TEAM 22

No. 22-123

IN THE
SUPREME COURT OF THE UNITED STATES

FORDHAM PUBLIC EMPLOYEES
INVESTMENT FUND,
Petitioner,

v.

GORDON, KATIE, et al.,
Respondent.

ON WRIT OF CERTIORARI

BRIEF FOR RESPONDENT

COUNSEL FOR RESPONDENT
Oral Argument Requested

QUESTIONS PRESENTED

I. Whether an individual can be subject to primary liability under Rule 10b-5(a) and (c) when she neither made nor distributed false or misleading statements.

II. Whether the *Affiliated Ute* rebuttable presumption of reliance applies where the plaintiff asserts "mixed" allegations involving both omissions and affirmative misrepresentations by an actor who does not have a duty to disclose material information.

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STATUTORY PROVISIONS

This case involves Section 10(b) of the Securities Exchange Act of 1934 ("the Act") as implemented by SEC Rule 10b-5 ("Rule 10b-5"). *See* C.F.R. § 240.10b-5. Rule 10b-5 provides in relevant part:

> 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[.]

STATEMENT OF THE CASE

I. Factual History

The Founders. Ms. Grace Underwood ("Ms. Underwood") and Ms. Danielle Scott ("Ms. Scott") met in New York City in June 2014 as recent MBA graduates. R. at 1. The two took a liking to each other—realizing they shared several "common" interests, including a desire to utilize the "substantial wealth" (i.e., $50,000,000) they had inherited to acquire and financially improve an underperforming small or mid-size manufacturing company. *Id.*

An Ambitious Growth Plan. Because of their effectively non-existent experience running a company, Ms. Underwood and Ms. Scott sought out a more seasoned executive to assist them in their search and to help them chart an "ambitious growth plan." R. at 2. In January 2017, a business broker introduced them to McGrath, Inc., a large manufacturing entity that planned to sell its machine tool business. The business met their ambitious growth metrics, and they agreed to a price of $75,000,000, subject to due diligence and standard closing conditions. *Id.*

They then hired attorneys to structure the transaction, a consulting firm to identify a new senior manager, and an engineering firm to examine the business's property, plant, and equipment to ensure it was suitable for its intended use. R. at 3. Notably, the engineering report they commissioned stated that one of the composites used by McGrath's largest selling machine had characteristics which might lead to the development of microscopic cracks over time and under stress. *Id.* However, Ms. Underwood and Ms. Scott deemed this finding inconsequential in the final due diligence review. *Id.* And after completing the remainder of the review, they finalized the terms of the transaction. *Id.*

Gemstar. Ms. Underwood and Ms. Scott named the new entity Gemstar. *Id.* They also hired a new Vice President of Operations but appointed themselves Chief Executive Officer and President, respectively. *Id.* In their roles, they shared responsibility for making all "material executive decisions." *Id.* Over the following three years, Gemstar expanded rapidly. R. at 4. Its two main customers were Silberfarb Solutions and Lerche Logistics, and its most popular product was a machine tool—the SwiftMax—which was used to produce a fastener for numerous applications, including cargo aircrafts. *Id.*

However, despite the success of Gemstar, Ms. Underwood and Ms. Scott were intent on finding their next project and began seeking an exit strategy. *Id.* They met with another old friend from business school—Allison Ritter of Carter Capital ("Ms. Ritter")—who agreed to assist them with the structuring of the sale of Gemstar to either a private equity firm or a strategic partner. *Id.* Ms. Ritter then requested Gemstar's financial statements to check whether there were any contingent liabilities which could affect the sale. *Id.* Having reviewed the financial statements, Ms. Ritter proposed that the two of them sell 80 percent of Gemstar in a private placement to institutional investors, while retaining 20 percent in the form of super voting shares. *Id.* She emphasized that this approach would help them maximize their return. R. at 5. While they were hesitant to maintain any position in the company, they ultimately agreed to move forward with the private placement. *Id.*

The Memo. As Vice President of Investor Relations, Ms. Katie Gordon ("Ms. Gordon") was tasked with aiding in this process. *Id.* Her responsibilities were largely administrative; they included coordinating with the attorneys, advisors, engineering firm, and other experts, who were in turn tasked with developing the Private Placement Memorandum ("the Memo") that would be used to market the common stock. *Id.* Accordingly, her primary responsibility was to manage the flow of information to Ms. Ritter at Carter Capital. *Id.* In May 2021, the engineering firm delivered its report on the structural integrity of Gemstar's assets and products to Ms. Gordon. *Id.* The Report identified no material deficiencies; however, it did contain a three-years old addendum ("Trade Letter") from a departed engineer at the firm, who suggested that the SwiftMax used a composite which could, over time, develop microscopic cracks from stress under extreme conditions. R. at 5-6.

Although the letter was relatively old, Ms. Gordon was concerned about its contents and discussed the matter with her supervisors—Ms. Underwood and Ms. Scott. R. at 6. In response, Ms. Underwood "aggressively" expressed that she thought it was a waste of time to discuss an "outdated" letter, and instructed Ms. Gordon to remove the Trade Letter from the Report before its delivery to Gemstar's experts. *Id.* Per her supervisor's direct instructions, Ms. Gordon delivered the Report without the Trade Letter and the investor Memo was completed in August 2021 without reference to the defective composite. *Id.* One of Ms. Gordon's associates then distributed the Memo to twenty-six potential investors using Gemstar's stationery. *Id.* The cover letter neither invited investors to inquire about the contents of the Memo nor identified Ms. Gordon as the individual responsible for its contents. *Id.*

The Incident. The private placement was completed in October 2021, with the sale of Gemstar's common shares to sixteen institutional investors including the Fordham Public Employees Investment Fund (the "Fund"). R. at 7. The Fund purchased 3,000,000 shares, and the record is unclear as to whether the Fund, or its advisors, had relied upon the Memo's contents at the time of the purchase. *Id.* Two months later, a Seaboard Airlines cargo plane—serviced by Silberfarb Solutions with fasteners manufactured by Gemstar's SwiftMax— experienced an incident while accelerating for takeoff from Kennedy International Airport. *Id.* An FAA investigation found that the explosion on the left side of the plane occurred because of a faulty SwiftMax composite which had caused one of the engines to become dislodged. *Id.*

II. Procedural History

Following the incident, Gemstar's stock price declined, and the Fund commenced an action in the United States District Court for the District of Fordham (the "District Court") in March 2022. R. at 8. The Fund sought compensatory damages from Gemstar and three of its executives for its purchase of the common stock, which was made in supposed reliance of allegedly misleading statements and omissions in the Memo. *Id.*

The Fund named Ms. Underwood, Ms. Scott, and Ms. Gordon as the three executives in its complaint. *Id.* It alleged that they committed securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 (the

"Act") and Rule 10b-5 by engaging in a deceptive scheme to conceal potential issues with the defective composite. *Id.* The Fund settled with Gemstar in August 2022, but the claims against the three executives remained. *Id.*

As a result, Ms. Underwood, Ms. Scott, and Ms. Gordon filed individual Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In her motion, Ms. Gordon argued that she neither "made" nor "disseminated" the allegedly misleading statements and could not be held liable as a primary violator under Rule 10b-5. R. at 8-9. Even if she were to be found liable under Rule 10b-5, she argued that the Fund failed to prove that it relied on the Memo when it decided to purchase Gemstar stock. *Id.*

In October 2022, the District Court issued its opinion denying Ms. Gordon's motion to dismiss. R. at 9. Although the court conceded that Ms. Gordon was not a "maker" of the statements under Rule 10b-5, it ultimately rejected her motion on the basis that she could still be held primarily liable under the scheme liability provisions of Rule 10b-5. *Id.* The District Court also rejected Ms. Gordon's argument that the Fund failed to adequately allege reliance. *Id.*

On appeal, the Circuit Court affirmed the District Court's finding on the first issue: Ms. Gordon could be subject to primary liability under Rule 10b-5(a) and (c). R. at 21.On the second issue, however, the Circuit Court reversed and held that the Fund was not entitled to a rebuttable presumption of reliance under *Affiliated Ute Citizens of Utah v. U. S.*, 406 U.S. 128 (1972), since the Fund's allegations primarily involved omissions, not affirmative misrepresentations. *Id.* The Fund subsequently filed a petition for a writ of certiorari, which this Court granted on January 9, 2023. R. at 30.

III. Standard of Review

This Court reviews *de novo* a 12(b)(6) motion to dismiss for failure to state a claim. In considering a 12(b)(6) motion, the Court must determine whether the facts alleged support a claim that is plausible on its face and provide a basis to "draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

SUMMARY OF THE ARGUMENT

Ms. Gordon is not subject to primary liability under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 since she neither made nor disseminated the statements contained in the Memo. Congress has distinguished liability under Section 10(b) of the Act between primary and secondary violators. Specifically, the Section 10(b) private cause of action only extends to primary violators, whereas enforcement of secondary liability is left to the SEC. Correspondingly, courts have been careful to preserve that distinction, warning that blurring the line between primary and secondary liability would lead to "uncertainty and unpredictability" in securities law. Additionally, this Court has expressed concerns about the scheme liability provisions of Rule 10b-5 being used as a "short cut" to circumvent liability for actors that are only "tangentially involved" in the dissemination of information. Accordingly, Ms. Gordon cannot be held liable by a private actor for her tangential role in the distribution of the Gemstar Memo. She neither made nor disseminated the information in question, and the Section 10(b) private cause of action does not extend to secondary actors such as herself. This Court should reverse the Circuit Court's decision on the first issue.

This Court should additionally find that the Fund is not entitled to the *Affiliated Ute* rebuttable presumption of reliance for two reasons. First, the Fund's allegations of omission of material fact rely heavily on actual statements from the Memo. This Court has held that when a plaintiff points to affirmative misstatements to prove omissions of facts material to the sale of a security, the plaintiff must prove justifiable reliance—not depend on the presumption of reliance crutch from *Affiliated Ute*. Second, even if this Court were to find that the Fund sufficiently alleged omissions to satisfy the first prong of the presumption of reliance, it failed to establish that Ms. Gordon had a duty to disclose material information to investors. Because she merely took orders from executives at Gemstar, Ms. Gordon's position as Vice President of Investor Relations and her subsequent affirmative conduct does not impose such a responsibility. This Court should affirm the Circuit Court's decision on the second issue.

ARGUMENT

I. RESPONDENT CANNOT BE SUBJECT TO PRIMARY LIABILITY UNDER RULE 10b-5 SINCE SHE NEITHER MADE NOR DISTRIBUTED MISLEADING STATEMENTS TO INVESTORS.

In the wake of the Great Depression, the failed paradigm of *caveat emptor*, and the fall-out of an unbridled capitalism, Congress enacted the Securities Exchange Act of 1934 to avert a similar crisis in the future. In doing so, it birthed a framework of securities regulation meant to safeguard "securities and funds" while also "protect[ing] interstate commerce, the national credit, [and] the Federal taxing power." 15 U.S.C. § 78j(b). Its purpose is to "protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions." *Id.* To that end, the Act was intent on creating regulations that are predictable, effective, uniform, and *fair.*

A. A widened scope of primary liability under Rule 10b-5 would undermine Congress's statutory intent.

SEC Rule 10b-5 implements Section 10(b) of the Act. 17. C.F.R. § 240.10b-5. Consistent with Congress's intent, Rule 10b-5 describes two specific categories of content that give rise to liability: false or misleading statements and omissions, under Rule 10b-5(b) ("misstatement liability"), and fraudulent or deceptive schemes and practices, under Rule 10b-5(a) and (c). 17. C.F.R. § 240.10b-5 ("scheme liability"). In practice, this Court has acknowledged that applying these categories can "present difficult problems of scope in borderline cases." *Lorenzo v. Sec. & Exch. Comm'n,* 139 S.Ct. 1094, 1101 (2019). However, when faced with those challenging cases, the Court has recommended considering "purpose, precedent, and circumstance" to ascertain the scope of these provisions. *Id.*

1. The decision to extend the § 10(b) private cause of action is for Congress, not the courts.

Accordingly, we should adhere to the Court's guidance here and consider the facts of our case through the lens of "purpose, precedent, and circumstance." *Id.* To that end, we begin with the *purpose* of the Act—as implemented in Rule 10b-5. As discussed above, Congress adopted the Act with the intent to provide a framework for the "fair" and "effective" operation of the securities industry. 15 U.S.C. § 78j(b). However, in drafting this unprecedented piece of legislation, Congress was careful to introduce protections and limitations on the Act's scope and reach. Most obviously, Congress did not give private litigants authority to prosecute anyone engaged in conduct found to be in violation of the Act's misstatement liability (i.e., Rule 10b-5(b)) or scheme liability (i.e., Rule 10b-5(a) and (c)) provisions. Rather, it demarcated a line between primary violators and aiders & abettors; and it only granted authority to prosecute the latter to the SEC. 15 U.S.C. § 78t(e).

Moreover, as this Court noted in *Stoneridge Inv. Partners, LLC v. Scientific- Atlantic*, 552 U.S. 148, 164–65 (2008), "[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text." Correspondingly, this Court has cautioned against its unfettered application and expansion. As the Court emphasized in *Stonebridge*, "Concerns with the judicial creation of a private cause of action caution against its expansion." 552 U.S. at 165. As such, "the decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Id.*

In *Stonebridge*, the Court considered a securities fraud class action brought against a corporation providing cable television services, its executives, an independent auditor, and the corporation's vendors and customers. *Id.* at 148-49. The petitioners alleged that the corporation entered into sham transactions with these suppliers and customers in order to embellish its revenue and cash flow. *Id.* The Eighth Circuit dismissed claims against the vendors and customers as aiders and abettors; petitioners appealed. In its holding, the Court provided a comprehensive synopsis of the § 10(b) private cause of action; specifically, the Court noted that, “at most, respondents had aided and abetted [the cable corporation]’s misstatement,” and added that “the private cause of action this Court has found implied in § 10(b) and Rule 10b–5, does not extend to aiding and abetting a § 10(b) violation.” *Id.* at 148.

In its opinion, the *Stonebridge* majority also referenced *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164 (1994)—in which the Court first warned of the ramifications of extending the § 10(b) private right to aiders and abettors. The *Central Bank* Court explained that “While it is true that an aider and abettor of a criminal violation of any provision of the 1934 Act, including § 10(b), violates 18 U.S.C. § 2, it does not follow that a private civil aiding and abetting cause of action must also exist.” *Id.* at 190. Therefore, the Court was wary of “infer[ing]” a private right of action from a criminal prohibition alone. *Id.* Most troublingly for the Court, were this line of reasoning to be applied, was the lack of any “logical stopping point” and the possibility that “every criminal statute passed for the benefit of some particular class of persons would carry with it a concomitant civil damages cause of action.” *Id.* at 190-91.

2. Congress has delegated enforcement of secondary liability to the SEC, not to private actors.

Following the Court’s decision in *Central Bank*, there were calls for a creation of an express cause of action for aiding and abetting, but Congress once again decided “not to follow this course.” *Stonebridge*, 533 U.S. at 148.

Instead, it passed the Private Securities Litigation Reform Act of 1994 ("PSLRA")—one year after *Central Bank*—in which it reiterated that the prosecution of aiders and abettors fell within the SEC's purview, not that of private plaintiffs. Therefore, it would seem "appropriate for the Court to assume that when PSLRA § 104 was enacted, Congress accepted the § 10(b) private right as then defined but chose to extend it no further." *Id* at 150.

The consequences of failing to heed the Court's repeated warnings would be numerous. Specifically, a widened scope of liability "would defeat the congressional limitation on the enforcement of secondary liability, multiply the number of defendants subject to private securities actions, and render the statutory provision for secondary liability superfluous." *Sec. & Exch. Comm'n v. Rio Tinto plc*, 41 F.4th 47, 55 (2d Cir. 2022).

Here, Petitioner's position would ask this Court to "put an unsupportable interpretation on Congress' specific response to *Central Bank* in § 104 of the PSLRA." *Stoneridge,* 552 U.S. at 150. Congress's intent is clear: it amended the securities laws to provide liability for aiders and abettors in actions brought by the SEC—not by private parties. Accordingly, if there is to be any liability for Ms. Gordon's actions—which Respondent disputes—that would emanate from the SEC. Per the facts in the record, Ms. Gordon clearly falls under the Act's parameters for an aider and abettor: it was Ms. Underwood and Ms. Scott that "shared responsibility for making all material decisions"; it was Ms. Underwood and Ms. Scott who instructed Ms. Gordon to remove the Trade Letter from the Report; and it was Ms. Gordon's associate who distributed the Memo to potential investors. R. at 3, 6. As an aider and abettor, Ms. Gordon cannot be held primary liable and is not subject to a § 10(b) private right of action. Holding otherwise would disregard Congress's express purpose when enacting the Act and the PSLRA, and it would dismiss this Court's own warnings about the potential consequences. The SEC—not the Fordham Public Employees Investment Fund— is the only party which is authorized to bring action against Ms. Gordon.

Ultimately, "this case is resolved by the statutory text, which governs what conduct is covered by § 10(b)." *Central Bank of Denver,* 511 U.S. at 164. It is Congress's prerogative—not the courts'—to decide whether to extend the § 10(b) private cause of action to the class of defendants, which includes aiders and abettors. *See Stonebridge,* 522 U.S. at 165. As of the hearing date, it has not done so.

B. Courts have been careful to maintain the distinction between primary and secondary liability.

In the wake of *Central Bank*, courts—including this one—have recognized the need for a "clean line" between primary and secondary violations of Section 10(b). *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 143 n. 6 (2011). Therefore, having considered the "purpose" of the Act, we turn to court "precedent" on the issue of primary and secondary liability. *Lorenzo*, 139 S.Ct. at 1101.

1. The decision to extend the § 10(b) private cause of action is for Congress, not the courts.

The Court first recognized the need to clarify this distinction in *Central Bank.* There, it considered whether the indentured trustee of a public building authority that defaulted on public improvement bonds could be held primarily liable under Section10(b). In its holding, the Court determined that a private plaintiff may not maintain an aiding and abetting suit under Section 10(b). *Central Bank,* 511 U.S. at 164, Specifically, the Court noted that "the SEC's various policy arguments in support of aiding and abetting" could not "override the Court's interpretation of the Act's text and structure." *Id.* at 165. Moreover, the Court warned of the dangers of blurring the line between primary and secondary liability—as it would lead to "uncertainty and unpredictability" in securities law, the potential for "excessive litigation," and "difficulties and costs" born by companies and investors alike. *Id.*

Since, "from *Central Bank* to *Stoneridge*, the Supreme Court has consistently narrowed the class of defendants reachable by the implied cause of action under Section 10(b)." *Sec. & Exch. Comm'n v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 355 (D.N.J. 2009). More recently, in *Janus,* the Court further refined the scope of primary liability under Rule 10b-5(b), specifically, when it held that it was limited to the "maker" of a false or misleading statement. There, the Court considered whether a group of private plaintiffs could bring a Rule 10b-5(b) suit against an investment advisory firm that helped draft misleading statements contained in its client's prospectuses. In finding that the advisory firm did not "make" the statements, the majority held that, "This rule follows from *Central Bank of Denver,* in which we held that Rule 10b–5's private right of action does not include suits against aiders and abettors." *Janus,* 564 U.S at 136.

2. Scheme liability is not a "short cut" to circumvent liability for actors that are only "tangentially involved."

Meanwhile, in *Lorenzo*, the Court dealt with a distinct set of facts and introduced an additional qualification for the primary liability test. 139 S.Ct. 1094 (2019). There, the Court considered whether a group of investors could sue an individual who had sent them emails containing his client's false statement even if he did not "make" the statements. *Id.* The Court held that, under the facts, the individual had still violated Rule 10b-5(a) and (c) by "employing devices and schemes to defraud" and "engaging in fraudulent or deceptive acts or practices." C.F.R. § 240.10b-5(a) and (c). The Court distinguished this case because—unlike in *Janus*—the individual in question had sent false statements directly to investors and invited them to follow up with questions. *Id.* Predictably, Petitioner relies heavily on *Lorenzo* to advance the argument that primary liability can still be established under the scheme liability provisions of Rule 10b-5.

However, what Petitioner does not address is courts' repeated warnings that "Subsection (a) and (c) may only be used to state a claim against a defendant for the underlying deceptive devices or frauds themselves, and not as a short cut to circumvent *Central Bank*'s limitations on liability for a secondary actor's involvement in making misleading statements." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F.Supp.2d 319, 337 n. 17 (S.D.N.Y.2004). Specifically, scheme liability must involve "performance of an inherently deceptive act that is distinct from an alleged misstatement." *Sec. & Exch. Comm'n v. Kelly*, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011). Consequently, even in *Lorenzo*, the Court made clear that *Janus* "remain[s] relevant (and preclude[s] liability) where an individual neither *makes* nor *disseminates* false information." 139 S.Ct. at 1103. And because *Janus* remains good law, the Court could not have been giving plaintiffs permission to "characterize every misstatement or omission as a scheme." *Rio Tinto*, 41 F.4th at 54. Perhaps most relevantly, the *Lorenzo* Court cautioned against applying the scheme liability provisions broadly to those who are only "tangentially involved" in dissemination. 139 S.Ct. at 1101.

Most recently, in *Rio Tinto,* the Second Circuit echoed the *Lorenzo* majority's language when it cautioned against plaintiffs using the scheme provisions of Rule 10b-5 "as a short cut" to by-pass courts' limitations on liability for a secondary actor. 41 F.4th at 55. Moreover, it also warned that an "overreading" of *Lorenzo* would "muddle primary and secondary liability," by "multiply[ing] the number of defendants subject to private securities actions, and render[ing] the statutory provision for secondary liability superfluous." *Id.*

Here, there is no dispute that that Ms. Gordon did not make the statement in question. Neither the District Court for the District of Fordham nor the Circuit Court have found otherwise. R. at 9, 13. The question before this Court is whether she can still be held primarily liable as a *disseminator* under Rule 10b-5(a) and (c). Taking heed of the *Lorenzo* Court's forewarning against applying these provisions broadly to those who are only "tangentially involved" in dissemination, Ms. Gordon clearly falls outside the scope of primarily liability under 10b-5(a) and (c). Unlike the Vice President of investment banking in *Lorenzo*, she did not disseminate false or misleading information herself. Rather, an associate at Gemstar was directly responsible for distributing the Memo. R. at 6. Additionally, the associate prepared a cover letter and attached it to the Memo, which was then sent to potential investors under Gemstar's cover. *Id.* Notably, in what constitutes another critical distinction from *Lorenzo,* the Memo did not identify Ms. Gordon and did not invite investors to inquire with her about the Memo's content. Therefore, she was only "tangentially involved" in its dissemination and cannot be held primary liable. Ruling otherwise would risk subsuming the misstatement liability provision under the language of scheme liability and would undermine Congress's intent by creating a short cut to circumvent limitations on primary liability.

C. Ms. Gordon neither made nor disseminated false or misleading information and Rule 10b-5 does not reach her conduct.

Having considered the "purpose" of Rule 10b-5 and court "precedent" in delineating the scope of liability, we now consider the "circumstances," which further narrow the scope of primary liability here. *Lorenzo*, 139 S.Ct. at 1101.

1. Ms. Gordon did not make the statement in question.

As noted, the lower courts have both conceded that Ms. Gordon did not make the statement in question as she did not have "ultimate authority" over material decisions. R. at 9, 14. Although Ms. Gordon first brought the Report to Ms. Underwood and Ms. Scott's attention, she did not "make" the Memo under Rule 10b-5(b). Additionally, she did not control the content of the Memo, "whether to communicate it, or how to communicate it." R. at 25. As such, Ms. Gordon's role was more akin to that of a "speechwriter," since she did not have "ultimate authority" over the contents of Memo. R. at 12. Contrary to what the

Petitioner suggests, the facts here are more analogous to those in *Janus* than *Lorenzo*. As with the investment advisory firm in *Janus*, Ms. Gordon merely followed the directives of her supervisors who instructed her to remove the Trade Letter from the Report and share it with Gemstar's experts. R. at 6. As a result, it is Gemstar, through Ms. Underwood and Ms. Scott, who is primarily liable for making the misleading statements in the Memo.

2. Ms. Gordon did not disseminate the information in question.

The question, then, is whether Ms. Gordon disseminated the Memo, which could render her liable under 10b-5(a) and (c). However, on this front, the evidence is also conclusive. And while Petitioner would have this Court analogize the facts here to those in *Lorenzo*, the distinctions with that case are dispositive. Unlike the Vice President of the investment banking company there, Ms. Gordon did not disseminate the information in question herself. R. at 6. Specifically, in *Lorenzo*, the individual sent the email with the fraudulent information directly to investors from his work email address—going so far as to invite them to "call back with any questions they might have." 139 S.Ct. at 1099. Here, meanwhile, a concerned Ms. Gordon brought the Trade Letter to Ms. Underwood and Ms. Scott's attention; it was Ms. Underwood and Ms. Scott who "aggressively" said that discussing the Trade Letter was a "waste of time" and "instructed" her to remove it from the Report. R. at 6.

Therefore, Ms. Gordon merely followed the instructions of her supervisors, who "shared responsibility for making all material executive decisions" at Gemstar. R. at 3. Accordingly, as it pertains to the individual in *Lorenzo*, "their roles as Vice Presidents might be the only thing Katie and

Lorenzo have in common." R. at 26. Most critically, Ms. Gordon did not disseminate the false or misleading information herself. Instead, one of her associates was responsible for distributing the Memo. Lastly, the Memo contained a cover letter, which was also not compiled by Ms. Gordon; and dissimilarly from *Lorenzo*, the Memo did not identify Ms. Gordon nor ask investors to direct their questions at her. R. at 26. Therefore, Petitioner's claim amounts to a "back door" for imposing liability on Ms. Gordon. Courts have consistently rejected attempts of this sort, which aim "to bypass the elements necessary to impose 'misstatement' liability under section (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'" *Sec. & Exch. Comm'n v. Kelly*, 817 F. Supp. 3d 340, 343 (S.D.N.Y. 2011); *see, e.g., Sec. & Exch. Comm'n v. Lucent Techs.*, 610 F.Supp.2d 342, 359–61 (D.N.J.2009); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir.2005); *Sec. & Exch. Comm'n v. KPMG LLP*, 412 F.Supp.2d 349, 377–78 (S.D.N.Y.2006); *Sec. & Exch. Comm'n v. PIMCO Advisors Fund Mgmt. LLC*, 341 F.Supp.2d 454, 467 (S.D.N.Y.2004).

Ultimately, Ms. Gordon cannot be held primarily liable under Rule 10b-5 as she did not communicate the misrepresentations or omissions. Gemstar, under the purview of Ms. Underwood and Ms. Scott, did. "Purpose, precedent, and circumstance" support that conclusion.

II. THE FUND IS NOT ENTITLED TO A REBUTTABLE PRESUMPTION UNDER *Affiliated Ute* BECAUSE IT PRIMARILY ALLEGES AFFIRMATIVE MISSTATEMENTS.

Federal law mandates that companies selling securities tell the truth about their products. The federal statutory scheme and the body of case law that has developed around it prohibit both affirmative misstatements and misstatements by omission. Investors alleging deception must prove reliance, among other things. It is somewhat easier for investors to prove that they relied on affirmative misstatements. Proof of reliance on deceptive omissions is almost impossible, and so courts permit plaintiff investors to prove their case using a rebuttable presumption of reliance. Here, the Fund seeks to travel that relatively easier proof path. But it cannot. Stripped of its rhetoric, the Fund's allegations ultimately rely on affirmative representations it claims were deceptive, not omissions.

Proving reliance under Section10(b) of the Act requires proof of the "causal connection between a defendant's misrepresentation and a plaintiff's injury." *Stoneridge*, 552 U.S. at 159. So, the plaintiff must have been "aware of a company's statement and engaged in a relevant [securities] transaction... based on that specific misrepresentation." *Id.* But proof of reliance on omissions is sometimes impossible to demonstrate, so the Supreme Court established two presumptions to aid plaintiffs. First, under *Affiliated Ute*, the Court recognizes a rebuttable presumption of reliance in cases that involve (1) the *withholding* of material information (2) by someone with a duty to disclose that information. *Affiliated Ute*, 406 U.S. at 153-54. Notably, substantial Circuit Court and Supreme Court case law establishes that a rebuttable presumption is only applied to cases that primarily allege omissions. *See Stoneridge*, 552 U.S. 148; *see also Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999). Second, under *Basic*, a plaintiff may rely on a fraud-on-the-market theory presumption of reliance. 485 U.S. 224 (1988). In this appeal, the only issue is whether the Fund is entitled to the first rebuttable presumption under *Affiliated Ute*. R. at 28. It is not.

The Circuit Court correctly reversed the District Court for two reasons. First, the Fund is not entitled to a rebuttable presumption under *Affiliated Ute* because this is a "mixed" case, where the Fund primarily alleges affirmative misstatements. Second, the Fund failed to establish Ms. Gordon's duty to disclose the alleged deceptive omissions. *Affiliated Ute*, 406 U.S. 128.

A. The Fund is not entitled to the *Affiliated Ute* rebuttable presumption because it primarily alleges affirmative conduct.

The Supreme Court and, in turn, Circuit Courts, have traditionally applied the *Affiliated Ute* presumption of reliance to cases involving omissions because direct proof of reliance on an omission would require "a speculative negative"—proving reliance on something someone didn't say but should have. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1199, 1204 (9th Cir. 2021) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905–06 (9th Cir. 1975)). The Ninth Circuit focused on this "speculative negative" problem in *Blackie.* The court applied the *Affiliated Ute* presumption of reliance where plaintiffs alleged omissions of material facts from annual and interim financial reports, press releases, and SEC filings in violation of Rule 10b-5(b) because proving "I would not have bought had I known" or "I would not have sold had I known" is nearly impossible. *Blackie*, 524 F.2d at 908.

Courts have been reluctant to extend the *Affiliated Ute* presumption beyond cases that allege omissions. Further, where a plaintiff alleges both omissions and affirmative misstatements, the line has historically been drawn to prohibit the presumption in cases that *primarily* allege affirmative misrepresentations. In *Poulus,* the Ninth Circuit clarified that plaintiffs were not entitled to the presumption where they primarily alleged affirmative misrepresentations because their alleged omissions were "part of a much broader claim," and did not suffice to bring the case under *Affiliated Ute*. 379 F.3d 654, 666 (9th Cir. 2004).

Again, where omissions are part of a larger claim of misrepresentations, the presumption does not apply. The Second Circuit clarified that the "presumption does not apply to earlier misrepresentations made more misleading by subsequent omissions… nor does it apply to misstatements whose only omission is the truth that the statement misrepresents." *Waggoner v. Barclays PLC*, 875 F.3d 79, at 96 (2d Cir. 2017).

The Ninth Circuit, in *In re Volkswagen* reversed the district court's application of the presumption of reliance to investors' "mixed" omission and affirmative representation claim because even though the "[p]laintiff allege[d] an omission, and that omission looms large over [p]laintiff's claims," the plaintiff's nine-page allegations of affirmative misrepresentations "push[ed]" the case outside of "*Affiliated Ute*'s narrow presumption" realm. 2 F.4th 1199, 1206 (9th Cir. 2021). Essentially, the plaintiffs based their allegations "as much on what is there as what is purportedly missing," providing the court with specific statements from Volkswagen's Offering Memoranda allegedly omitting material facts regarding a scheme to defraud emissions regulations. *Id.* at 1208 (quoting *Poulos*, 379 F.3d at 666). The plaintiff's alleged omissions were merely the inverse of what the affirmative misrepresentations purported to claim. *Id.*

Similarly, in *Waggoner,* the circuit court relied on two previous decisions to support its reluctance to increase the scope of *Affiliated Ute*'s application. 875 F.3d 79. First, in *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981), the court determined that the difference between a misrepresentation and an omission is minor: "[in] many instances, an omission to state a material fact relates back to an earlier statement, and if it is reasonable to think that that prior statement still stands, then the omission may also be termed a misrepresentation." Second, in *Starr ex rel. Estate of Sampson v. Georgeson Shareholder, Inc.*, 412 F.3d 103, 110 (2d Cir. 2005), the court found the plaintiff's "mixed case" included primarily misleading statements, thus requiring the plaintiff to show justifiable reliance on such misstatements. And lastly, the Second Circuit concluded that the *Affiliated Ute* presumption "does not apply to earlier misrepresentations made more misleading by subsequent omissions… nor does it apply to misstatements whose only omission is the truth that the statement misrepresents." *Waggoner,* 875 F.3d at 95–96.

1. The Fund relies on specific affirmative misrepresentations – not omissions – from the Memo to advance its argument.

The *Affiliated Ute* presumption does not apply here for the same reasons that it was inapplicable in *Poulos, In re Volkswagen, Waggoner, Wilson,* and *Starr*: A plaintiff primarily alleging affirmative misrepresentations cannot depend on the presumption of reliance. *See Poulos*, 379 F.3d 654; *In re Volkswagen,* 2 F.4th 1199; *Wilson,* 648 F.2d 88; *Starr*, 412 F.3d 103; *Waggoner,* 875 F.3d 79. Here, the Fund alleges omissions that are effectively the inverse of exact misstatements from the Memo it provides in its complaint:

(1) "Gemstar's physical assets are in reasonable condition for their intended use[;]" (2) None of Gemstar's products are materially defective[;]" and (3) "[T]here are no material undisclosed contingent liabilities relating to Gemstar's products[.]" R. at 8. The plaintiffs in *In re Volkswagen* pointed to misstatements in the car manufacturer's Offering Memoranda. Likewise, the Fund pointed to the Memo's language from which it relied upon in its purchase of Gemstar shares; therefore, it is not in the impossible position—the one that the plaintiffs in *Affiliated Ute* faced—of proving justifiable reliance on contents of the Memo.

2. Ms. Gordon's affirmative conduct cannot be classified as an omission.

Deceptive conduct may be actionable under *Affiliated Ute*. *Stoneridge*, 552 U.S. at 158. But affirmative conduct in disseminating misrepresentations to shareholders "cannot transform… [the conduct] into omissions." *In re Volkswagen,* 2 F.4th at 1205. *Affiliated Ute* applies only to concealment, or a failure to disclose, none of which occurred here because the Memo contained affirmative misstatements allegedly supplied by Ms. Gordon upon which the Fund claims to have relied in making its investment decisions. *Affiliated Ute*, 406 U.S. at 153; R. at 7-8.

Ms. Gordon's mere compliance with her executives' orders to distribute the Memo containing the alleged misstatements and omissions does not trigger the *Affiliated* Ute presumption. Like in *Waggoner*, where the Second Circuit rejected application of *Affiliated Ute* because the defendant's omission merely "exacerbated the misleading nature" of its conduct, Ms. Gordon's conduct does not require application of the presumption simply because her alleged "omission is the truth that the [affirmative] statement misrepresents." 875 F.3d at 96. Her conduct in omitting the material facts thus only "exacerbated the misleading nature" of her conduct. This case is not one of omissions, but one of primarily affirmative misstatements and conduct.

B. The Fund fails to establish that Ms. Gordon maintained a duty to disclose material information to investors per *Affiliated Ute*.

Even if the Court were to find that this is an omissions case, the Fund nevertheless fails to prove that Ms. Gordon's actions as Vice President of Investor Relations established a duty to disclose. The *Affiliated Ute* presumption of reliance applies only to cases where an actor with a duty to disclose withholds material information. 406 U.S. 128. Importantly, this duty to disclose does not apply to individuals such as Ms. Gordon—a peripheral actor.

The Supreme Court in *Stoneridge* drew a line between executives and subordinates and the duties each owes in disclosing material information in a securities transaction. 552 U.S. 148. This Court refused to apply the *Affiliated Ute* presumption of reliance to affirmative conduct carried out by actors not directly involved in material decision-making and who do not owe a duty to investors. *Id.* at 158.

In *Stoneridge*, plaintiff-investors sued a cable television corporation for allegedly entering fake transactions with vendors to inflate its financial statements. 552 U.S. at 152. This Court found that the third-party vendors did not have a duty to disclose the nature of the transactions because they were removed from the material misstatements of the deceptive party. *Id.* at 157. Although the third-party in *Stoneridge* was an entirely different company, this

Court's reasoning nevertheless applies to cases where an employee who does not maintain a duty to disclose makes material misstatements under the direction of executives.

Where an actor does not have a duty to investors, he or she cannot be held liable for allegedly deceptive conduct in a securities transaction. In *Regents of University of California,* the Fifth Circuit determined that a bank's allegedly deceptive conduct in aiding a public company in falsifying its financial statements did not trigger the *Affiliated Ute* presumption because the bank did not have a duty to the public company's investors. 482 F.3d 372 (5th Cir. 2007). "[T]he banks were not fiduciaries and … did not owe plaintiffs any duty to disclose the nature of the alleged transactions." *Id.* at 384.

Here, the record clearly reflects that Ms. Gordon's job was effectively administrative: "[h]er primary responsibility was to manage the flow of information." R. at 5.; *see also* R. at 29. Her title—Vice President of Investor Relations—is meaningless if she merely provided assistance as a middleman and was not integrally involved in decision-making processes. The record shows that Ms. Gordon was not involved in the decision-making that led to the alleged misstatements, and importantly, her name did not appear on the Memo to which she is being attributed fault. R. at 6. Like the third-party corporation in *Stoneridge* and the bank in *Regents,* Ms. Gordon's allegedly deceptive conduct in helping distribute the Memo containing her supervisor's misrepresentations, does not trigger the *Affiliated Ute* presumption because her position did not involve a duty to disclose material information—it largely involved relaying messages between parties.

The Fund primarily alleges affirmative misrepresentations and conduct outside the scope of the *Affiliated Ute* presumption of reliance. And even if this Court finds that the Memo contains material omissions justifying application of the reliance, the Fund nevertheless fails to establish Ms. Gordon's affirmative duty to disclose material information. The Circuit Court's ruling must be affirmed.

CONCLUSION

This Court should reverse the Circuit Court's determination that Ms. Gordon can be held primarily liable as a "disseminator" under Rule 10b-5(a) and (c) and affirm the Circuit Court's decision that the Fund is not entitled to a rebuttable presumption of reliance under *Affiliated Ute.*

First, Congress has expressly stated that the § 10(b) private cause of action does not extend to secondary actors that are only tangentially involved in the distribution of information. Second, courts have been wary of blurring the line between primary and secondary liability as it would lead to unpredictability and uncertainty in securities litigation and undermine Congress's intent. Here, Ms. Gordon is clearly a secondary actor: she neither made nor disseminated the information in question and cannot be held primarily liable.

Additionally, this Court has deliberately confined the *Affiliated Ute* presumption of reliance to cases alleging omissions as opposed to affirmative misstatements, given the near-impossible evidentiary burden presented by proving the former. The presumption also requires such omissions of material fact to be communicated by an actor with a duty to disclose that information.

Here, the Fund clearly relies on specific, affirmative misstatements from the Memo in its argument, which removes its claim from the scope of *Affiliated Ute*'s presumption. Additionally, Ms. Gordon's position as Vice President did not impose upon her a duty to disclose material information to investors.

For the foregoing reasons, Respondent respectfully requests that this Court REVERSE IN PART and AFFIRM IN PART the ruling of the United States Circuit Court.