and (c) because she neither made nor disseminated false or misleading information. She did not engage in a scheme. Nor did she intend to deceive. *See Lorenzo*, 139 S.Ct. at 1102 ("*Janus* . . . remain[s] relevant (and preclude[s] liability) where an individual neither makes nor disseminates false information.").

B. KATIE IS NOT SUBJECT TO PRIMARY LIABILITY AS A DISSEMINATOR UNDER RULE 10B-5(A) AND (C) BECAUSE EXTENDING *LORENZO* TO A PRIVATE CAUSE OF ACTION GOES AGAINST PRECEDENT AND CONGRESSIONAL INTENT.

When the Circuit Court decided to extend a private cause of action to a disseminator under a broad view of the holding in *Lorenzo*, they ignored both the congressional intent of the Securities and Exchange Act, as well as this Court's established precedent on the difference between primary and secondary liability. The Securities and Exchange Commission ("SEC") created rule 10b-5 under the authority of § 10(b) of the Securities Exchange Act of 1934. 15 U.S.C. § 78j(b). However, neither rule 10b-5 nor § 10(b) create an express private right of action for violation of the statutes. While Congress only intended to give a right of action to the SEC, this Court has read a private right of action into § 10(b) for primary violations of 10b-5. *Superintendent of Ins. Of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 (1971). Even though a private right of action is read into the statute, this Court has cautioned against "extending liability beyond the scope and conduct prohibited by the statutory text" because of "[concerns] with the judicial creation of a private cause of action caution against its expansion." *Stoneridge,* 552 U.S. at 165.

By extending a broad view of primary liability to disseminators, making them subject to private actions, the Circuit Court has engaged in the conduct that this Court has cautioned against. To extend primary liability and a private cause of action to a disseminator who neither makes or distributes false or misleading, would be to expand primary liability beyond the intent of Congress and disrupt the precedent laid out by this Court. This Court should reconsider the application of *Lorenzo* in the context of a private right of action.

1. Both this Court and Congress have established precedent requiring a bright line separation between primary and secondary violators.

There is a long line of precedent from this Court, as well as congressional intent that emphasizes the importance of creating a bright line between primary and secondary violators. Additionally, precedent and intent point to the fact that Congress did not want to extend a private cause of action to aiders and abettors. While it is true that the broad language of § 10(b) and Rule 10b-5 is intended to be flexible to reach a broad variety of schemes, this does not mean that Congress intended to give a private right of action under every circumstance. This Court has been reluctant to shift this line before, "Congress did not attach private aiding and abetting liability to any of the express cause of action in the securities Acts." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* 511 U.S. 164, 179. In, *Cent. Bank*, this Court refused to extend primary liability to someone who aided in someone else's misstatement. *Id.* at 177.

Furthermore, after *Cent. Bank*, the SEC chairman at the time, Arthur Levitt testified at the Senate Securities Subcommittee imploring Congress to extend aiding and abetting liability in private claims. *S. Hearing No. 103-795,* pp 13–14 (1994). In response, Congress passed § 104 of the Private Securitas Litigation Reform Act which gave the authority to prosecute aiders and abettors to the SEC. *See* 15 U.S.C § 78t(e). Furthermore, "Congress generally acts intentionally when it uses particular language in one section of a statue but omits it in another." *Department of Homeland Security v. Maclean*, 574 U.S. 383, 392 (2015). The reading in of "disseminate" into § 10(b) goes against this. For example, § 9(a)(5) of the Exchange Act addresses "circulation, dissemination, and publishing of certain types of statements." If Congress wanted to implement dissemination into 10b-5, they would have as evidenced by their use of it in a different part of the act.

Additionally, in *Stoneridge*, this Court upheld the bright line distinction between primary and secondary violators when they refused to expand liability to someone "committing a deceptive act in the process of facilitating… misstatements made by others." *Stoneridge*, 522 U.S. at 162–63. This Court warned that expanding liability would supersede congressional intent by "undermining Congress' determination that this class of defendants should be pursued by the SEC." *Id.* In *Lorenzo*, when this Court held that a disseminator can be held primarily liable, they extended a private right of action in a case that was not brought by a private party.

Furthermore, by relying on the holding in *Lorenzo* the Circuit Court emphasizes that because the provisions in 10b-5 apply to a wide range of conduct, "Applying them may present difficult problems of scope in the borderline cases. Purpose, precedent, and circumstances could lead to narrowing their reach in other contexts." *Lorenzo*, 139 S.Ct. at 1101. This assertion admits that there are going to be borderline cases that are now going to have to be decided without a bright line rule between primary and secondary liability. This Court in *Lorenzo* also argued that the new bright line rule is just as administrable as the Court's line of decisions after *Central Bank*. While it may be just as easy to apply, the Circuit Court is extending a right of action that Congress did not intend to be available. For example, in *Lorenzo*, the individual charged with violating rule 10b-5 used his own email to convey misleading statements made by his boss and implored the recipients to respond to him directly. In applying the holding of *Lorenzo* to a private right of action, the Circuit Court attempted to apply the bright line rule, to a set of non-analogous facts.

The Circuit Court admits that Katie is not a "maker" under rule 10b-5(b), but they nonetheless hold her liable under 10b-5(a) and (c). R. 14. Rule 10b-5(a) makes it unlawful to "employ any device, scheme or artifice to defraud." 17 C.F.R. §240.10b-5. In *Aaron v. SEC*, this Court observed that those terms all mean a knowing or an intentional practice. 446 U.S. at 696. This means that scheme liability requires some affirmative action or conduct to contribute to a scheme. Additionally, 10b-5(c) makes it unlawful "to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit….” C.F.R 240.10b-5(c). As Justice Thomas points out in the dissent of *Lorenzo*, “a person who has not ‘made’ a fraudulent misstatement within the meaning of Rule 10b-5(b) nevertheless could be held primarily liable for facilitating that same statement… In short, Rule 10b-5 [is] rendered entirely superfluous in fraud cases.” *Lorenzo*, 139 S.Ct. at 1108 (2019) (Thomas, J., dissenting). By increasing the amount of primary liability under the act, this reading of *Lorenzo* will increase litigation by private actors against individuals that Congress did not intend to be subjected to primary liability.

II. THE FUND IS NOT ENTITLED TO A REBUTTABLE PRESEUMPTION OF RELIANCE UNDER *AFFILIATED UTE* BECAUSE THE FACTS PROVE AFFIRMATIVE MISREPRESENTATION INSTEAD OF OMISSIONS AND UNLIKE PLAINTIFF’S IN THE CITED CASE, THE FUND IS A SOPHISTICATED FIANANCIAL INSTITUTION WHICH MUST HAVE CONDUCTED DUE DILIGENCE BEFORE INVESTING AND CAN PROVE RELIANCE EVEN WHEN KATIE HAD NO DUTY TO DISCLOSE.

The Petitioner’s request for the Court to expand *Affiliated Ute* would make the “well established distinction, for purposes of the *Affiliated Ute* presumption, between omission … and misrepresentation and manipulation claims” useless. *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 941 (9th Cir. 2009). The Petitioners cannot raise the *Affiliated Ute* rebuttable presumption of reliance because the allegations by the Fund are primarily claims of omissions. *Id.* Courts review the entire complaint to ensure that the plaintiff does not strategically manipulate the facts to cast the defendant’s affirmative misinterpretations as omissions. *See Poulos v. Caesars World, Inc.,* 379 F.3d 654, 666-67 (9th Cir. 2004). Furthermore, courts have ruled that *Affiliated Ute* is confined only to cases which primarily allege omissions and have rejected its application to cases where the actions were "mixed," which means that *Affiliated Ute* does not apply to cases that allege both omissions and misrepresentations. *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999); *Ibe v. Jones*, 836 F.3d 516, 532 (5th Cir. 2016). Moreover, simply concealing a fact does automatically turn an affirmative misrepresentation of a fact into an omission. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1199, 1206 (9th Cir. 2021).

For the Fund to show that it was detrimentally affected by Katie's affirmative misrepresentations, it must prove its reliance on the Memo. *Stoneridge,* 552 U.S. at 159. Reliance upon a misrepresentation or omission is an essential element under § 10(b) and Rule 10b-5 to prove that the Fund relied on Katie's actions, which led to its investment losses. *Id.* (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988)).

The Fund cannot argue that *Affiliated Ute* applies in this case because here, Katie had no duty disclose the Trade Letter. §10(b) and Rule 10b-5(b) "provide no duty for an employee to disclose any and all material information." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011). Instead, the duty to be truthful is *very much distinct* from the duty to affirmatively disclose which arises from a fiduciary relationship as applied by *Affiliate Ute*. *Affiliated Ute,* 406 U.S. at 149. As per *Affiliated Ute*, the relationship between the plaintiff and the defendant must be of *extreme trust and confidence*. *Id.* Only then would the defendant have the duty to disclose all material information accurately. *White* v. *Abrams*, 495 F.2d 724, 731 (9th Cir. 1974).

A. THE COURT SHOULD NOT EXPAND *AFFILIATED UTE* BECAUSE IT IS PRIMARILY AN OMISSIONS CASE WHEREAS HERE, THE FUND MISCHARACTERIZED KATIE'S AFFIRMATIVE ACTIONS TO NOT INCLUDE THE TRADE LETTER AS OMISSIONS, HENCE ARGUING THE WRONG STANDARD.

Petitioner cannot use the *Affiliated Ute* rebuttable presumption of reliance because Katie's actions were affirmative, rather than omissions. In *Affiliated Ute*, the Ute Partition Act (UPA) was enacted to distribute tribal assets between mixed-blood and full-blood members of the Native Indian Tribe. *Affiliated Ute,* 406 U.S. at 153–54. To do this, the UPA created Ute Distribution Corp. (UDC) to manage the rights to the land and distribute the stock, which used the First Security Bank of Utah ("the Bank") as its stock transfer agent, holder of bank certificates, and issuer of receipts. *Id.* at 133-39. If a stockholder wanted to sell their stock, they could sell it to a non-tribal person only if the tribal members first refused to purchase the stock. *Id.* Two employees of the Bank facilitated this type of sale of stock from mixed-blood tribal members to non-tribal members. *Id.*

However, the bank employees did not inform the mixed-blood tribal members that they had created an unofficial secondary market where non-tribal stocks were sold at a premium, and even bought stocks for themselves. *Id.* There, the Court held that even though the bank employees affirmatively misrepresented to the mixed blood tribal members that their stocks were being sold for market price, the case was primarily about omissions because the bank employees omitted information when they did not tell the mixed-blood tribal members about the existence of a secondary market. *Id.* at 153-54. Thus, the bank employees were primarily liable for omissions, and not for affirmative misstatements. *Id.*

The petitioner fails in its attempt to disguise omissions as affirmative misstatements. In *In re Volkswagen*, Volkswagen issued bonds in a private placement for which it issued an offering memorandum. 2 F.4th at 1202. The bonds offered by the car manufacturer were purchased by a pension fund. *Id.* The United States Environmental Protection Agency cited the car manufacturer for violations when it installed devices which manipulated data to show lower emissions output from its cars. *Id.* The scandal led to the market price of the bonds to crater, which caused heavy losses to the pension fund. *Id.* The pension fund filed an action against Volkswagen for violating § 10(b) of the Securities Exchange Act alleging fraud. *Id.*

There, the court held that while fraud involves concealing the truth, the court could not allow such concealments of truth to transform affirmative misstatements into implied omissions. *Id.* at 1208-09. The court emphasized that if *Affiliated Ute* was extended to mixed cases, it would become available for all securities fraud claims because all misrepresentations could be construed as omissions. *Id.* Thus, the *Affiliated Ute* rebuttable presumption of reliance was not applicable in the case because it primarily covered omissions. *Id.*

Here, Katie was Gemstar's Vice President of Investor Relations who oversaw putting together the Private Placement Memorandum ("the Memo"). R. 5. She found the memorandum (Trade Letter") by a former junior structural engineer who hypothesized that Gemstar's product, Swiftmax, was defective. R. 5-6. At the direction of her superiors, Katie affirmatively removed the Trade Letter from the Memo. R. 6. Furthermore, Katie also instructed her associate to use Gemstar's stationery and distribute the Memo to twenty-six of the country's largest non-bank financial institutions. R. 6. Importantly, the Memo said there were "no material defects" in Gemstar's products. R. 6. Furthermore, the Memo's cover letter did not identify Katie as the Vice President of Investor Relations for Gemstar and did not invite the prospective investors to inquire about the content of the Memo. R. 6.

Unlike the bank employees in *Affiliated Ute*, Katie did not omit information from the Memo. Instead, she affirmatively included a misstatement that none of Gemstar's products were defective. R. 6. Katie's actions, although under the direction of her superiors, show that she affirmatively took actions to leave the Trade Letter out of the Memo and contrary to the Fund's claims about omissions, Katie's affirmative actions are clear in this case. She oversaw the curation of the Memo and after reviewing the controversial report, raised the issue with the owners of Gemstar. R. 6. She purposely—with full knowledge of actions and knowledge of the items in the Trade Letter—directed her staff to disseminate the information to solicit investments for the private placement. R. 6. Unlike *Affiliated Ute*, this case is concerned solely about misrepresentation of products to potential investors, rather than an omission of relevant information.

Conversely, Katie's actions are like that of the car manufacturer in *Volkswagen*. Like the car manufacturer, Katie put together a Memo with a material misstatement about the products and directed it to be released. R. 6. Just as the *Volkswagen* court did, here, the Court should not allow Katie's affirmative misrepresentation to be misconstrued as an omission because of the existence of fraud. *See Poulos*, 379 F.3d at 29-30 (noting that courts have the authority to review the facts to determine whether the case involves affirmative misrepresentations or omissions, regardless of what the parties claim).

Accordingly, *Affiliated Ute* and *In re Volkswagen* show that Katie's actions were affirmative misrepresentations and not omissions. Thus, the *Affiliated Ute* rebuttable presumption of reliance does not apply in this case.

B. EVEN IF THE COURT HOLDS KATIE'S ACTIONS AS OMISSIONS, THE FUND IS NOT ENTITLED TO A REBUTTABLE PRESEUMPTION OF RELIANCE BECAUSE IT IS A SOPHISTICATED FIANANCIAL INSTITUTION WHICH MUST HAVE READ KATIE'S MEMO BEFORE INVESTING AND THUS, SHOULD BE ABLE TO PROVE RELIANCE.

Petitioner must show reliance on Katie's misstatements to recover under Rule 10b-5 and is not allowed to circumvent the reliance requirement. *Central Bank v. First Interstate Bank,* 511 U.S. 164, 180, 191 (1994). Private damages under §10(b) are only valid where the "*all* of the requirements for primary liability under Rule 10b-5 are met." *Id.* at 191. The Court adopted the *Affiliated*

Ute presumption in cases "where reliance would be difficult to prove because it was based on a negative" and thus, if applied to every other case, the presumption would "swallow the reliance requirement almost completely." *Desai*, 573 F.3d at 941. Importantly, it would be inconsistent with *Affiliated Ute* to apply the rebuttable presumption of reliance where "reliance is not impossible to prove" because the [defendant] did offer positive statements. *In re Interbank Funding Corp. Sec. Litig.*, 668 F.Supp.2d 44, 51 (D.D.C. 2009). Moreover, the presumption of reliance only applies in "the impersonal stock exchange context." *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975). Thus, *Affiliated Ute* does not eliminate the reliance requirement which is an essential element of § 10(b) private cause of action. *Stoneridge*, 552 U.S. at 159.

The Fund must prove that it relied on Katie's affirmative misrepresentation when it made the investment because it is a sophisticated financial institution which can easily prove that it relied on the Memo. In *Basic, Inc.*, this Court held that presumption of reliance applied when it would be too onerous to require each plaintiff in a class action lawsuit to show direct reliance on the defendant's misstatements. *Basic, Inc.*, 485 U.S. at 224.

There, two companies agreed to merge and held meetings over a span of two years to discuss the possibilities of a merger. *Id.* However, one of the companies made multiple public statements denying any merger negotiations and relying on these denials, shareholders of the company sold their stock prior to the merger. *Id.* After the merger, the shareholders brought an action against the company alleging violation of § 10(b) and Rule 10b–5 because the company's statements were false or misleading. The Court held that it was reasonable for the shareholders to rely on public information disseminated by a company, which is then incorporated into the share price by the market. *Id.* at 245. And thus, there, petitioners did not have to prove reliance. *Id.*

Here, however, the petitioner is unlike the plaintiffs in *Basic, Inc.* Unlike the shareholders there, Katie asked her associate to distribute the Memo to twenty-six of the country's largest non-bank financial institutions. R. 6. The non-financial banking institutions are distinguishable from the common investors in *Basic, Inc.* Instead, these institutions are sophisticated financial outfits that conduct due diligence before investing large amounts. It cannot be realistically fathomed that the Fund bought $81 million worth of Gemstar shares without at least reading the Memo. R. 7. Unlike *Basic, Inc.*, where the company was publicly listed and the shareholders could obtain information from the marketplace, Gemstar was a private company which opted to sell its shares through private placement. R. 5. This meant that there was no publicly available information about the company and the Fund must have relied on the contents of the Memo to obtain information about the company and conducted due diligence before its investment in Gemstar.

Furthermore, according to the record, there is no indication that the Fund ever read the Memo before making the purchase, further solidifying the argument that it did not rely on the Memo. R. 7. It is not onerous to prove reliance because there must have been some form of meeting to discuss the investment or a singular analyst report assessing Gemstar's investment potential. However, the Fund fails to provide any such proof of reliance on the Memo's contents. The rebuttable presumption of reliance is only applicable when it would be unrealistic or onerous to prove reliance. However, here, it would be very simple for the Fund to access its digital records and retrieve the data showing a single email or call to prove reliance. Additionally, even though Katie's name was not on the distributed Memo, the Fund knew about Katie's role in the private placement and could have easily asked her any questions regarding the Memo, which would show reliance. R. 6,7. However, the Fund did no such thing.

Because the Fund cannot prove the most basic non-onerous requirement of proof of reliance, it is not entitled to a rebuttable presumption of reliance.

C. THE FUND CANNOT RAISE *AFFILIATED UTE* TO HOLD KATIE LIABLE BECAUSE THE CASE ONLY APPLIES WHEN THERE IS AN AFFIRMATIVE DUTY TO DISCLOSE AND HERE, KATIE DID NOT HAVE SUCH DUTY.

Affiliated Ute only applies in omissions cases (not affirmative misrepresentations) where there is duty to disclose pertinent information instead of a basic duty to speak truthfully. *In re Credit-Suisse-AOL Sec. Litig.*, 253 F.R.D. 17, 26 (D. Mass. 2008). The *Affiliated Ute* presumption applies only where the defendant owes the plaintiff an affirmative duty, like a duty owed by a fiduciary. *Stoneridge*, 552 U.S. at 159.

In *Parcor Fin., Inc. V. Gen. Elec. Capital Corp.*, the Ninth Circuit ruled that the relationship between the investment and investors did not impose a duty on the investment firm to disclose information. 96 F.3d 1151, 1157 (9th Cir. 1996). There, investors brought a claim against firms for violating § 10(b) and Rule 10b-5 by making affirmative misrepresentations and failing to disclose material facts about the company's earnings when the investment firm marketed the debentures for sale. *Id.* The court held that the relationship between the investment firm and the investors did not rise to the level where the disclosure should have been made since there was no relationship between the plaintiffs, including no communication. *Id.* The court also held that even though the investment firm had initiated the transaction, it *did not assume* a relationship of trust and confidence towards the investors, and the investors were expected to do their own due diligence. *Id.* Interestingly, the court noted that the investors were "not novices in the financial markets" and thus, failed to show an issue of material fact to prove actionable misrepresentations or omissions and reliance. *Id.* at 1160.

Here, the record clearly shows that Katie had no duty to disclose. The Trade Letter that Katie found was over three years old and was a hypothesis by a departed junior structural engineer. R. 5, 6. Furthermore, she brought the Trade Letter to the owners of the company, Grace and Danielle, *who directed* Katie to leave the Trade Letter out of the Memo. R. 6. Unlike the bank employees in *Affiliated Ute*, Katie had no fiduciary duty towards the Fund, and hence no obligation to disclose the old Trade Letter.

Katie did not have a relationship with the Fund, instead it was Grace and Danielle who were the face of the company and their advisor Allison from Carter Capital who was orchestrating the sale. R. 4. Katie was simply an employee of Gemstar who was following instructions provided by the owners of the company. Next, the Fund had access to the information from the Memo, and if it needed more, the Fund knew that Katie was the Vice President of Investor Relations, however there is no record that the firm asked for any follow up information. R. 7.

Moreover, Katie received no benefit from this transaction. Rather, it was Gemstar's owners Grace and Danielle who were made very wealthy from Gemstar's Private Placement. R. 7. Importantly, Katie was not aware that the Fund was relying on her position as Vice President of Investor Relations to make their investment decision. Rather, the Fund would have relied on the Memo, which was approved by Grace and Danielle. R. 6. Lastly, Katie did not initiate the transaction, and again, it was Grace and Danielle who approved the private placement process through Allison's advice, showing that Grace and Danielle had the overall control of the transaction process. R. 4.

Since this is an affirmative misrepresentation case, and not omissions, there is no duty to disclose material facts because there is no fiduciary duty as per *Affiliated Ute* and *Parcor*. Katie clearly did not have a relationship of trust and confidence with the Fund, which disposes her of any duty of disclosure.

Rather, that relationship is justified between Grace, Danielle, Allison, and the Fund since they were leading the transaction and making enormous profits.

Since Katie had no fiduciary duty or a duty of disclosure towards the Fund, *Affiliated Ute* would not apply in this case.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests this Court to overturn the Circuit's decision on the first issue and affirm the decision on the second issue.