Team 19

No. 22-123

IN THE

SUPREME COURT OF THE UNITED STATES

FORDHAM PUBLIC EMPLOYEES INVESTMENT FUND,

Petitioner,

v.

KATIE GORDON,

Respondent.

On Petition for a Writ of Certiorari
To the Second Circuit Court of Appeals,

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

(1) *Lorenzo v. SEC* extended the scope of SEC Rule 10b-5 liability by stating that "disseminators" who neither "make" nor distribute misleading statements can be subject to primary liability under subsections (a) and (c). Ms. Gordon did not personally distribute Gemstar's Private Placement Memorandum or invite questions from investors, and the Memo was distributed on generic Gemstar letterhead with no mention of Ms. Gordon. Should Ms. Gordon be held primarily liable under Rule 10b-5(a) and (c) as a "disseminator" of misleading statements?

(2) To be entitled to the *Affiliated Ute* presumption of reliance in a Rule 10b-5 mixed case, the plaintiff must primarily allege omissions, and prove the defendant had an affirmative duty, failed to disclose, and proof of reliance is therefore impossible. The Fund alleges three explicit affirmative misstatements it relied upon in order to make its investment decision, and Katie and the Fund were in neither a fiduciary nor confidential relationship. Should the *Affiliated Ute* presumption be applicable to the Fund's mixed claim?

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CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

Title 15 Section 78j(b) of the United States Code Service states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> > (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Title 17 Section 240.10b-5 of the Code of Federal Regulations states:

> 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.

STATEMENT OF THE CASE

A. Factual History

Grace Underwood and Danielle Scott sought to purchase a smaller, underperforming business that they could turn around by way of an ambitious growth plan. R. at 2. After extensive searching, a business broker introduced them to McGrath, Inc., a company that was looking to sell its machine tool business. *Id.* In an effort to diligently examine the company prior to closing, Grace and Danielle hired Forsyth Finance ("Forsyth"), a business consulting firm, and MMD Inc. ("MMD"), an engineering firm, to prepare reports on the business. R. at 3. MMD's report noted that one of the composites used in the business' highest selling machines had potentially defective characteristics. *Id.* Ultimately, this did not impact their decision to buy the business, and they closed the transaction. *Id.* They named the new entity Gemstar, and identified Grace as the Chief Executive Officer and Danielle as the President. *Id.*

After three years of running Gemstar, Grace and Danielle began looking for an exit strategy. R. at 4. Eventually they opted to sell 80% of Gemstar in a private placement to institutional investors. *Id.* Katie Gordon, Gemstar's Vice President of Investor Relations, was tasked with organizing the private placement process. R. at 5. She coordinated the various attorneys, financial advisors, auditors, engineering firms and other experts ("Gemstar's Experts") who were constructing the Private Placement Memorandum ("Memo") that would be used to market the common stock. *Id.*

In May 2021, midway through the private placement organization, Keane delivered its Report on the structural integrity of the Company's assets and products. R. at 5. The Report contained general information, a list of Gemstar's products, as well as a memorandum ("Trade Letter") from three years ago written by a former junior structural engineer. R. at 5. The Trade Letter suggested the composite used in the SwiftMax could develop microscopic cracks over time while under extreme stress. R. at 5-6. Ms. Gordon reviewed the report and took notice of the Trade Letter. *Id.* Before taking further action to distribute the Report, she discussed the matter with Grace and Danielle. R. at 6. The Gemstar executives told Ms. Gordon to remove the memorandum from the Report before delivering it to Gemstar's Experts, reasoning the Trade Letter was outdated and written in error. *Id.* While Ms. Gordon was slightly uncomfortable with this, she nevertheless followed the executives' instruction. *Id.*

Per the executives' instruction, the Memo was completed in August 2021, without reference to the potentially defective composite. *Id.* The Memo did state Gemstar's property, plant, and equipment were in reasonable condition for intended use, and there were no material defects in products, and no material undisclosed contingent liabilities relating to the products that were required to be noted in financial statements. *Id.*

Ms. Gordon directed one of her associates to distribute the Memo to twenty-six of the country's largest non-bank financial institutions. *Id.* The Memo was distributed under cover of Gemstar's stationary, and did not identify Ms. Gordon in any fashion. *Id.* Additionally, the Memo did not invite the investors to inquire about the contents of the Memo, nor did it invite the investors to direct questions to Ms. Gordon. *Id.*

Gemstar's private placement was completed in October 2021. R. at 7. Fordham Public Employees Investment Fund ("the Fund") purchased 3,000,000 shares in the private placement. *Id.* There is no evidence the Fund read the memo at the time of purchase. *Id.* However, the Fund was aware of Ms. Gordon's role in the private placement process. *Id.*

An airplane experienced an explosion twenty seconds after the plane's acceleration. *Id.* The pilot was able to maintain control of the plane and safely land. *Id.* Investigations found the plane's fasteners manufactured with SwiftMax developed microscopic fissures over time due to takeoffs. *Id.* Months after the incident, the Fund sold its position in Gemstar, incurring a loss. *Id.*

B. Procedural History

In March 2022, the Fund commenced this action in the District Court for the District of Fordham, alleging Gemstar executives engaged in securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. R at 8. The Fund specifically alleges it purchased stock in reliance of three misleading statements and omissions contained in the Memo: that Gemstar's physical assets are in reasonable condition for their intended use, none of Gemstar's products are materially defective, and there are no material undisclosed contingent liabilities relating to Gemstar's products. *Id.* Ms. Gordon filed a 12(b)(6) motion to dismiss, arguing she cannot be liable as a primary violator under § 10(b) and Rule 10b-5 because she did not make or disseminate the Memo's misleading statements. *Id.* She further alleged the Fund failed to prove reliance on the Memo while purchasing Gemstar shares. R. at 9.

The District Court denied Ms. Gordon's motion to dismiss, finding she served as a disseminator who could be primarily liable, and afforded the *Affiliated Ute* presumption of reliance to the Fund. *Id.* Ms. Gordon filed a timely appeal. *Id.*

The Circuit Court affirmed in part, and reversed in part, finding that although Ms. Gordon can be held primarily liable, the Fund is not entitled to the *Affiliated Ute* presumption of reliance. R. at 23. Without proof of reliance, the Circuit Court granted Ms. Gordon's 12(b)(6) motion. *Id.* This Court granted certiorari on January 9, 2023.

SUMMARY OF THE ARGUMENT

I. This Court should grant Ms. Gordon's 12(b)(6) motion for failure to state a claim upon which relief should be granted because Ms. Gordon cannot be held primarily liable under SEC Rule 10-5(a) and (c).

First, Ms. Gordon does not qualify as a "disseminator" under *Lorenzo v. SEC.* Unlike the defendant in *Lorenzo*, Ms. Gordon did not personally distribute the Private Placement Memorandum, rather, one of her associates distributed it. Additionally, she did not sign her name anywhere on the Memo, or invite investors to reach out to her with any questions regarding the Memo. Lastly, the Memo was sent nationwide to twenty-six of the largest non-bank financial institutions, on generic Gemstar letterhead.

Second, even if Ms. Gordon did qualify as a "disseminator," *Lorenzo's* holding that disseminators can be held primarily liable under 10b-5 conflicts with Congressional intention and previous precedent. Primary liability is not designed to extend to aiders and abettors who are merely tangentially involved in securities violations. Disseminators, who merely assist statement makers in committing 10b-5 violations by distributing fraudulent statements, are better suited for secondary liability. Additionally, because misstatement-related liability is addressed by subsection (b), extending subsection (a) and (c) liability to misstatement-related conduct will result in overlap that makes subsection (b) superfluous—against well-established principles of statutory interpretation.

II. This Court should affirm the Circuit Court's grant of Ms. Gordon's 12(b)(6) motion because the *Affiliated Ute* presumption is inapplicable to the Fund's claim alleging both affirmative misstatements and omissions.

First, the underlying allegations in the Fund's complaint are positive misrepresentations, not omissions as required by the Supreme Court in order to invoke the presumption. The Fund specifically alleges three affirmative misstatements it relied on during its decision to purchase Gemstar stock. Further, the disclosed, relevant information is simply the inverse of the alleged omission, the defective composite.

Second, Katie did not owe the Fund an affirmative duty of disclosure as an executive of a tool company. Circuits have required plaintiffs to show the defendant provided security trading services with an imposed duty beyond conventional brokers or executives trading their own corporation's securities. Courts have found an affirmative duty exists when a defendant acts as an agent who stands to benefit from the services rendered. When plaintiffs are experienced businessmen who make their own investment decisions, such as members of the Fund, the defendant owes no particular duty.

Finally, applying the *Ute* presumption here does not advance the Supreme Court's purpose in creating the presumption: aiding plaintiffs when proving reliance on a negative is practically impossible. Here, the Fund has admitted to relying on three affirmative representations in its complaint. Application of the *Ute* presumption would unduly dispose of their evidentiary duty of proving reliance.

ARGUMENT

I. MS. GORDON'S ROLE IN THE PREPARATION AND DISTRIBUTION OF GEMSTAR'S PRIVATE PLACEMENT MEMORANDUM DOES NOT GIVE RISE TO PRIMARY LIABILITY UNDER RULE 10B-5.

Section 10(b) of the Securities Exchange Act makes it unlawful "to use or employ, in connection with the purchase or sale of any security…any manipulative or deceptive device in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. § 78j(b). Pursuant to § 10(b), the SEC enacted Rule 10b-5, which further defines the conduct prohibited by the statute. Rule 10b-5 makes it unlawful, in connection with the purchase or sale of a security, to: (a) "employ any device, scheme, or artifice to defraud;" (b) "make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made;" or (c) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 CFR § 240.12b-5.

While § 10(b) does not explicitly provide for a private cause of action, this Court has found a right implied in the statute. *Superintendent of Ins. of N. Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13, n. 9 (1971). Thus, private plaintiffs may initiate suits against alleged violators who are primarily liable under Rule 10b-5, but those who are merely secondarily liable can be held liable solely by the SEC. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 166 (1994).

A. Ms. Gordon Does Not Qualify as a Disseminator Under *Lorenzo*, Because She Did Not Personally Distribute the Memo, Invite Questions From Investors, or Name Herself as Author of the Memo.

Rule 10b-5 provides for two distinct categories of violations: those that involve fraudulent *statements*, and those that involve fraudulent *conduct* or schemes. 17 C.F.R. § 240.10b-5. Rule 10b-5(b) covers the former, making it improper for an actor to make untrue statements or omissions. Rule 10b-5(a) and 10b-5(c), on the other hand, furnish liability for fraudulent "practices," referred to as "scheme liability. *Aaron v. SEC*, 446 U. S. 680, 696 (1980).

The first category of liability—involving fraudulent statements—is not at issue in this matter. In order to be held liable pursuant to 10b-5(b), the violator must be considered the "maker" of the statement. *Janus Capital Group. Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). In *Janus*, this Court held that a "maker" is "the person or entity with *ultimate authority* over the statement, including its content and *whether* and *how* to communicate it." *Id.* at 142. Ms. Gordon did not have "ultimate control" over the Memo and was directed to prepare it by Gemstar Executives; thus, she cannot be said to be the memo's "maker." R. at 6.

At issue in this matter is whether Ms. Gordon should be held liable under the second category of liability—that involving deceptive "schemes." In *Lorenzo*, this Court considered whether those who did not make deceptive statements, but instead distributed them, could be subject to "scheme" liability. *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). In *Lorenzo*, the Court found an investment banker, who sent two emails on behalf of his boss, could not be held liable as the "maker" of those statements under 10b-5(b). *Id.* at 1100.

However, the Court reasoned that his *conduct* as a "disseminator" could subject him to liability under subsections (a) and (c). *Id.*

Because "disseminator" liability may be construed broadly, the Lorenzo court warned of "difficult problems of scope" presented by "borderline cases." Indeed, the Court emphasized that *not any* alleged "disseminator" will qualify for liability under subsections (a) and (c). *Lorenzo*, 139 S. Ct. at 1101. For example, Lorenzo's intent is not to capture "other actors tangentially involved in dissemination" like "a mailroom clerk." *Id.* Therefore, when considering whether an individual falls within the scope of disseminator liability, courts must consider context—namely, "purpose, precedent, and circumstance." *Id.*

In Lorenzo's case, the Court held that there was "nothing borderline" about his actions. *Id.* In the Court's view, Lorenzo was fit for liability because he (1) "sent false statements directly to [two potential] investors," from his email and with his signature, (2) "invited them to follow up [with him] with questions," and (3) "did so in his capacity as vice president of an investment banking company." *Id.* at 1099-100; *Lorenzo v. SEC*, 432 U.S. App. D.C. 420, 423 (2017). Additionally, because Lorenzo did not challenge the Court's scienter finding, they did not have to separately prove that he sent the emails with "'intent to deceive, manipulate or defraud' the recipients." *Id.* at 1100 (citing *Aaron*, 446 U. S., at 686, n. 5, 686).

Ms. Gordon's case, while perhaps more dubious than a mailroom clerk, is, at best, a "borderline" case. First, unlike Lorenzo, Ms. Gordon did not herself send correspondence directly to investors. R. at 6. There, Lorenzo not only identified himself as the vice president, but also sent emails signed with his name, and presumably with his name featured in the email address. Here, Ms. Gordon did not identify herself anywhere on the Memo as the Vice President of Investor Relations. *Id.* Additionally, she did not personally deliver the Memo, nor deliver it in a manner that would suggest that she sent it. *Id.* Instead, the memo was printed on generic Gemstar stationary and distributed by one of Ms. Gordon's associates. *Id.*

Second, there, Lorenzo invited investors to reach out directly to him with any questions related to his emails, whereas here, Ms. Gordon did not similarly invite inquiries from investors. *Id.* Since Ms. Gordon did not identify herself as the Vice President, nor provide her own contact information, investors did not have a clear avenue to contact here, even if they wanted to. *Id.* Whereas Lorenzo's email was adorned with his personal signature block, here, the Memo had no mention of Ms. Gordon's name, and was under cover of Gemstar's stationary. *Id.* Additionally, unlike in *Lorenzo* where the information was communicated via Lorenzo's personal email, here because the Memo was distributed by Ms. Gordon's associate, no simple "reply" button could lead recipients to contact Ms. Gordon personally. *Id.* Lastly, while Lorenzo personally emailed only two potential investors, the Memo was distributed nationally to twenty-six of the largest non-bank financial institutions. *Id.* Certainly, a greater expectation of transparency and candor attaches to personalized, one-on-one communication than to nationwide mailers.

Lastly, while Ms. Gordon and Lorenzo both occupied Vice President positions, only Mr. Lorenzo communicated directly with investors in this capacity. Conversely, Ms. Gordon merely prepared a Memo that came from Gemstar as a whole—and not from her specifically. *Id.*

Given these facts, it is clear that Ms. Gordon had a much less active and involved role in the *dissemination* of the Memo, than the defendant in *Lorenzo*. The facts that defined Lorenzo as a disseminator are simply not present in this case—the bulk of Ms. Gordon's role was in the preparation of this Memo, not in the dissemination of it. And while not the primary issue up for discussion in this matter, it is important to note that Ms. Gordon has not succumbed to the scienter requirement like Lorenzo did. While Ms. Gordon stated that removing the Trade Letter from the Report "bothered her," nothing on the record states that she knew doing so was misleading or deceptive. *Id.*

B. The *Lorenzo* Court Improperly Expanded 10b-5 Liability Beyond Congressional Intent.

1. *Lorenzo* disregarded Congress' distinction between primary and secondary liability.

When a court interprets an implied cause of action that Congress did not expressly establish in the text of a rule or statute, that implied right must be given "narrow dimensions." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 167 (2008); *see Ziglar v. Abbasi,* 137 S. Ct. 1843, 1855 (2017) (noting the need for courts to be cautious when creating and expanding causes of action that Congress did not expressly create, because it is "far better course [] for Congress to conger that remedy in explicit terms"). *Lorenzo* disregarded the "narrow dimensions" of § 10(b)'s implied cause of action and extended the statute's purview by allowing private actors to hold "disseminators" of deceptive statements liable under 10b-5(a) and (c).

In *Central Bank of Denver, N. A. v. First Interstate Bank of Denver N. A.*, 511 U.S. 165 (1994), this Court considered the scope of § 10(b)'s implied private right of action. There, respondents asked that the Court declare that § 10(b) liability applies to secondary violators (aiders and abettors) in addition to primary violators. *Id.* However, because of the limitations on statutory interpretation, the Court ultimately found that Congress did not intend for private actors to hold secondary violators liable under 10b-5. *Id.* at 175 (noting that Congress knows "how to impose aiding and abetting liability" when it wants, and here, § 10(b) "does not in terms mention aiding and abetting"). The Court made clear that because "Congress has not enacted a general civil aiding and abetting statute," where Congress enacts a statute that provides for a private cause of action, "there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* at 182

In addition to being contrary to congressional intent, subjecting aiders and abettors to § 10b-5 liability results in "uncertainty and excessive litigation." *Id.* at 189. Expanding liability to include secondary actors results in ad hoc decisions with little "predictive value," and would require those who are merely providing services to participants in the securities business to expend large sums undergoing 10b-5 litigation. *Id.* at 188-89l.

By holding that "disseminators'' can be primarily liable under 10b-5(a) and (c), *Lorenzo* blatantly disregards the work that *Central Bank* did to preserve the distinction between primary and secondary liability, and "undermin[es]

Congress' determination that [aiders and abettors] should be pursued by the SEC and not private litigants." *Stoneridge*, 552 U.S. at 162-63. When defining statement "makers," *Janus* expressed concern that if non-maker contributors were able to be held primarily liable "aiders and abettors would be almost nonexistent." *Janus* 564 U.S at 143. *Lorenzo's* holding raises this same concern—who are the aiders and abettors of 10b-5(b) if not the individuals who tangentially assist with the preparation and distribution of a misstatement? A disseminator of a statement, who is not the "maker" of that statement, necessarily aids and abets the "maker" in committing fraud. The disseminator's violation necessarily hinges on the fraudulent nature of the statement.

Janus' definition of "maker" captures the intention of primary liability—to hold those who are in "ultimate control" accountable for their fraudulent actions. *Id.* Where control and authority lie distinguishes the primary actor from the secondary actor. *Lorenzo's* rule ignores the intention behind the distinction in liability, by holding those responsible who do not have "ultimate authority" over what actions are taken. Like Lorenzo, who was directed by his boss to email investors, Ms. Gordon did not have control over whether the Memo was distributed—Gemstar's executives would have directed the distribution of the Memo regardless of who filled the Vice President of Investor Relations role. *Lorenzo*, 139 S. Ct. at 1099; R. at 5-6. If anyone should be held *primarily liable* for distribution, it should be the executives with control and authority; those who issue orders—not those that follow them.

Ultimately, *Lorenzo's* rule acts "as a shortcut to circumvent *Central Bank's* limitations on liability for a secondary actor's involvement in making misleading statements." *SEC v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 361 (D.N.J. 2009) (citation and quotation marks omitted).

2. *Lorenzo's* holding resulted in an overlap in liability that diminishes the value of 10b-5(b).

General principles of statutory interpretation dictate how courts should read § 10b-5—and how the statute's subsections should be distinguished. This Court previously stated, "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). The *Ginsberg* court elaborated, stating that "specific terms will prevail'' over general terms from another subsection. *Id.* Additionally, it is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be *superfluous, void, or insignificant.*" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citing *Duncan* v. *Walker*, 533 U.S. 167, 173 (2001)) (emphasis added).

Several circuits' have made efforts to implement these principles of statutory interpretation and keep the various § 10b-5 provisions distinct. In *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005), the Second Circuit held that were the "sole basis for such claims is alleged misrepresentation or omissions," plaintiffs cannot maintain a market manipulation claim under 10b5(a) and (c). An aggregation of material misrepresentations does not amount to a "scheme to defraud." *Id.* (citing *Schnell v. Conseco, Inc.*, 43 F. Supp. 2d 438, 447-48 (S.D.N.Y. 1999). Additionally, the Ninth Circuit recognized that manipulative conduct is distinct from actionable omissions; they held that, "[i]f such nondisclosure of defendant's fraud was an actionable omission, then every manipulative conduct case would become an omissions case." *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940-41 (9th Cir. 2009). Ultimately, equating fraudulent conduct and fraudulent omissions would make the Supreme Court's law regarding manipulative activity "redundant." *Id.* at 941. In another matter, two years later, the Ninth Circuit made clear that, "[a] defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses *conduct beyond those misrepresentations or omissions*." *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) (emphasis added). The Eighth Circuit agreed with the Second and Ninth Circuits and similarly stated that "a scheme liability claim must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)"). *Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012).

In expanding 10b-5 liability so broadly, *Lorenzo* blurs the once-distinct line between scheme and misstatement liability. Scheme liability requires that a plaintiff prove that the defendant committed "an inherently deceptive or manipulative act that is *independent* from any alleged misstatement or omission." *In re Eastman Kodak Co. Sec. Litig.*, No. 6:21-CV-6418 EAW, 2022 U.S. Dist. LEXIS 174437, at *42 (W.D.N.Y. Sep. 27, 2022) (citing *In re Platinum-*

Beechwood Litig., 427 F. Supp. 3d 395, 450 (S.D.N.Y. 2019)). Distribution is not *independent* from the misstatement, as discussed *supra*, because there would be no wrongdoing *but for* the misstatement. Justice Thomas' dissent rightfully identified that "liability for false statements is specifically dealt with in Rule 10b-5(b)." *Lorenzo*, 139 S. Ct. at 1109 (Justice Thomas, *dissenting*). However, pursuant to *Lorenzo's* rule "the SEC or plaintiff need only relabel the person's involvement [regarding the misstatement] as an 'act,' 'device,' 'scheme,' or 'artifice'" to maintain primary liability under 10b-5(a) and (c). *Id.* at 1108. Under that dangerous line of reasoning, even the act of "making" a statement could be considered fraudulent conduct—an example which blatantly exposes the overlap *Lorenzo's* holding enables. Ultimately, if misstatement liability is encompassed by 10b-5(a) and (c), subsection (b) becomes superfluous and utterly insignificant.

3. The theory of "disseminator" liability advanced by *Lorenzo* requires courts to engage in unnecessary line-drawing.

Lorenzo acknowledges that its holding presents "difficult problems of scope in borderline cases," because of the broad range of conduct that can fall under the umbrella of "dissemination." *Id.* at 1101. *Lorenzo* admits that there are actors who are "tangentially involved in dissemination," for whom primary liability would be improper, but provides courts with no guidance to determine what makes disseminators worthy of primary liability over secondary liability. *Id.* Ultimately, courts will have to expend significant resources to draw lines between various "disseminators"—an issue that was not presented by previous precedent guiding § 10b-5(b) interpretation. *See Janus* at 564 U.S. at 142.

Further, *Lorenzo's* holding also presents complications for courts who are trying to discern what conduct is sufficient to qualify as the "something extra" required to make a violation a scheme. *See SEC v. Rio Tinto PLC,* 41 F.4th 47, 54 (2d Cir. 2022). If even minimal distribution amounts to "something extra," courts will be required to consider an extremely broad range of conduct.

For these reasons, this Court should find that Ms. Gordon does not qualify as a "disseminator" that is deserving of primary liability under 10b-5(a) and (c).

II. THE *AFFILIATED UTE* PRESUMPTION IS INAPPLICABLE BECAUSE THE FUND ALLEGES PRIMARILY AFFIRMATIVE MISREPRESENTATIONS, MS. GORDON DOES NOT OWE THE FUND AN AFFIRMATIVE DUTY OF DISCLOSURE, AND THE EVIDENTIARY CONCERN OF PROVING RELIANCE IS NOT AT ISSUE.

In a Rule 10b-5 claim, affirmative proof of reliance as a condition of recovery can be presumed in limited circumstances. *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153 (1972). Specifically, the *Affiliated Ute* presumption of reliance ("*Ute* presumption") is available to plaintiffs whose claims are primarily based on alleged omissions of material fact. *Id.* The Supreme Court further elaborated on the applicability of the *Ute* presumption in *Chiarella v. United States,* 445 U.S. 222, 229-30 (1980), adding a required "duty to disclose arising from a relationship of trust and confidence between parties of a transaction." In mixed cases, involving both omissions and misrepresentations, reliance is only presumed if the difficult task of proving a speculative negative remains. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Litigation*, 2 F.4th 1199, 1204 (9th Cir. 2021). The circuits have applied varying degrees of leniency when determining whether the presumption applies. While some unequivocally decline to apply the presumption in mixed cases, all circuits provide at a minimum the alleged omissions must remain the dominant part of the claim. Further, the circuits remain faithful to the true purpose of the presumption, to aid plaintiffs in recovery when proving reliance is impossible. Here, the Fund specifically points to three affirmative misrepresentations in the Memo in which it relied on, Ms. Gordon does not owe an affirmative duty to the Fund, and the evidentiary issue of proving reliance is irrelevant. Therefore, the Fund should not be entitled to the presumption.

A. The Presumption of Reliance Should not be Applied in this Mixed Claim, as the Fund Explicitly Alleges Three Affirmative Statements it Relied on in its Decision to Purchase Gemstar Stock.

Although the circuits are split in how generously to apply the *Ute* presumptions, each circuit has the baseline rule that plaintiffs must primarily allege omissions in order to be afforded the presumption. *Affiliated Ute,* 403 U.S. at 153. The Fund specifically alleges three affirmative misstatements it relied on during its decision to purchase Gemstar stock. R. at 8.

1. This claim is primarily a positive misrepresentation case, not a nondisclosure case.

The *Affiliated Ute* presumption is limited to omissions, as no circuit has applied the presumption in a case that primarily alleges misrepresentations. *In re Interbank Funding Corp. Securities Litigation*, 629 F.3d 213, 219 (D.C. Cir. 2010). However, the circuits have adopted various approaches in determining how far the underlying allegation must lean towards omissions. In *Cavalier*

Carpets Inc. v. Caylor, plaintiff alleged three omissions and three misstatements related to an acquisition. 746 F.2d 749, 757 (11th Cir. 1984). The court declined to apply the presumption on the general basis that mixed cases are not entitled to a presumption of reliance because reliance on the affirmative statements can be proven. *Id.* The defendants did not stand mute in the face of a duty to disclose as they did in *Affiliated Ute*, instead they disclosed relevant info in an offering statement that the Plaintiffs admitted to have relied on.

The primary allegation here is that the Fund relied on the Memo while making its decision to purchase stock at Gemstar. R. at 9. Further, the Fund specifically points to three statements made in the Memo that it allegedly relied on. R. at 8. In the exact same manner the Plaintiff in *Cavalier Carpets* explicitly state three affirmative statements, the Fund can easily prove reliance on those misstatements, as Ms. Gordon and Gemstar did not stand mute in the face of disclosure. *Id.* Moreover, unlike the *Cavalier Carpets* complaint, the Fund failed to specify any specific omission it relied on in connection with the decision to purchase stocks, pushing the classification further away from an omission case. Therefore, the allegations in this case are primarily based on affirmative misrepresentations, rather than omissions.

2. The alleged omission is simply the inverse of the Memo's affirmative misrepresentations the Fund specifically alleges it relied on.

When the alleged omission is the inverse of the misrepresentations, the Second and Ninth Circuits have declined to extend the presumption. *In re Volkswagen*, 2 F.4th at 1208; *Waggoner v. Barclays*, 875 F.3d 79, 96 (2nd Cir.

2017). In *re Volkswagen,* the court declined to apply the presumption, even though the plaintiff alleged an omission that "loom[ed] large over Plaintiff's claims[:]" the fact that it was secretly installing defeat devices in vehicles to cheat on emissions tests. 2 F.4th at 1206. The additional alleged misrepresentations made by Volkswagen regarding its vehicle's emission status pushed the case outside of *Affiliated Ute*'s narrow applicability because the misrepresentations were the inverse of the omission: that its vehicles were environmentally compliant. *Id.* at 1206. Despite the overbearing allegation of not disclosing the use of defeat devices, the court declined to extend the presumption because the plaintiff could prove reliance by simply demonstrating a connection between the misstatements and its losses. *Id.* at 1209. In *Waggoner*, the omission alleged by the plaintiffs was the inverse of the affirmative statement by Barclays, a financial PLC: that its trading system actually did not protect clients from high frequency trading activity as Barclays had claimed. 875 F.3d at 88. The court reasoned the presumption did not apply to misstatements whose only "omission is the truth that the statement misrepresents." *Id.* at 96. Further, the court noted the alleged omissions simply "exacerbated" the misleading statements' effect. *Id.* Accordingly, when an omission is the inverse of the misrepresentation allegation, and the resulting effect is not altered, the presumption is inapplicable.

Plaintiffs may not be afforded the presumption when merely alleging the misrepresentations are false. Although the Fund has failed to specify an omission, assumingly the presence of the defective composite is the basis of the alleged nondisclosure. Here, the omission perfectly fits as the inverse of the three affirmative misstatements cited by the Fund. The statements "Gemstar's physical assets are in reasonable condition for their intended use, none of Gemstar's products are materially defective, there are no material undisclosed contingent liabilities relating to Gemstar's products" are negated by the disclosure of the Trade Letter. R. at 8. More convincing is the outdated Trade Letter in reference to only one of Gemstar's products does not loom large over the allegations, like the alleged omission in *Volkswagen*. The *Volkswagen* inverse relationship, statements of emission level compliance and the installation of defeat devices, is even less of an antithetical equivalent than the Memo's statement, "Gemstar's physical assets are in reasonable condition for their intended use" and the possibility of a composite defect. *Id.* Further, similar to the falsity of Barclays' statements, by failing to disclose the presence of the Trade Letter, the statements of confidence in Gemstar products is merely exasperated. The effect of the misstatements was not altered by the omission of the Trade Letter, as the Trade Letter is merely an inversion of the affirmative statements made in the Memo. The Fund therefore should prove reliance on the misstatements in the traditional evidentiary manner.

3. The Fund's underlying allegations, Ms. Gordon engaged in manipulative conduct is distinguishable from an omissions based claim.

The omission in this case, the existence of an outdated memo written by a departed junior engineer believed to be written in error, greatly differs from the type of large scale omission typically afforded the *Ute* presumption. *See Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1973). In *Blackie*, the plaintiffs of the class action suit were purchasers of stock that relied on the general idea market prices are validly set, and no artifice or manipulation has inflated the price. *Id.* The Ninth Circuit stated that to require proof of reliance on a particular representation from each purchaser would leave open market purchasers unprotected, and stock purchasers do not seek to assume losses in the form of artificially inflated stock. *Id.* at 907-08. Conversely, in *Desai v. Deutsche Bank Securities, Ltd.*, the Ninth Circuit declined to provide the *Ute* presumption to investors who alleged Deutsche Bank engaged in a stock price manipulation scheme. 573 F.3d 931, 933 (9th Cir. 2009). The court explained that manipulative conduct inherently contains omissions to conceal the scheme, and that nondisclosures of fraud do not automatically create an omissions case that triggers the *Ute* presumption. *Id.* at 941. Therefore, the omission of the potential defect is not an actionable omission the *Ute* presumption applies to.

The omission of a possible defect in a single Gemstar product does not transform this affirmative misrepresentation case into an omission case. Ms. Gordon's actionable conduct alleged by the Fund is founded on the affirmative misstatements in the Memo and potential manipulative conduct, similar to *Desai*. The misrepresentations made in the Memo are akin to the manipulative scheme in *Desai*, as they inherently contain a nondisclosure of the fraudulent conduct: leaving the Trade Letter out of the Report. Just like in *Desai*, that is not enough to trigger the *Ute* presumption, as the omission is inherently intertwined with the positive misrepresentations that were present in the Memo. R. at 8. Ms. Gordon's alleged conduct is not reflective of the artificially inflated prices set in *Blackie*, as the omissions there were a widespread omission of the true value of the stock prices. Here, the single omission of an outdated trade letter written by a former junior employee does not constitute an omission strong enough to overshadow the alleged affirmative misrepresentations the Fund claims to have relied on. R. at 8.

B. Ms. Gordon does not Owe the Fund an Affirmative Duty of Disclosure as a Gemstar Executive, as the Parties did not have a Relationship of Trust or Confidence.

In order for a plaintiff to claim the *Affiliated Ute* presumption, the defendant must have had an affirmative duty to disclose. 406 U.S. at 154. *Affiliated Ute* suggests that a defendant must be performing security trading services from which it gains some benefit, imposing the duty on parties that are beyond mere conventional brokers or corporate insiders trading their own corporation's securities. *Id.* at 153. Because the defendant in *Affiliated Ute* was a corporation specifically formed to manage the tribe's assets, it owed plaintiffs an affirmative duty to provide material information regarding the circumstances of their securities management. *Id.* at 152-53.

In *Cavalier Carpets*, defendants purchased fixed assets of plaintiff Cavalier, and Cavalier filed a complaint on the circumstances of the transfers. 746 F.2d 749, 751-52. The court determined the defendants owed "no particular duty," as there was no requirement to put the plaintiff's welfare above their own, and the plaintiff was an "experienced businessman," who was familiar with the industry and "made his own investment decisions." *Id.* at 756. The Eleventh Circuit further asserted that an investor who makes their own decision and does not rely on the defendant for advice "is barred from asserting he presumably relied upon a particular omission." *Id.* In *Hoxworth* *v. Blinder, Robinson & Co., Inc*, 903 F.2d 186, 191, the Third Circuit found an affirmative duty for a securities firm that acts as an agent and charges commission for services due to the established fiduciary duty. Further, in *In re Credit Suisse-AOL Securities Litigation*, 253 F.R.D. 17, 26, the court noted the presumption applies only where there is a "special affirmative obligation" to disclose material information, not when there is "merely a duty to speak truthfully." There, the defendants released reports to the public, and the court described this as dealing with "investors at an arms' length." *Id.* at 26. Importantly, the court stated had the defendants simply remained silent, there would have been no cause of action, as there was no reasonable expectation material information would be disclosed. *Id.* at 26-27. Therefore, the required affirmative duty must include a fiduciary duty of loyalty where the defendant stands to gain from giving securities services, and the plaintiff is in a position of reliance.

Ms. Gordon did not owe the Fund any special duty of disclosure as a mere executive of the company the Fund chose to purchase securities in. Gemstar is a machine tool company, not an institution that renders securities advice, such as the securities firm in *Hoxworth* that was held to a duty of disclosure. Moreover, in contrast to the *Hoxworth* defendant, Ms. Gordon did not act as an agent for the Fund, nor any other investor, nor did she charge commission for sending the Memo. Rather, Ms. Gordon is more comparable to the defendant in *In re Credit Suisse*, as she released the Memo to multiple investors, not a single customer, and was at an arm's length from the sixteen investors who did purchase Gemstar stock. R. at 6-7. She did not owe them, including the Fund, a specific duty beyond a duty to speak truthfully. Further, Ms. Gordon acted at the request of superior executives, and the Memo was reviewed by Gemstar's experts. [Add record cite]. If Ms. Gordon had simply remained silent, and not released the Memo to potential investors, the Fund would have no cause of action, as she did not owe an affirmative duty to disclose material information. Accordingly, the Fund may not presume reliance against defendant Ms. Gordon, as she was not bound by the required duty of disclosure.

Further, the Fund is not only an institutional investor, but it is one of the "country's largest non-bank financial institutions." R. at 6-7. The Fund can be classified as an "experienced" investor that makes its "own investment decisions," like the defendants in *Cavalier Carpets* who were declined the presumption. The Fund, similarly, should be barred from asserting presumed reliance, because as an investment firm, it should not have been relying on a mere executive of the corporation whose stock it is seeking to purchase for advice. Assumingly, a large investment fund would have experienced advisors and analysts able to make informed decisions on whether to invest in a corporation undergoing a private placement. Therefore, the Fund should be prohibited from using the presumption.

C. Reliance is Possible for the Fund to Prove, and Application of the ***Ute*** Presumption Would Allow for the Fund to Circumvent the Requisite Element of Causation in Fact and Would Fail to Serve the Presumption's Purpose.

The *Affiliated Ute* reliance presumption was created for the limited purpose of aiding plaintiffs when proving reliance on a negative would be practically impossible to prove. 406 U.S. at 153. In *Joseph v. Wiles*, 223 F.3d 1155, 1163 (10th Cir. 2000), the plaintiff alleged that the defendant "failed to disclose the existence of the fraudulent scheme" and "omitted to disclose" that statements had been falsified. The Tenth Circuit saw through this skillful attempt to intertwine omissions with positive misrepresentations in which reliance was easily provable, and reasoned that to provide the presumption would "swallow the reliance requirement almost completely." *Id.* In *In re Interbank Funding Corp. Securities Litigation*, the D.C. Circuit found reliance is not impossible to prove because the defendant offered affirmative statements and plaintiffs could have easily alleged they relied directly on those assertions in deciding how to handle their securities in the defendant's company. 629 F.3d at 217-18. The court supported its denial to apply the presumption on *Affiliated Ute* and basic tort principles of causation in a case where plaintiffs could, but do not, allege actual reliance. *Id.* at 421-22.

Here, there is no speculative negative as the Memo provided multiple affirmative representations. In fact, the Fund has already alleged in its complaint to have relied on three specific positive misstatements. R. at 8. It is not an unrealistic evidentiary burden, as in *In re Interbank Funding Corp.*, due to the already offered statements made by Gemstar in the Memo. R. at 8. Applying the *In re Interbank Funding Corp* reasoning, because the Fund has already admitted to reliance in its complaint, it is a similarly "easy" task to prove reliance on the given statements in deciding whether or not to participate in Gemstar's private placement.

Similarly the Fund does not face the difficult task of proving a speculative negative, as they expressly point to 3 misrepresentations it relied on to purchase stock. R. at 8. By including a general allegation of reliance on any "material omissions contained in the Memo," the Fund is attempting to intertwine supposed omissions with the positive misrepresentation it has already admitted to rely on in order to be afforded the presumption. This Court, like the *Joseph* court, should identify the unfounded intertwining of allegations, and properly conclude that this is a case of affirmative misrepresentation where reliance is possible to prove the traditional way.

If courts apply the *Ute* presumption too liberally, straying from this Court's purpose, the reliance prong of Rule 10b-5 claims has the potential of being disposed of. Reliance is essential to show an actual causal connection between defendants' alleged conduct and plaintiffs' injury. Because the task of proving reliance is indeed possible, the Fund should not be able to circumvent its evidentiary duties in proving that it actually relied on Ms. Gordon's conduct in the claim against her.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals granting Katie Gordon's 12(b)(6) motion should be affirmed.

Respectfully submitted.

Team 19

February 15, 2023