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IRVING R. KAUFMAN MEMORIAL
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EVARISTO, *Circuit Judge*:

I. BACKGROUND

This case reaches us on appeal from the District Court for the District of Fordham. Defendant-Appellant, Katie Gordon, appeals the District Court's denial of her motion to dismiss the complaint filed against her by Plaintiff-Appellants, the Fordham Public Employees Investment Fund ("the Fund"), for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

This appeal requires us to address two distinct issues. First, we must decide whether an individual who neither "makes" nor distributes false or misleading statements, but rather, instructs an employee to distribute them to investors, is subject to primary liability as a "disseminator" under Rule 10b-5(a) and (c). Second, we must determine whether plaintiffs in "mixed" cases, that allege both omissions and affirmative misrepresentations, are entitled to a rebuttable presumption of reliance under *Affiliated Ute*.

A. SUMMARY OF THE CASE

Grace Underwood moved to New York City in June 2014, shortly after receiving an MBA degree at Nikolaidis School of Business in Berkeley, California. Soon after, she attended a conference for young women in business, where she was introduced to Danielle Scott, a recent graduate of Sintim Business School in New York City.

Grace and Danielle learned that they had a lot in common. Neither woman was interested in joining a major investment bank's analyst training group, a consulting firm, or a Fortune 500 executive training program. Fortunately, both had inherited substantial wealth at a young age. Their combined wealth aggregated over $50,000,000, giving them ample time and flexibility to plan independent career paths.

Grace and Danielle decided to pool their efforts and capital to search for an underperforming small or mid-sized manufacturing company. They planned to hire an experienced executive to lead a turnaround effort and begin an ambitious growth plan. They felt working in close association with their new manager would give them invaluable experience and prepare them to manage a manufacturing business on their own.

They hit their first bump in the road when they realized that their interests differed. Grace was focused almost exclusively on traditional lines of business, like logistics and machine manufacturing. Danielle, on the other hand, was interested in technology and its accompanying potential growth opportunities. They decided to compromise by looking at companies in each category and settling on the first likely prospect which could grow and produce considerable cash flow in the medium term.

The search was exhaustive and time consuming. Grace and Danielle connected with contacts in their respective business schools' alumni networks and cultivated relationships with business brokers. For three years, they scoured the financial statements, internal operating reports, and properties of dozens of companies. None of the prospects had the potential for growth that Grace and Danielle required.

Finally, in January 2017, a business broker introduced them to McGrath, Inc., a large manufacturing concern that planned to sell its sophisticated machine tool business. Grace liked that the business had some of the characteristics of a traditional manufacturing concern, and Danielle was excited that it was in the technologically oriented segment of its line of business. More importantly, the business met their desired growth metrics. Satisfied with their choice, they agreed to a price of $75,000,000, subject to due diligence and standard closing conditions.

Each of the parties retained merger and acquisition attorneys to structure the transaction. Grace and Danielle hired a business consulting firm, Forsyth Financial ("Forsyth"), to examine everything from potential markets to the adequacy of management. Forsyth was also asked to identify a senior manager who could run day-to-day operations because the current manager was leaving to take another opportunity. Additionally, they retained an engineering firm, MMD Inc. ("MMD"), to examine the business' property, plant, and equipment to ensure it was suitable for its intended use.

Forsyth's comprehensive report painted a picture of a company capable of substantial growth in its field. MMD's report stated that the company's physical assets were in satisfactory condition for their intended use. However, it noted, that one of the composites used by their largest selling machine had been reported in the trade literature to have characteristics which might lead to the development of microscopic cracks over time and under stress. This was either overlooked or deemed inconsequential in the final due diligence review.

After completing their due diligence review, they finalized the terms of the transaction. Each woman agreed to contribute $10,000,000 in cash and borrow the remainder on a secured basis, using the assets of the business as collateral. The attorneys finished documenting the acquisition and the secured loan.

In January 2018, the transactions closed. Grace and Danielle named the new entity Gemstar. They identified Maya Neuberger as the manager they needed to run the business, bringing her on board as Vice President of Operations. They agreed that Grace would serve as Chief Executive Officer, and Danielle would serve as President. They shared responsibility for making all material executive decisions, while Maya managed dayto-day affairs.

In just three years, Gemstar became a substantial presence in the sophisticated machine tool business. Its two crown jewel customers were Silberfarb Solutions and Lerche Logistics. Its most popular product was a machine tool, known as the SwiftMax, used to produce a fastener for use in numerous applications, including in structural applications on cargo jet aircrafts.

Although Grace and Danielle enjoyed running Gemstar, to hold it longer was inconsistent with their personal business plans. It was time to look for an exit strategy. To assist in their efforts, Grace got in touch with a friend from business school, Allison Ritter. Allison was a Junior Managing Director at Carter Capital, who was active in both mid-market mergers and acquisitions and capital markets. Grace explained that she and Danielle had a business liquidity matter that would need sophisticated financial advice and execution capacity. Allison agreed to meet with them.

In January 2021, they had a working lunch at which Grace and Danielle outlined their business goals. They would structure a liquidity event and, in turn, sell Gemstar either to a private equity firm in partnership with management or to a strategic partner. The proceeds would be used to purchase a company in the technology sector. Allison said Carter Capital would be interested in advising on the transaction and offered to do a deep dive into Gemstar's financial statements. Grace and Danielle agreed and said they would make their financial statements and auditors available.

Allison spent the next two weeks reviewing Gemstar's financial condition and checking with the auditors to see if there were any contingent liabilities other than those in the financial statements. Following her review, she scheduled a meeting to review options. After setting out the pros and cons of the buyout and strategic sales options, Allison introduced a third possibility—they could sell 80% of Gemstar in a private placement to institutional investors while retaining 20% in the form of super voting shares, securing their control of the business. Allison explained that, with common stocks trading at current levels, they would maximize their return in a private placement, which they priced with reference to a basket of common equity issued by sophisticated machine tool manufacturers.

Grace and Danielle were not keen on maintaining a position in Gemstar, as they were turning their attention elsewhere. However, Allison explained that they would have to keep a substantial position for marketing purposes. After protracted consideration, they opted for the private placement and instructed

Allison to go ahead in February 2021. The process was complicated and long, extending over a period of several months.

Katie Gordon, Gemstar's Vice President of Investor Relations, was tasked with organizing the process. She coordinated the attorneys, financial advisors, auditors, engineering firms, and other experts ("Gemstar's experts"), who were constructing the Private Placement Memorandum ("the Memo"), which would be used to market the common stock. Her primary responsibility was to manage the flow of information to Carter Capital and the other players.

About midway into the process, in May 2021, Keane & Company ("Keane"), the principal engineering firm, delivered its report on the structural integrity of the Company's assets and products to Katie Gordon. Keane's fifty-six-page report ("the Report") contained boilerplate information about the firm's practices and procedures. The Report also listed all of Gemstar's facilities, capital machinery, and products, and identified files containing material deficiencies with respect to such items.

Katie reviewed the Report before delivering it to Gemstar's experts. Everything seemed routine and referenced no material deficiencies. However, the Report included a memorandum ("Trade Letter") by a departed junior structural engineer suggesting that Gemstar's most in demand product, the SwiftMax, used a composite ("the defective composite") which could over time develop microscopic cracks produced by stress under extreme conditions, such as an aircraft takeoff. The Trade Letter included an article that supported this hypothesis. Katie was alarmed but calmed down when she realized the Trade Letter was over three years old. She decided against taking any action until she discussed the matter with Grace and Danielle.

Soon after, the three women met in Grace's conference room, and Katie showed them the memorandum. Grace aggressively said that she thought it was a waste of time discussing an outdated Trade Letter that was clearly written in error. Danielle was cautious, wondering aloud whether the auditors were entitled to review it. Grace countered auditors often make mountains out of molehills and argued in favor of removing the Trade Letter from the Report. Danielle finally reluctantly agreed. Katie removed the memorandum from the file and delivered the Report to the Gemstar's experts, as instructed. Although her actions bothered her, Katie decided she could live with it.

In August 2021, the Private Placement Memorandum ("the Memo") was completed without reference to the possibility of microscopic cracks in the SwiftMax composite. The Memo stated that Gemstar's property, plant, and equipment were in reasonable condition for their intended use. It also said there were no material defects in the products sold to customers and there were no material undisclosed contingent liabilities relating to its products which were required to be noted in its financial statements. The Memo made no reference to the defective composite.

Katie directed one of her associates to distribute the Memo to twenty-six of the country's largest non-bank financial institutions, under cover of Gemstar's stationery. The cover letter did not invite investors to inquire about the contents of the Memo or identify Katie as Vice President of Investor Relations.

In October 2021, the private placement was completed, and Grace and Danielle were made very wealthy. Gemstar's common shares were sold to sixteen institutional investors at $27 per share. One of those investors, the Fordham Public Employees Investment Fund ("the Fund") purchased 3,000,000 shares. The record does not indicate whether the Fund, or its advisors, had read the Memo at the time of the purchase. However, the Fund was aware of Katie's role in the private placement.

In December 2021, a Seaboard Airlines wide bodied cargo jet, which had been routinely serviced by Silberfarb Solutions, taxied onto a runway at Kennedy International Airport in New York City, in preparation for a flight to Lima, Peru. About twenty seconds after the pilot began acceleration, an explosion occurred on the left side of the plane. Fortunately, the highly experienced pilot was able to maintain control and bring the plane to a stop 200 yards from the end of the runway.

After the incident, the FAA conducted a preliminary investigation and found that the explosion occurred because an engine had become partially dislodged from the airplane's left wing, which occurred because two fasteners were unable to support the engine's weight. Silberfarb Solutions had manufactured the fasteners using Gemstar's SwiftMax. Further investigations conclusively demonstrated that the fasteners had developed microscopic fissures over time due to the pressure generated by takeoffs.

In February 2022, one month after the FAA released its preliminary findings, the Fund sold its entire position to a special situation financial participant at $4 a share, incurring a loss of $68,000,000.

B. PROCEDURAL HISTORY

Having incurred severe losses when Gemstar's stock price declined sharply, the Fund commenced an action in the United States District Court for the District of Fordham in March 2022.

The Fund sought $68 million dollars in compensatory damages from Gemstar and three of its executives in connection with the purchase of its common stock in reliance on allegedly false and misleading statements and material omissions contained in the Memo. Specifically, the Fund points to three 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

The Fund alleges that Gemstar and its executives, Grace Underwood, Danielle Scott, and Katie Gordon ("the Executives"), committed securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder ("the securities laws"), by engaging in a deceptive scheme to conceal material contingent liabilities relating to the defective composite. After the Fund settled its claim against Gemstar in August 2022, only the claims against the Executives remained.

In September 2022, the Executives each filed separate Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). In her motion to dismiss, Katie Gordon argued that she did not "make" or "disseminate" the Memo's false and misleading statements, and thus could not be held liable as a primary violator under § 10(b) and Rule 10b-5. Katie further asserted that even if she could be held liable under the Fund's scheme liability theory, the Fund failed to allege that it, or its advisors relied on the Memo, or any deceptive conduct, in connection with its decision to purchase shares in Gemstar

In October 2022, the District Court for the District of Fordham issued its opinion denying Katie's motion to dismiss. First, although the court agreed that Katie was not a "maker" of the false and misleading statements or material omissions, it rejected her argument that she could not be primarily liable. Instead, the court found that she had served as the "disseminator" of the allegedly false and misleading statements or material omissions and, therefore, could be subject to primary liability under Rule 10b-5(a) and (c). *See Lorenzo v. Securities & Exchange Commission*, 139 S.Ct. 1094 (2019). Second, the court also rejected Katie's argument that the Fund failed to adequately allege reliance, finding that the Fund primarily alleged omissions and was thus entitled to a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

Appellant Katie Gordon timely filed this appeal, arguing that the District Court erred in finding that she can be held liable under Rule 10b-5(a) and (c) because she did not "disseminate" the Memo herself. Further, Katie argues that the District Court erred in applying the *Affiliated Ute* presumption because the underlying allegations here involve affirmative, not concealed, conduct.

C. Statement of Jurisdiction

The District Court established jurisdiction over this action pursuant to 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa. This Court agrees to entertain this appeal pursuant to 28 U.S.C. § 1291.

D. Standard of Review

We review *de novo* the District Court's denial of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, accepting all allegations in the complaint as true and construing them in the light most favorable to Appellant. *Crystallex Int'l Corp. v. Petroleos De Venezuela, S.A.*, 879 F.3d 79, 83 n.6 (3d Cir. 2018). We must determine whether the facts alleged support a claim that is plausible on its face and allow the court 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)).

II. Primary Liability Under Rule 10b-5

The first issue before the Court is whether Katie is subject to primary liability under Rule 10b-5, for instructing an employee to distribute the misleading Report, even though she neither made nor distributed the Report herself. The District Court found that Katie could be subject to primary liability under Rule 10b-5(a) and (c). This Court agrees.

A. Applicable Law

In the wake of the Great Depression, Congress adopted the Securities Act of 1933 and Securities Exchange Act of 1934, marking the "first experiment in federal regulation of the securities industry." *Securities & Exchange Commission v. Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 198 (1963). Together, these laws sought "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*." *Affiliated Ute*, 406 U.S. at 151 (quoting *Capital Gains Rsch. Bureau*, 375 U.S. at 186).

Consistent with this purpose, § 10(b) of the 1934 Act makes it unlawful to "use or employ . . . any manipulative or deceptive device or contrivance" in violation of the SEC's rules. 15 U.S.C. § 78j(b). SEC Rule 10b-5 describes two broad categories of conduct that give rise to liability: false or misleading statements and omissions, under Rule 10b-5(b), and fraudulent or deceptive schemes and practices, under Rule 10b-5(a) and (c). 17 C.F.R. § 240.10b-5.

The Supreme Court has long recognized the right of private plaintiffs to bring claims against those who violate § 10(b) and Rule 10b-5. *See, e.g., Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13, n.9 (1971); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164 (2008) (recognizing that the § 10(b) private action is a "judicial construct"). However, neither the statute nor the rule expressly creates that right, and the Court has cautioned against "extend[ing] liability beyond the scope of conduct prohibited by the statutory text." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (noting that "the text of the 1934 Act does not itself reach those who aid and abet" violations).

Accordingly, private plaintiffs can only bring suit under § 10(b) and Rule 10b-5 against primary violators—those who "directly or indirectly" engage in the proscribed conduct. *Id.* at 176; *see also* 15 U.S.C. § 78j(b). Meanwhile, only the SEC has authority to pursue secondary violators—those who provide "substantial assistance" to the primary violator but do not engage in violative conduct themselves. 15 U.S.C. § 78t(e).

The Court's efforts to preserve the line between primary and secondary violations under Rule 10b-5 are often further complicated by the fact that the proscriptions vary in specificity, "capture a wide range of conduct," and contain "considerable overlap." *Lorenzo v. Securities & Exchange Commission*, 139 S.Ct. 1094, 1101–02 (2019); *see also Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142–43 (2011) (holding that Rule 10b-5(b)'s proscription against "making" false or misleading statements applies only to the "person or entity with ultimate authority over the statement"); *Affiliated Ute*, 406 U.S. at 152–53 (noting that whereas Rule 10b-5(b) "specifies" the violative conduct, subsections (a) and (c) "are not so restricted").

The Court first drew a line between primary and secondary violators under Rule 10b-5(b) in *Janus*. There, the Court held that a group of private plaintiffs could not bring a Rule 10b-5(b) suit against an investment advisory firm that helped draft misleading statements contained in its client's prospectuses because the advisory firm did not "make" the statements. *Id.* at 137–38. Much like a speechwriter, the advisory firm did not have "ultimate authority" over its client's prospectus and, therefore, could not be held primarily liable for "making" the statements. *Id.* at 142–43 & n.6 (2011) (recognizing the need for a "clean line" between primary and secondary violations of Rule 10b-5(b) after *Central Bank*).

Although *Janus* drew a "clean line" between primary and secondary violations under Rule 10b-5(b), the Court has recognized that an individual who is not liable under Rule 10b5(b), for "making" false or misleading statements can still be held liable for "disseminating" those statements with the intent to defraud, under Rule 10b-5(a) and (c). *Lorenzo* 139 S.Ct. at 1099– 1100.

In *Lorenzo*, the Court held that a group of investors could sue an individual who had sent them emails containing his client's false statements and invited them to follow up with questions while serving as Vice President of an investment banking company. *Id.* The Court reasoned that even if he did not "make" the statements, Lorenzo still violated Rule 10b-5(a) and (c) by "employing devices and schemes to defraud" and "engaging in fraudulent or deceptive acts or practices." 17 C.F.R. § 240.10b-5(a) and (c); *see also Lorenzo*, 139 S.Ct. at 1099–1100. Although the Court cautioned against applying these provisions broadly to those who are only "tangentially involved" in dissemination, Lorenzo's was hardly a "borderline" case. *Lorenzo*, 139 S.Ct. at 1099–1100.

After *Lorenzo*, the Second Circuit sought to clarify the distinction between primary and secondary liability under Rule 10b-5(a) and (c). *See Securities & Exchange Commission v. Rio Tinto plc*, 41 F.4th 47 (2d Cir. 2022). In *Rio Tinto*, the court held that "misstatements and omissions can form part of a scheme liability claim, but an actionable scheme liability claim also requires something *beyond* misstatements and omissions." *Id.* at 49 (citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005)) (emphasis in original). The court distinguished its holding from *Lorenzo*, finding that dissemination is "one example of something extra that makes a violation a scheme." *Id.* at 54.

The District Court in this case adopted the Second Circuit's rule, finding that a defendant must do more than "make" misstatements to give rise to scheme liability. Applying *Rio Tinto* and *Lorenzo*, the District Court found that Katie can be held primarily liable under Rule 10b-5(a) and (c). We agree.

B. ANALYSIS

Katie contends that she cannot be primarily liable under Rule 10b-5. First, she asserts that she cannot be liable under Rule 10b-5(b) because she did not "make" false or misleading statements. *See generally Janus*, 564 U.S. 135 (2011). Second, Katie argues that she cannot be held liable under Rule 10b-5(a) and (c) because she did not "disseminate" the Memo to investors herself. *See generally Lorenzo*, 139 S.Ct. 1094 (2019).

We begin with the text to determine whether Rule 10b-5 reaches Katie's conduct and conclude that even though Katie was not a "maker" under Rule 10b-5(b), she cannot escape primary liability under Rule 10b-5(a) and (c). *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175 (1994) (noting that "the statutory text controls the definition of conduct covered by" Rule 10b-5). Our conclusion is strengthened by purpose and precedent.

1. Rule 10b-5 Reaches Katie's Conduct

We agree that Katie is not a primary violator under Rule 10b-5(b) because she did not "make" the false and misleading statements contained in the Memo. *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Rule 10b-5(b) prohibits "any person, directly or indirectly" from making false or misleading statements. 17 C.F.R. § 240.10b-5(b). Much like a speechwriter, Katie only "edited" the Report when she removed the Trade Letter, at the direction of her employers, before delivering it to Gemstar's experts. *See Janus*, 564 U.S. at 142–43. Her employers, Grace and Danielle, had "ultimate authority" over the Report and Memo, "including [their] content, and whether and how to communicate" the risk of microscopic cracks in Gemstar's composite. *Id.* at 142.

Nonetheless, we find that Katie's conduct plainly falls within Rule 10b-5's "expansive language." *Lorenzo*, 139 S.Ct. at 1101–02. Rule 10b-5(a) reaches anyone who "employ[s] any device, scheme, or artifice to defraud," and Rule 10b-5(c) reaches anyone who "engage[s] in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5. By delivering the Report to Gemstar's experts, Katie participated in a "plan" to conceal the risk of microscopic cracks in Gemstar's composite. *Lorenzo*, 139 S.Ct. at 1102 (quoting *Aaron v. Securities & Exchange Commission*, 446 U.S. 680, 696, n.13 (1980)). And she instructed an associate to disseminate the Memo to potential investors in furtherance of that deceptive "plan." *Id.* Therefore, we find that the statutory text "readily embraces the conduct before us." *Id.*

2. OUR DECISION IS CONSISTENT WITH THE PURPOSES OF THE SECURITIES LAWS

Congress enacted the securities laws "to root out all manner of fraud in the securities industry." *Lorenzo,* 139 S.Ct. at 1104. It adopted broad and overlapping proscriptions, designed "to meet the countless and variable schemes devised by" fraudsters. *Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946); *see also Lorenzo*, 139 S.Ct. at 1102 (recognizing "considerable overlap" among the Rule's subsections). Congress expected the courts to construe those proscriptions "not technically and restrictively, but flexibly to effectuate [the securities laws'] remedial purposes." *Affiliated Ute*, 406 U.S. at 151 (quoting *Capital Gains Rsch. Bureau*, 375 U.S. at 195).

Katie's conduct is plainly fraudulent. As Vice President of Investor Relations, she was ultimately responsible for delivering the Report to Gemstar's experts and disseminating the Memo to investors. By removing the Trade Letter from the Report, delivering the Report to Gemstar's experts, and instructing her associate to disseminate the Memo to investors, Katie was an active participant in the scheme to conceal the risk of microscopic cracks in the defective composite. We do not see how the securities laws can "achieve a high standard of business ethics in the securities industry" if we safeguard "paradigmatic example[s] of securities fraud" from private action. *Lorenzo*, 139 S.Ct at 1103 (quoting *Capital Gains Rsch. Bureau, Inc.*, 375 U.S. at 186).

3. OUR DECISION IS CONSISTENT WITH *JANUS*, *LORENZO*, AND *RIO TINTO*

Even though her conduct falls within the Rule's plain text, Katie argues that the Fund seeks to use the scheme provisions of Rule 10b-5 "as a short cut to circumvent [the Court's] limitations on liability for a secondary actor's involvement in making misleading statements." *Securities & Exchange Commission v. Rio Tinto*, 41 F.4th 47, 55 (2d Cir. 2022) (quoting *Securities & Exchange Commission v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 361 (D.N.J. 2009)). Relying on the Second Circuit's decision in *Rio Tinto*, she urges that our decision will blur the clear line between primary and secondary liability established in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). We disagree and find that our decision is consistent with *Janus*, *Lorenzo*, and *Rio Tinto*.

Janus involved an "independent" investment management firm that helped draft the misstatements contained in another entity's prospectus. 564 U.S. at 145. Based on those facts, the Court rejected an interpretation of Rule 10b-5(b) that would have allowed private plaintiffs to sue an individual who "provides the false or misleading information that a person then puts into the statement." *Id.*

However, in *Lorenzo*, the Court rejected the assertion that subsection (b) "*exclusively* regulates conduct involving false or misleading statements." 139 S.Ct. at 1102–03. Instead, the Court signaled that *Janus* precludes liability only "where an individual neither *makes* nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud." *Lorenzo*, 139 S.Ct. at 1103 (emphasis in original); *see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (recognizing that anyone "may be liable as a primary violator under 10b-5, assuming all of the requirements for primary liability . . . are met").

Unlike the independent advisor in *Janus*, here, Katie did more than help Grace and Danielle draft the Report. She "us[ed] false representations to induce the purchase of securities" by delivering the Report to Gemstar's experts and instructing an associate to disseminate the Memo to potential investors. *Lorenzo*, 139 S.Ct. at 1103. As Vice President of Investor Relations, Katie was charged with coordinating the flow of information to the experts preparing the Memo and transmitting the Memo to potential investors. Ultimately, she was responsible for disseminating the Memo to investors. Her associate merely acted as a "mailroom clerk" when she sent the Memo to potential investors at Katie's instruction. *Id*. Based on these allegations, we can hardly say that Katie was only "tangentially involved" in the dissemination of false and misleading information to investors. *Id.*

Katie's reliance on *Rio Tinto* is similarly unavailing. In *Rio Tinto*, the Second Circuit sought to clarify the distinction between primary and secondary liability discussed in *Janus* and *Lorenzo*. 41 F.4th at 54. The court held that "misstatements and omissions alone are not enough" to give rise to liability under Rule 10b-5(a) and (c), reasoning that any other interpretation would dismantle the distinction set out in *Janus* and preserved in *Lorenzo*. *Id.* However, the court made clear that its holding was "limited to the legal issue." *Id.* at 54–55. The court did not consider whether the defendants had engaged in "something extra" by "corrupt[ing]" an audit and "conceal[ing] information from auditors." With today's holding, we make clear that this type of conduct can give rise to scheme liability under Rule 10b-5(a) and (c).

For these reasons, we affirm the District Court's finding that Katie can be held primarily liable under Rule 10b-5(a) and (c).

III. *AFFILIATED UTE* PRESUMPTION

The second issue before this Court is whether the Fund is entitled to a rebuttable presumption of reliance under *Affiliated Ute*, 406 U.S. 128 (1972), even though it alleges both omissions and affirmative misrepresentations.

The District Court found that the Fund's allegations primarily involve omissions, not affirmative misrepresentations, and held that the *Affiliated Ute* presumption applied. This Court disagrees.

A. APPLICABLE LAW

Although we have found that Katie can be held liable under Rule 10b-5, the Fund still bears the burden of establishing its claim. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157–58 (2008). To prevail, the Fund must show: "(1) a material misrepresentation or omission by the defendant; (2)

scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Id.* at 157 (citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005)). On appeal, Katie argues that the Fund cannot satisfy the reliance requirement.

Reliance is an "essential element" of a private action under § 10(b) and Rule 10b-5, providing the "requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Stoneridge,* 552 U.S. at 159 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988)). Although showing they actually relied on the defendant's deceptive conduct is "[t]he traditional (and most direct) way," for private plaintiffs to establish reliance, it is not always so straightforward. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011). In some cases, requiring affirmative proof of reliance would impose an unreasonable evidentiary burden on private plaintiffs. *See Basic,* 465 U.S. at 245 (noting that presumptions "serve to assist courts in managing circumstances in which direct proof . . . is rendered difficult").

Accordingly, the Court has recognized 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 154 (holding that "positive proof of reliance is not a prerequisite to recovery" if these requirements are met). To determine whether the presumption applies, courts look to the circumstances of the case. *See id.* at 153 (finding the presumption applied "under the circumstances of [the] case, involving primarily a failure to disclose").

In *Affiliated Ute*, the primary allegations involved a concealed scheme to defraud investors. The plaintiffs were members of the Ute Indian Tribe, which had organized its assets into a corporation, issued shares of stock in that corporation to its "mixed blood" members, and designated First Security Bank of Utah as the transfer agent for those shares. *Id.* at 133–39. Unbeknownst to the "mixed blood" shareholders, two employees at the bank had developed a secondary market whereby non-tribe members purchased the shares at higher prices. *Id.* at 145–48. Although the defendants had made affirmative misstatements of material fact by telling the "mixed blood" shareholders that their shares were being sold at the prevailing market price, the Court nonetheless found that the case primarily involved omissions relating to the secondary market and concluded that the shareholders were entitled to a rebuttable presumption of reliance. *Id.* at 153–54.

Since *Affiliated Ute*, courts have struggled to define the presumption's applicability in "mixed" cases, where the plaintiff alleges both material misrepresentations and omissions. However, the Circuits have cautioned against a reading of *Affiliated Ute* that would blur the distinction between omissions and affirmative misstatements. *Binder v. Gillespi*e, 184 F.3d 1059, 1064 (9th Cir. 1999) (noting that most Circuits have confined *Affiliated Ute* to cases that primarily allege omissions).

Even where the "omission looms large" over a "mixed" case, the Ninth and Second Circuits have held that the presumption cannot apply if the omission is ultimately just "the inverse" of the alleged misstatements. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1199, 1206, 1208 (9th Cir. 2021); *see also Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017) (holding that the presumption does not apply in cases involving "earlier misrepresentations made more misleading by subsequent omissions," "half-truths," or "misstatements whose only omission is the truth that the statement misrepresents").

Take *In re Volkswagen*, for example. The plaintiffs alleged that Volkswagen failed to disclose that it was secretly installing devices designed to conceal high emissions and cheat emissions tests for its new line of clean diesel cars and made false and misleading statements in its Offering Memo as to that information. 2 F.4th at 1206–08. Reasoning that the alleged omissions were "simply the inverse" of the affirmative misrepresentations made in Volkswagen's Offering Memo, the court held that the *Affiliated Ute* presumption did not apply. *Id.* at 1208.

Moreover, even if the case primarily involves omissions, the *Affiliated Ute* presumption only applies where the defendant owed the plaintiff a duty to disclose material information. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlantic*, 552 U.S. 148 (2008) (finding that the presumption did not apply because the defendants were under no obligation to disclose their participation in secret transactions); *Regents of University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007) (finding that the presumption did not apply to banks that entered into partnerships that enabled Enron to commit fraud).

The District Court in this case found that the Fund was entitled to the *Affiliated Ute* presumption, reasoning that Katie's position as Vice President of Investor Relations gave rise to a special relationship with Gemstar's potential investors, and the Fund relied on Katie's transmission of the Memo when they purchased their shares in Gemstar. This Court disagrees.

B. Analysis

Although "omission looms large" over this "mixed" case, we find that the underlying allegations primarily involve affirmative conduct, not omissions. *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2 F.4th 1199, 1206, 1208 (9th Cir. 2021). Because this is not an omissions case, we find that the Fund is not entitled to a rebuttable presumption of reliance under *Affiliated Ute.*

1. This is Not an Omissions Case

We begin with the circumstances of this case. *See Affiliated Ute,* 406 U.S. at 153 (finding the presumption applied "under the circumstances of [the] case, involving primarily a failure to disclose"). The Fund argues that like the defendants in *Affiliated Ute*, Katie participated in a secret scheme.

However, Katie's alleged conduct is hardly comparable to the concealed scheme at issue in *Affiliated Ute.* Katie allegedly participated in a plan to conceal the defective composite by removing the Trade Letter from the Report before delivering it to Gemstar's experts. The Fund also alleges that Katie instructed an associate to distribute the Memo, which contained false and misleading statements, directly to investors.

The conduct in this case is distinct from concealed fraud. *See In re Volkswagen*, 2 F.4th at 1205 (holding that "the mere fact of concealment cannot transform affirmative conduct into omissions"). In *Affiliated Ute*, the primary allegations involved a secret scheme to create a secondary market for stock. 406 U.S. at 153. Although the defendants had made affirmative misstatements of material fact by telling the "mixed blood" shareholders that their shares were being sold at the prevailing market price, the Court nonetheless found that the case primarily involved omissions relating to the secondary market and concluded that the shareholders were entitled to a rebuttable presumption of reliance. *Id.* at 153–54.

Unlike *Affiliated Ute*, here, the underlying allegations are "based as much on what is *there* as what is purportedly missing." *In re Volkswagen*, 2 F.4th at 1208 (quoting *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004)). Although she did not "make" the Memo, Katie engaged in expressly affirmative conduct by instructing an associate to distribute its misleading statements. The fact that she did not disclose information relating to the defective composite while engaging in that conduct cannot change the fact that it was expressly affirmative. Because her omission merely "exacerbated the misleading nature" of her conduct, we cannot find that this is an omissions case. *Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017) (quoting *Starr ex rel. Estate of Sampson v. Georgeson Shareholder, Inc.*, 412 F.3d 103, 109 n.5 (2d Cir. 2005)).

2. The Fund Offers No Justification for Extending *Affiliated Ute* to Katie's Alleged Affirmative Conduct

We see no reason to extend *Affiliated Ute* to the circumstances of this case, where it could realistically be shown that the Fund relied on Katie's affirmative conduct when it purchased shares in Gemstar. Although the *Affiliated Ute* defendants also made affirmative material misstatements about the stock's market price, it would have been "unnecessarily unrealistic" to require the plaintiffs to show "how [they] would have acted" if they had known about the secondary market for their stock. *Basic*, 485 U.S. at 245 (citing *Affiliated Ute*, 406 U.S. at 153–54); *see also In re Volkswagen*, 2 F.4th at 1204 (holding that the presumption only applies to cases that "primarily allege omissions and present plaintiffs with the difficult task of proving a speculative negative"). The Fund "does not face that burden here" because Katie's alleged conduct is expressly affirmative and, unlike the *Affiliated Ute* plaintiffs, the Fund was aware that Katie had control over the Memo's dissemination. *In re Volkswagen*, 2 F.4th at 1209.

Although her conduct "necessarily involve[d] concealing the truth," we find no reason to believe that the Fund cannot possibly show that it relied on Katie's affirmative conduct. *In re Volkswagen*, 2 F.4th at 1205. The Fund either relied on Katie's affirmative conduct as Vice President of Investor Relations, or it did not. *Id.* at 1208. We do not believe requiring the Fund to show positive proof of reliance would impose an unrealistic burden, given that the Fund was aware of Katie's role in the private placement.

IV. Conclusion

For the foregoing reasons, we affirm the District Court's holding that Katie can be held primarily liable under Rule 10b-5(a) and (c) and reverse the District Court's finding that the Fund is entitled to a rebuttable presumption of reliance under *Affiliated Ute*. Because the Fund has not provided positive proof of reliance, we grant Katie's 12(b)(6) motion for failure to state a claim upon which relief can be granted.

KASTENBAUM, *Circuit Judge*, concurring in part, and dissenting in part:

Section 10(b) and Rule 10b-5 "capture a wide range of conduct," which the Court has cautioned "may present difficult problems of scope in borderline cases." *Lorenzo v. Securities & Exchange Commission*, 139 S.Ct. 1094, 1101 (2019). In Part II of the opinion, the majority holds that there is nothing borderline about a Vice President who instructs an employee to distribute false and misleading statements to potential investors. Because the majority's holding disregards "[p]urpose, precedent, and circumstance," I respectfully dissent. *Id.*

I would find that Katie cannot be held primarily liable under Rule 10b-5 and grant her motion to dismiss.

I. PRIMARY LIABILITY UNDER RULE 10B-5

Fraudulent conduct comes in a variety of shapes and sizes, a fact Congress and the SEC recognized when adopting the broad language contained in § 10(b) and Rule 10b-5. *Securities & Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946) (noting that the securities laws afford flexibility "to meet the countless and variable schemes" devised by fraudsters). Even though Congress wanted to reach a broad range of conduct, it did not give private litigants authority to prosecute everyone who engages in that conduct. Instead, Congress drew a line between primary violators and aiders and abettors, granting only the SEC authority to go after the latter. 15 U.S.C. § 78t(e).

The Court has been careful to maintain this distinction. Since "[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text," the Court has cautioned against its expansion. *Stoneridge Inv. Partners, LLC v. ScientificAtlantic*, 552 U.S. 148, 164–65 (2008). In *Stoneridge*, the Court rejected an interpretation of the securities laws that would make any aider and abettor primarily liable "if they committed a deceptive act in the process of providing assistance." *Id.* at 162. The Court reasoned that it was for Congress, not the courts, to decide whether to extend the private cause of action to that class of defendants. *Id.* at 165. Given that Congress had explicitly reserved prosecution of aiders and abettors for the SEC," the Court held that the implied private right under § 10(b) does not extend to those who provide substantial assistance to primary violators of the securities laws. *Id.* at 158.

Recognizing this distinction, the Court has interpreted Rule 10b-5 to reach only primary violators. In *Janus,* the Court limited primary liability under Rule 10b-5(b) to the "maker" of a false or misleading statement. *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. 135, 142–43 (2011). In *Lorenzo,* the Court made clear that *Janus* "remain[s] relevant (and preclude[s] liability) where an individual neither *makes* nor *disseminates* false information." *Lorenzo v. Securities & Exchange Commission*, 139 S.Ct. 1094, 1103 (2019). Though Katie is neither a "maker" under *Janus*, nor a "disseminator" under *Lorenzo*, the majority holds that she is primarily liable under Rule 10b-5(a) and (c). In doing so, the majority "undermine[s] Congress' determination that this class of defendants should be pursued by the SEC." *Stoneridge,* 552 U.S. at 162.

Although Katie assisted in the Memo's preparation by removing the memorandum from the Engineer's report, she did not "make" the Memo under Rule 10b-5(b). Katie did not have "ultimate authority" over the Memo. *Janus*, 564 U.S. at 143. She did not control the Memo's content, whether to communicate it, or how to communicate it. *See id*. at 143–44. Ultimately, it was Gemstar, through Grace and Danielle, who made the misleading statements in the Memo. *See id.* at 142–43 (noting that "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by . . . the party to whom it is attributed). Therefore, I agree with the majority's finding that Katie cannot be primarily liable as a "maker" under Rule 10b-5(b).

Contrary to the majority's opinion, Katie is also not a "disseminator." The majority improperly relies on the Court's holding in *Lorenzo*, that "disseminating false or misleading information to prospective investors with the intent to defraud" is a primary violation under Rule 10b-5(a) and (c). 139 S.Ct. at 1101. In his role as Vice President of an investment banking company, Lorenzo sent false statements directly to investors and invited them to follow up with questions. *Id.* But their roles as Vice Presidents might be the only thing Katie and Lorenzo have in common. Katie did not disseminate false or misleading information herself. Instead, she instructed an employee to do so. Moreover, someone, presumably the employee, prepared a cover letter and attached it to the Memo. That cover letter, delivered under Gemstar's cover, did not identify Katie or invite investors to inquire about the Memo's contents at all. Under these circumstances, I would find that, unlike Lorenzo, Katie is not a "disseminator," and thus, cannot be primarily liable under Rule 10b-5(a) and (c).

Although I do not reach the issue of reliance, I find the Court's decision in *Stoneridge Inv. Partners, LLC v. ScientificAtlantic*, 552 U.S. 148 (2008), further supports a finding that Katie is a secondary violator within the meaning of the statute. In *Stoneridge*, the Court held that a group of investors could not sue a corporation's customers and suppliers for engaging in transactions that enabled the company to mislead auditors and issue misleading financial statements. 552 U.S. at 152–53. The Court found that the deceptive transactions, "which were not disclosed to the investing public, [were] too remote to satisfy the requirement of reliance," reasoning that nothing the defendants did made it "necessary or inevitable" for the corporation to violate the Rule. *Id.* at 162.

Like the transactions in *Stoneridge*, here, there is nothing in the record to suggest that Katie's conduct was known to investors at the time of the private placement, or that her conduct was "necessary" for Gemstar to conceal the risk of microscopic cracks in Gemstar's composite. Katie assisted in that scheme by removing the memorandum from the Engineer's Report, delivering the Report to Gemstar's experts, and instructing an employee to disseminate the Memo to potential investors. However, it was ultimately Gemstar, through Grace and Danielle, who misled its experts and disseminated misleading statements. *See Lorenzo*, 139 S.Ct. at 1104 (distinguishing "the direct transmission of false statements to prospective investors intended to induce reliance" from the concealed transactions at issue in *Stoneridge*)

For these reasons, I would find that Katie cannot be primarily liable under Rule 10b-5 and grant her motion to dismiss.

SEO, *Circuit Judge*, concurring in part, and dissenting in part:

I agree with the majority's holding that Katie "employ[ed]" a "scheme . . . to defraud" and "engage[d] in a[n] act" that "operate[d] . . . as a fraud or deceit" by instructing an employee to distribute the misleading Memo to Gemstar's investors. 17 C.F.R. § 240.10b-5; 15 U.S.C. § 78j(b). However, I write separately to dissent from the majority's holding in Part III of the opinion.

I would find that the Fund is entitled to a rebuttable presumption of reliance under *Affiliated Ute* because this is an omissions case and Katie owed the Fund a duty to disclose information relating to the defective composite.

I. *AFFILIATED UTE* PRESUMPTION

Like the majority, I begin by comparing the allegations in *Affiliated Ute* to the allegations in this case. However, I take a much more holistic view of the case than the majority.

In *Affiliated Ute,* 406 U.S. 128 (1972), the Court held that plaintiffs in cases "involving primarily a failure to disclose" do not have to show positive proof of reliance to establish the requisite element of reliance. Although the defendant bank employees had made affirmative misstatements of material fact by telling the "mixed blood" shareholders that their shares were being sold at the prevailing market price, the Court nonetheless found that the case primarily involved omissions relating to the secondary market. Reasoning that it would be impossible to prove reliance in omissions cases, the Court concluded that the shareholders were entitled to a rebuttable presumption of reliance. *Id.* at 153–54.

The majority clumsily attempts to characterize plainly deceptive conduct in this case as primarily affirmative conduct barring application of the *Affiliated Ute* presumption. However, much like the *Affiliated Ute* plaintiffs, the Fund primarily alleges that Katie engaged in a scheme to conceal the Letter and the defective composite. Specifically, the Fund alleges that Katie, like the defendants in *Affiliated Ute*, "engaged in more than ministerial functions" *Id.* at 154. She delivered the misleading Report to investors and instructed an associate to distribute it. Her alleged conduct was deceptive and justifies application of the *Affiliated Ute* presumption.

Katie also owed the Fund a duty to disclose information relating to the defective composite. A duty to disclose arises out of a fiduciary, or other special relationship of trust and confidence. *See Chiarella v. United States*, 445 U.S. 222, 228–29 (1980). Katie served as Vice President of Investor Relations at the time of the private placement and was responsible for managing the flow of information between Gemstar's experts, and to investors. Katie "may not stand mute" while she facilitates Gemstar's transaction, particularly when the alternative risks lives, as it did in this case. *Affiliated Ute*, 406 U.S. at 154.

Contrary to the majority's view, it is both unnecessary and unrealistic to require the Fund provide positive proof of reliance on Katie's deceptive conduct. The Fund had no way of knowing about the defective composite or that Katie delivered the misleading Report to Gemstar's experts. Moreover, even though the Fund was aware of her role in the private placement, it had no way of knowing that Katie instructed an employee to distribute the Memo to investors. She was not identified in the Memo's cover letter, so it would likely be impossible for the Fund to provide proof of reliance. Thus, I would find that the *Affiliated Ute* presumption is necessary in cases, like this one, to safeguard against onerous evidentiary burdens.

(U.S. SUPREME COURT ORDER LIST: 589 U.S.)

MONDAY, JANUARY 9, 2023

CERTIORARI GRANTED

No. 22-123: Fordham Public Employees Investment Fund v. Gordon, Katie, et al.

The petition for a writ of certiorari is granted. This Court may consider the following questions raised by the parties:

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

Dated: January 9, 2023

/s/ Melanie Gargano

MELANIE GARGANO, Clerk