UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-0457 Caption [use short title]

Motion for: Leave to file amicus brief In re: FACEBOOK, INC., IPO Sec

Set forth below precise, complete statement of relief sought:

Chamber of Commerce of the United States of America seeks leave to file a brief as amicus curiae in support of Defendants-Appellants NASDAQ OMX Group, Inc., et al.

MOVING PARTY: Chamber of Commerce of the United States of America

☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: First New York Securities L.L.C., T3 Trading Group, LLC, Avatar Securities, LLC

MOVING ATTORNEY: Steven G. Bradbury

Dechert LLP
1900 K Street, NW, Washington, D.C. 20006
(202) 261-3333
steven.bradbury@dechert.com

OPPOSING ATTORNEY: Vincent R. Cappucci

[name of attorney, with firm, address, phone number and e-mail]

Entwistle & Cappucci LLP
280 Park Avenue, 26th Flr West, New York, NY 10017
(212) 894-7200
vcappucci@Entwistle-Law.com

Court-Judge/Agency appealed from: Hon. Robert W. Sweet, U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Steven G. Bradbury **Date:** 6/6/2014

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE FACEBOOK, INC., IPO SECURITIES AND DERIVATIVE LITIGATION	:	
FIRST NEW YORK SECURITIES L.L.C., et al.,	:	Docket No. 14-0457
Plaintiffs-Appellees,	:	
- against -	:	
NASDAQ OMX GROUP, INC., et al.,	:	
Defendants-Appellants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS NASDAQ OMX GROUP, INC., *ET AL.*

Pursuant to Federal Rules of Appellate Procedure 27 and 29(b) and Second Circuit Local Rule 27.1(a), the Chamber of Commerce of the United States of America (the "Chamber") hereby moves for leave to file a brief as *amicus curiae* in support of Defendants-Appellants NASDAQ OMX Group, Inc. *et al.* ("Defendants-Appellants"). The proposed brief accompanies this motion. This motion and brief are timely filed within seven days "after the principal brief of the party being supported [was] filed," in accordance with Federal Rule of Appellate

Procedure 29(e). Defendants-Appellants consent to the filing of this brief; Plaintiffs-Appellees do not consent. *See* Declaration of Steven G. Bradbury.

The Chamber has a significant interest in the interpretation and enforcement of the federal securities laws. The Chamber is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is representing its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates as *amicus curiae* in cases that raise issues of concern to the nation's business community, including litigation concerning securities class actions. Recently, the Chamber submitted an *amicus* brief in the Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.* (Docket No. 13-317), a case addressing the continuing validity of *Basic Inc. v. Levinson*'s fraud-on-the-market presumption of reliance applicable to private securities fraud claims based on alleged misrepresentations.[1]

[1] The Chamber also filed *amicus* briefs in other major securities fraud cases such as *Amgen Inc. v. Conn. Ret. Plans & Trust Funds* (S. Ct. Docket No. 11-1085), *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* (S. Ct. Docket No. 06-43), and *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG* (2d Cir. Docket No. 12-4355).

The Chamber has a keen interest in this appeal because of the significant burden imposed on its members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of all sizes. Recognizing the economic drag engendered by frivolous securities fraud litigation, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, "to curb abusive securities-fraud lawsuits." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013). The requirement that private plaintiffs plead and prove reliance as an essential element of causation in securities fraud cases is an important check on the scope and impact of federal securities litigation for the Chamber's members. The Chamber is concerned about the potential weakening of this check if the District Court's interpretation of *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), is allowed to stand.

Accordingly, the Chamber seeks to participate in this appeal to comment on the proper, carefully limited application of the presumption of reliance applicable to claims of material omissions under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). As an organization that advocates for the interests of thousands of businesses subject to potential private securities claims, the Chamber is well suited to provide a cross-industry perspective on the long-term implications of allowing Plaintiffs-Apellees to invoke the *Affiliated Ute* presumption of reliance

in the present situation. The Chamber's brief delves into the jurisprudence interpreting *Affiliated Ute*'s presumption of reliance and the rationale for that presumption, supporting Defendants-Appellants' argument that the presumption does not apply in the present matter.

This Court has previously acknowledged the Chamber's helpful assistance as *amicus curiae*. *See Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21, 27 (2d Cir. 2001) (noting that the Court "received five helpful *amicus* briefs," one of which was filed by the Chamber); *see also In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 149 (2d Cir. 2010) (citing the Chamber's *amicus* brief); *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 93 (2d Cir. 2003) (acknowledging the Chamber's *amicus* brief); *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001) (describing the Chamber's position as expressed in its *amicus* brief.). Given this Court's past acknowledgement of the helpful perspective that the Chamber can bring to business litigation, the Chamber respectfully requests that the Court allow it to offer such assistance in the present matter.

WHEREFORE, the Chamber respectfully requests that this Court grant its motion and permit the filing of the accompanying *amicus curiae* brief.

Dated: June 6, 2014
Washington, DC

Respectfully submitted,

/s/ Steven G. Bradbury

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE FACEBOOK, INC., IPO SECURITIES AND DERIVATIVE LITIGATION	:	
FIRST NEW YORK SECURITIES L.L.C., et al.,	:	No. 14-0457
Plaintiffs-Appellees,	:	
- against -	:	**DECLARATION IN SUPPORT**
NASDAQ OMX GROUP, INC., et al.,	:	
Defendants-Appellants.	:	

I, **STEVEN G. BRADBURY**, do hereby declare as follows:

1. I am a partner at Dechert LLP, a member of the bar of this Court, and counsel for the Chamber of Commerce of the United States of America (the "Chamber"). Pursuant to Federal Rule of Appellate Procedure 29(b), the Chamber moves for leave to file the attached proposed brief as *amicus curiae* in support of Defendants-Appellants NASDAQ OMX Group, Inc. I submit this declaration in support of the Chamber's motion.

2. On June 4, 2014, I wrote an e-mail to Defendants-Appellants requesting their consent to the Chamber's appearance as *amicus curiae* in the

above-referenced matter. Defendants-Appellants consented via email on the same day.

3. On June 4, 2014, I wrote an e-mail to Plaintiffs-Appellees requesting their consent to the Chamber's appearance as *amicus curiae* in the above-referenced matter. Plaintiffs-Appellees responded via e-mail the same day stating that they did not consent.

4. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Dated this 6th day of June, 2014

/s/ Steven G. Bradbury
Steven G. Bradbury

Proposed Brief for Chamber of Commerce of the United States as *Amicus Curiae*

14-0457-cv

United States Court of Appeals

for the

Second Circuit

In re: FACEBOOK, INC., IPO Sec

AVATAR SECURITIES, LLC, MEREDITH BAILEY, on behalf of themselves and all others similarly situated, DMITRI BOUGAKOV, on behalf of themselves and all others similarly situated, RYAN CEFALU, on behalf of themselves and all others similarly situated, LORRAIN CHIN, FIRST NEW YORK SECURITIES L.L.C., ATISH GANDHI, on behalf of themselves and all others similarly situated, PHILLIP GOLDBERG, on behalf of themselves and all others similarly

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS NASDAQ OMX GROUP, INC., *ET AL.*

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Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

situated, ERIC HAMRICK, on behalf of themselves and all others similarly situated, STEVE JARVIS, JOE JOHNSON, on behalf of themselves and all others similarly situated, NUHKET KAYAHAN, on behalf of themselves and all others similarly situated, DAVID KENTON, on behalf of themselves and all others similarly situated, DENNIS KUHN, on behalf of themselves and all others similarly situated, BENJAMIN LEVINE, on behalf of themselves and all others similarly situated, KATERHINE LOIACONO, on behalf of themselves and all others similarly situated, CRYSTAL MCMAHON, on behalf of themselves and all others similarly situated, GEORGE MICHALITSIANOS, on behalf of themselves and all others similarly situated, RANDY TERESA MIELKE, on behalf of themselves and all others similarly situated, JACINTO RIVERA, on behalf of themselves and all others similarly situated, FAISAL SAMI, on behalf of themselves and all others similarly situated, SANJEEV SHARMA, on behalf of themselves and all others similarly situated, COLIN SUZMAN, on behalf of themselves and all others similarly situated, T3 TRADING GROUP, LLC, VIJAY AKKARAJU, ALEXIS ALEXANDER, as custodian for Chloe Sophie Alexander, BRIAN ROFFE PROFIT SHARING PLAN, Individually and on behalf of all others similarly situated, JOSE GALVAN, MARY GALVAN, ROBERT HERPST, Individually, on behalf of all others similarly situated, SANJAY ISRANI, on behalf of themselves and all others similarly situated, KBC ASSET MANAGEMENT NV, AND THE EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS (Collectively, the INSTITUTIONAL INVESTORS), DOUGLAS M. LIGHTMAN, Individually and on behalf of all others similarly situated, DENNIS PALKON, Individually and on behalf of all others similarly situated, RICK POND, JACOB SALZMANN, Individually and on behalf of all others similarly situated, MICHAEL SPATZ, MAREN TWINING, Individually and on behalf of all others similarly situated, GOLDRICH COUSINS P.C. 401(K) PROFIT SHARING PLAN & TRUST, IRVING S. BRAUN, Individually, EDWARD CHILDS, Derivately on Behalf of Himself and All Others Similarly Situated, KATHY REICHENBAUM, Individually and on behalf of all others similarly situated, JUN YAN, on behalf of herself and all others similarly situated, ELBITA ALFONSO, VICKY JONES, PHYLLIS PETERSON, JERRY RAYBORN, on behalf of themselves and all others similarly situated, EDWARD VERNOFF, JUSTIN F. LAZARD, on behalf of himself and all others similarly situated, SYLVIA GREGORCYZK, on behalf of herself and all others similarly situated, PETER BRINCKERHOFF, GARRETT GARRISON, DAVID GOLDBER, individually and on behalf of all others similarly situated, KEVIN HYMS, individually and on behalf of all others similarly situated, RICHARD P. EANNARINO, Individually and on behalf of all others similarly situated, PETER MAMULA, Individually and on behalf of all others similarly situated, KHODAYAR AMIN, on behalf of himself and all others similarly situated, ELLIOT LEITNER, individually and on behalf of all others similarly situated, BARBARA STEINMAN, on behalf of herself and all others similarly situated, HOWARD SAVITT, on behalf of himself and all others similarly situated, CHAD RODERICK, EUGENE STRICKER, individually and on behalf of all others similarly situated, STEVE SEXTON, Individually and on behalf of all others similarly situated, KEITH WISE, Individually and on behalf of all others similarly situated, JONATHAN R. SIMON, JAMES CHANG, individually and on behalf of all others similarly

situated, SAMEER ANSARI, individually and on behalf of all others similarly situated, DARRYL LAZAR, individually and on behalf of all others similarly situated, MICHAEL LIEBER, individually and on behalf of other members of the general public similarly situated, THOMA J. AHRENDTSEN, AARON M. LEVINE, Individually, and on behalf of all others similarly situated, KAREN CUKER, individually and on behalf of all others similarly situated, BRIAN GRALNICK, individually and on behalf of all others similarly situated, JENNIFER STOKES, Individually and On Behalf of All Others Similarly Situated, WILLIAM COLE, Derivatively on Behalf of Facebook, Inc., VERNON R. DEMOIS, JR., Individually and On Behalf of All Others Similarly Situated, HAL HUBUSCHMAN, Derivately on Behalf of Facebook, Inc., EDWARD SHIERRY, Individually and On Behalf of All Others Similarly Situated, JANIS FLEMING, GAYE JONES, Derivatively on Behalf of Facebook Inc., HOLLY MCCONNAUGHEY, Derivatively on Behalf of Facebook Inc., ROBERT LOWINGER, STEVE GRIFFIS,

Plaintiff-Appellees,

THOMAS E. NELSON, individually and behalf of all others similarly situated, ROCK SOUTHWARD, Derivatively on Behalf of Himself & All Others Similarly Situated, LIDIA LEVY, on behalf of herself and all others similarly situated, JOHN GREGORY, on behalf of himself and all other similarly situated,

Plaintiffs,

– v. –

THE NASDAQ STOCK MARKET L.L.C., a Foreign Limited Liability Company, NASDAQ OMX GROUP, INC., ROBERT GREIFELD, ANNA M. EWING,

Defendants-Appellants,

MARC L. ANDREESSEN, BARCLAYS CAPITAL INC., ERSKINE B. BOWLES, JAMES W. BREYER, DAVID A. EBERSMAN, FACEBOOK, INC., a Delaware corporation, GOLDMAN, SACHS & CO., DONALD E. GRAHAM, REED HASTINGS, J.P. MORGAN SECURIRIES LLC., MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO, INC., DAVID SPILLANE, PETER A. THIEL, MARK ZUCKERBERG, ALLEN & COMPANY LLC, BMO CAPITAL MARKETS CORP., BLAYLOCK ROBERT VAN LLC, C.L. KING & ASSOCIATES, INC., CABRERA CAPITAL MARKETS, LLC, CASTLEOAK SECURITIES, L.P., CITIGROUP GLOBAL MARKET, INC., COWEN AND COMPANY, LLC, CREDIT SUISSE SECURITES (USA) LLC, DEUTSCHE BANK SECURITES, INC., E TRADE SECURITIES LLC, ITAU BBA USA SECURITIES, INC., LAZARD CAPITAL MARKETS LLC, LEBENTHAL & CO., LLC, LOOP CAPITAL MARKETS LLC, M.R. BEAL & COMPANY, MACQUARIE CAPITAL (USA) INC., MORGAN STANLEY & CO. LLC, MURIEL SIEBERT & CO., INC., OPPENHEIMER & CO. INC., PACIFIC CREST SECURITIES LLC, PIPER JAFFRAY & CO., RBC CAPITAL MARKETS LLC, RAYMOND JAMES & ASSOCIATES, INC., SAMUEL A. RAMIREZ & COMPANY, INC., SHERYL K. SANDBERG, STIFEL, NICOLAUS & COMPANY, INC., THE WILLIAMS CAPITAL GROUP, L.P., WELLS FARGO SECURITIES, LLC, WILLIAM BLAIR & COMPANY L.L.C., GOLDMAN SACHS & CO., NASDAQOMX

GROUP, INC., LAWRENCE CORNECK, Individually and on behalf of all others similarly situated, JILL D. SIMON, CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH, PIERCE FENNER & SMITH INCORPORATED, ALLEN & FACEBOOK (sic) LLC, WILLIAM BLAIR & FACEBOOK (sic) LLC, M.R. BEAL & FACEBOOK (sic), COWEN AND FACEBOOK (sic) LLC, STIFEL NICHOLAS & FACEBOOK (sic) INCORPORATED, SAMUEL A. RAMIREZ & FACEBOOK (sic) INC, KEVIN HICKS, individually and on behalf of all others similarly situated, LINH LUU, individually and on behalf of all others similarly situated, HARVEY LAPIN, Individually and On Behalf of All Others Similarly Situated, KING & ASSOCIATES, INC., DAVID E. (SIC) EBERSMAN, NICK E. TRAN, NASDAQ STOCK MARKET, INC., UMA M. SWAMINATHAN, CIPORA HERMAN, J.P. MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, undersigned counsel states that the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States.[1] An important function of the Chamber is representing its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates as *amicus curiae* in cases that raise issues of concern to the nation's business community, including litigation concerning securities class actions. Recently, the Chamber submitted an *amicus* brief in the Supreme Court in *Halliburton Co. v. Erica P. John Fund, Inc.* (Docket No. 13-317), a case addressing the continuing validity of the fraud-on-the-market presumption of reliance applicable to private securities fraud claims based on alleged misrepresentations under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).[2]

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[1] Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored or contributed money to fund this brief in whole or in part, and no person other than *amicus curiae*, its members, and its counsel contributed money toward the preparation or submission of this brief.

[2] The Chamber also filed *amicus* briefs in other major securities fraud cases such as *Amgen Inc. v. Conn. Ret. Plans & Trust Funds* (S. Ct. Docket No. 11-1085), *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.* (S. Ct. Docket No.

The Chamber has a keen interest in this appeal because of the significant burden imposed on its members by private securities class action litigation, which adversely affects access to capital markets and raises costs for American businesses of all sizes. Recognizing the economic drag engendered by frivolous securities fraud litigation, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, "to curb abusive securities-fraud lawsuits." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1201 (2013). The requirement that private plaintiffs plead and prove reliance as an essential element of causation in securities fraud cases is an important check on the scope and impact of federal securities litigation for the Chamber's members. The Chamber is concerned about the potential weakening of this check if the District Court's interpretation of *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), is allowed to stand.

Accordingly, the Chamber seeks to participate in this appeal to comment on the proper and carefully limited application of the presumption of reliance applicable to claims of material omissions under *Affiliated Ute*.

06-43), and *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG* (2d Cir. Docket No. 12-4355).

SUMMARY OF ARGUMENT

The presumption of reliance under *Affiliated Ute* is a narrow and highly circumscribed exception to the fundamental requirement that plaintiffs must plead fraud, including the traditional elements of reliance and causation, in order to state a claim under Rule 10b-5. The Supreme Court's holding rests firmly on two rationales, neither of which applies here. First, the *Affiliated Ute* presumption reflects the concern that pleading reliance would be practically impossible where the defendant is not alleged to have made any misstatement to which the plaintiffs can point. Second, *Affiliated Ute* is applicable only where a defendant owes an affirmative duty of disclosure to the plaintiff based on the relationship between the parties—a duty to disclose that would apply even in the absence of any prior statement that is alleged to be false or misleading.

The District Court's extension of the *Affiliated Ute* presumption lacks any legitimate basis and, if upheld by this Court, would undermine the fundamental elements of a claim of securities fraud under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. For that reason, this Court should reverse the District Court's application of the presumption of reliance in this case.

ARGUMENT

The District Court ruled that Plaintiffs were entitled to a presumption of reliance because the NASDAQ Defendants allegedly failed to correct previous, pre-Class Period statements about the technological performance and capabilities of the NASDAQ systems and operations. The court so held even though the Plaintiffs failed to plead that they had read, let alone relied on, those statements. If this Court reaches the reliance issue, it should reverse the District Court's erroneous expansion of the narrow presumption set forth by the Supreme Court in *Affiliated Ute* and clarified by this Court in *Wilson v. Comtech Telecommunications Corp.*, 648 F.2d 88 (2d Cir. 1981), and elsewhere.

This Court should confirm that plaintiffs may not overcome their failure to plead direct and personal reliance on defendants' alleged misstatements by recasting defendants' statements as implied omissions and invoking the presumption of reliance recognized in *Affiliated Ute*. Rather, consistent with the purposes of the federal securities laws and the implied private right of action for securities fraud, *Affiliated Ute* provides for a presumption of reliance only where (1) the alleged omission is independent of the original alleged misstatement, and (2) the defendant owes a special duty to the plaintiff to disclose the allegedly omitted information. Here, neither of these requirements is satisfied. Upholding

the District Court's contrary ruling would thwart those fundamental purposes and the established requirements for maintaining private securities fraud claims.

I. THE *AFFILIATED UTE* PRESUMPTION OF RELIANCE DOES NOT APPLY TO THE SECURITIES CLAIMS AGAINST NASDAQ.

A. *Affiliated Ute*'s Presumption Must Not Be Applied to Undermine the Essential Element of Reliance in Securities Fraud Claims.

In approaching any proposed application of *Affiliated Ute*, courts must ensure that the use of the presumption does not displace the essential requirement that a plaintiff must prove reliance as an element of causation to support a claim securities fraud. Because of the fundamental tension between *any* evidentiary presumption of reliance and the essential requirement that every securities fraud plaintiff must prove actual reliance, the presumption is justified only where "reliance as a practical matter is impossible to prove." *Wilson*, 648 F.2d at 93 (quoting *Titan Group, Inc. v. Faggen*, 513 F.2d 234, 238-39 (2d Cir. 1975)).

Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), was "enacted for the purpose of avoiding frauds." *Affiliated Ute*, 406 U.S. at 151. Consistent with that purpose, Securities and Exchange Commission ("SEC") Rule 10b-5 implements section 10(b) by prohibiting market participants from using "any device, scheme, or artifice to defraud," making any untrue statement or omission of material fact, or engaging in any other "act, practice, or course of business" that operates "as a fraud or deceit upon any person" in connection with the purchase or

sale of a security. 17 C.F.R. § 240.10b-5. As is readily apparent from its terms, Rule 10b-5 was promulgated to protect investors against "fraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-13 n.32 (1976) (citing SEC, Securities Exchange Act Release No. 3230 (May 21, 1942); 1942 Annual Report of the SEC at 10).

Accordingly, when the Supreme Court endorsed an implied private right of action for violations of section 10(b) and Rule 10b-5 in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), the Court drew upon the common law action for civil fraud in defining the elements of the implied federal cause of action for securities fraud. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005); 4 Louis Loss, *et al.*, *Securities Regulation* § 11.C.4(d) (2013); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983) (adhering to the common law elements of fraud for claims under section 10(b) and Rule 10b-5 while approving variation from the common law standard of proof).

The "hornbook elements" of common law fraud are (1) that the defendant made a false representation of material fact, (2) that the defendant made the false statement with "scienter" (that is, knowing that the statement was false and intending to induce the plaintiff to rely on the statement), (3) that the plaintiff did in fact justifiably rely on the defendant's false statement, and (4) that the plaintiff suffered damages as a result of reliance on the false statement. 2 Louis Loss, *et al.*,

Securities Regulation § 9.A.2 (2013); *accord Dobbs' Law of Torts* § 664 (2d ed. 2013). The Supreme Court has made clear that the implied private cause of action for securities fraud tracks these common law elements.[3]

In particular, proof of actual reliance by the plaintiff "is an essential element of the § 10(b) private cause of action" because it "ensures that . . . the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008) (quoting *Basic*, 485 U.S. at 243); *see also Amgen*, 133 S. Ct. at 1192 (similar). In *Stoneridge*, the Supreme Court rejected a section 10(b) implied cause of action against customers and suppliers who allegedly enabled an issuer to make fraudulent financial statements because the plaintiff "did not in fact rely upon [the customers' and suppliers'] own deceptive conduct." 552 U.S. at 160. Similarly, the Court declined to extend section 10(b) liability to third-party aiders and abettors because such an action would permit plaintiffs to recover damages "without any showing that [they] relied upon the aider and abettor's statements or actions," and "[a]llowing plaintiffs to circumvent

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[3] The Supreme Court has defined the elements of a private securities fraud claim as: (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 by the plaintiff on the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Amgen*, 133 S. Ct. at 1192.

the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by [the Court's] earlier cases." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994), *superseded in part by* 15 U.S.C. § 78t(e). In *Amgen*, the Court reaffirmed that "[t]he traditional (and most direct) way for a plaintiff to demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction based on that specific misrepresentation." 133 S. Ct. at 1192 (internal quotations omitted).

While the Supreme Court has repeatedly confirmed that reliance is a fundamental element of a securities fraud claim, the Court recognized a narrow exception in *Affiliated Ute*. There, the Supreme Court addressed a claim by members of an Indian tribe who had been induced to sell their securities to employees of a bank who were actively making a market in those very securities and, unbeknownst to the plaintiff sellers, intending to flip those securities at a significant profit. 406 U.S. at 138-39, 153. "We would agree that if the two [individual defendants] and the employer bank had functioned merely as a transfer agent, there would have been no duty of disclosure here." *Id.* at 151-52. Because of the agents' self-dealing, however, the defendants "possessed the affirmative duty under [Rule 10b-5] to disclose this fact to the . . . sellers." *Id.* at 153 (citing *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970)). The Court concluded that "[t]he defendants may not stand mute," because "[t]he sellers had

the right to know that the defendants were in a position to gain financially from their sales." *Affiliated Ute*, 406 U.S. at 153. Therefore, the Court held, "[u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery." *Id.*

This Court has recognized that *Affiliated Ute* creates a narrow exception to the reliance requirement where (1) because a plaintiff's claim rests on an alleged omission of material information, not any affirmative statement, it may be impossible for the plaintiff to prove reliance on that lack of speech, *see Wilson*, 648 F.2d at 93, and (2) the defendant has an independent duty to disclose the missing information to the plaintiff, *see Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013) (stating that "an omission of a material fact by a defendant with a duty to disclose establishes a rebuttable presumption of reliance upon the omission by investors to whom the duty was owed" and finding *Affiliated Ute* inapplicable because the defendant had no fiduciary or other relationship-based duty to disclose).

Here, in contrast, Plaintiffs allege that NASDAQ made numerous false or misleading statements about the operation of its systems that were never corrected during the Class Period. Thus, Plaintiffs do not face the problem of being unable to prove reliance on a statement never made. Rather, Plaintiffs' real problem is that they do not allege that they actually relied on any of the statements that *were*

made by NASDAQ. Similarly, there was no special relationship—fiduciary, contractual, or otherwise—between the Plaintiffs and NASDAQ that created any duty on NASDAQ's part to make a disclosure to the Plaintiffs about its technical capabilities.

Under these circumstances, the *Affiliated Ute* presumption of reliance simply has no place.

B. *Affiliated Ute* Applies Only to Alleged Material Omissions That Are Independent of Prior Affirmative Statements of Fact and for Which Proof of Reliance Is Therefore Impossible.

As this Court has long recognized, *Affiliated Ute* reaffirmed that the reliance requirement is an essential tool in "restrict[ing] the potentially limitless thrust of Rule 10b-5 to those situations in which there exists a causation in fact between the act and injury." *Titan*, 513 F.2d at 238-39. As this Court put it, "in instances of *total* non-disclosure, as in *Affiliated Ute*, it is of course impossible to demonstrate reliance, and resort must perforce be had to materiality, *i.e.*, whether a reasonable man would attach importance to the alleged omissions in determining his course of action." *Id.* at 239 (emphasis added) (cited by *Wilson*, 648 F.2d at 93).

In *Wilson*, this Court further observed that "the rationale for a presumption of causation in fact in cases like *Affiliated Ute*, in which *no* positive statements exist[, is that] reliance as a practical matter is impossible to prove." 648 F.2d at 93 (emphasis added). As in *Wilson*, "[t]he situation here does not present that

problem." *Id.* This Court rightly rejected the argument by the *Wilson* plaintiff that he could invoke the *Affiliated Ute* presumption where the defendant allegedly failed to correct past misstatements but the plaintiff did not actually rely on any of those statements in the first place. *See id.* at 93-94. As here, the *Wilson* plaintiff made no effort to determine whether the original statement was still true. Moreover, there was no finding—here, there is not even an allegation—that the original statement had any causal connection to the plaintiff's decision to buy or sell a security.

Rather, as this Court found in *Chasins* (which the Supreme Court cited favorably in *Affiliated Ute*), the test for reliance in a non-disclosure case "is properly one of tort 'causation in fact.'" *Chasins*, 438 F.2d at 1172. A customer has shown "[c]ausation in fact or adequate reliance" where he proves that he "might well have acted otherwise" if he had known of his broker's market making when he decided how to act on the broker's recommendations. *Id.* at 1171, 1172. These holdings compel the conclusion that, where, as here, the defendant did previously speak, the plaintiff cannot evade the requirement of pleading and

proving actual reliance on the alleged misstatement by asserting that the defendant had a duty to correct the earlier statement.[4]

Other Circuits have reached the same conclusion. In *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213 (D.C. Cir. 2010), the D.C. Circuit ruled that plaintiffs could not avail themselves of the *Affiliated Ute* presumption because "the crux of appellants' claims are [the defendant auditor]'s affirmative misrepresentations of [the company's] financial statements." *Id.* at 220. The court reasoned that the plaintiffs' allegation that the defendants had failed to disclose that the company they were auditing was in fact a Ponzi scheme was really an allegation that the financial statements *misstated* the company's true financial condition and could not support the presumption. *Id.* Likewise, in *Binder v. Gillespie*, 184 F.3d 1059 (9th Cir. 1999), the Ninth Circuit held that the presumption should be applied only to "cases that primarily allege omissions," *id.* at 1064, because the rationale for the presumption is "the difficulty of proving a speculative negative—that the plaintiff relied on what was not said." *Id.* (internal quotations omitted). As the Tenth Circuit has observed, because "the *Affiliated*

[4] In any event, Plaintiffs could not base their claim on alleged misstatements, such as NASDAQ's statements about its systems capabilities, that occurred outside the Class Period. *See In re Int'l Bus. Mach. Corp. Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998) ("A defendant, however, is liable only for those statements made during the class period.").

Ute presumption of reliance exists in the first place to aid plaintiffs when reliance on a negative would be practically impossible to prove," and "[a]ny fraudulent scheme requires some degree of concealment," "[w]e cannot allow the mere fact of . . . concealment to transform the alleged malfeasance into an omission rather than an affirmative act." *Joseph v. Wiles*, 223 F.3d 1155, 1162-63 (10th Cir. 2000) (citing *Wilson*, 648 F.2d at 93). Where the plaintiffs alleged that the defendant had "*omitted to disclose that its financial statements had been falsified*," applying the *Affiliated Ute* presumption "would permit [that] presumption to swallow the reliance requirement almost completely. Moreover, it would fail to serve the *Affiliated Ute* presumption's purpose since this is not a case where reliance would be difficult to prove because it was based on a negative." *Joseph*, 223 F.3d at 1163 (emphasis in original).

In light of the reasoning behind *Affiliated Ute* and its progeny, the District Court's conclusion that the Plaintiffs' claims against NASDAQ are "primarily" about alleged omissions, not affirmative statements, JA 433 n.7, is simply unsupportable. As the Complaint makes plain, the alleged omissions the court credited were nothing more than the failure to correct the previous statements. In 22 paragraphs, the Plaintiffs detail purportedly materially misleading or false statements that the Defendants made before the Class Period. JA 224-33 ¶¶ 168-

89.[5] The Plaintiffs then allege that the "Defendants had a duty to update and/or correct these statements once it became apparent that these statements were no longer accurate." JA 233 ¶ 190; *see also* JA 234 ¶ 191 (Defendants failed to "disclos[e] these known problems" and "failed to update the statements made in NASDAQ's SEC filings that touted the very same technology and trading platforms" that were allegedly already "experiencing significant problems prior to" the IPO). The District Court based its finding that reliance had been adequately pleaded solely on these allegations of pre-Class Period misrepresentations that were then not corrected during the Class Period. *See* JA 387 (citing CAC ¶¶ 168-94).

The substance of these allegations rests on pre-Class Period affirmative statements on which the Plaintiffs never allege they relied and that were, at most, exacerbated by Defendants' alleged failure to correct them. As one district court recently recognized, under this Court's precedents, the *Affiliated Ute* presumption does not apply where the alleged omissions were "merely the inverse of defendants' alleged misrepresentation." *Goodman v. Genworth Fin. Wealth Mgmt.*, --- F.R.D. ----, No. 09-cv-5603, 2014 WL 1452048, at *12 (E.D.N.Y. Apr. 15, 2014). Under *Wilson*, the rationale for the *Affiliated Ute* exception is key:

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[5] The Class Period is defined as May 18, 2012 only. *See* JA 167.

"[W]here positive statements are central to the alleged fraud, thereby eliminating the evidentiary problems inherent in proving reliance on an omission, the *Affiliated Ute* presumption *does not apply*." *Id.* at *11 (internal quotations omitted) (emphasis added) (distinguishing cases in which the alleged statements at issue took on their misleading character "only when considered in conjunction with" the allegedly omitted facts, *id.* at *13); *see also In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 494 (S.D.N.Y. 2011) (*Affiliated Ute* presumption was inapplicable where plaintiffs alleged that defendant "made representations about the quality of their examination that was the exact opposite of what it was in reality" and therefore any omissions "merely serve to exacerbate and bolster [plaintiffs'] misrepresentation claims"); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, No. 05-1898, 2006 WL 2161887, at *9 (S.D.N.Y. Aug. 1, 2006), *aff'd*, 546 F.3d 196 (2d Cir. 2008) (plaintiff could not rely on *Affiliated Ute* presumption where each alleged omission was merely the inverse of an alleged misrepresentation and "this is certainly not a case 'in which no positive statements exist [and] reliance as a practical matter is impossible to prove'" (quoting *Wilson*, 648 F.2d at 93; alteration in *Teamsters*)).

The cases cited below by the Plaintiffs and the District Court either are not to the contrary or misapplied *Affiliated Ute*. Several of the cases on which Plaintiffs relied do not concern the *Affiliated Ute* presumption of reliance, but

rather address some other aspect of a Rule 10b-5 claim, such as whether the plaintiff has alleged a false statement at all or whether the statute of limitations has run. *See, e.g.*, *In re J.P. Jeanneret Assocs., Inc.*, 769 F. Supp. 2d 340, 375 (S.D.N.Y. 2011) (cited by Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss at 39, Docket No. 147 in MDL No. 12-2389 (S.D.N.Y.)). More fundamentally, to the extent any of these decisions imply that courts need not carefully cabin *Affiliated Ute*'s application to circumstances in which it would be impracticable to allege reliance on purported omissions, those cases are contrary to this Court's precedents. *See* JA 431-32.

C. *Affiliated Ute* Applies Only in Circumstances Where the Defendant Owes the Plaintiff a Special Duty of Disclosure.

The Plaintiffs also cannot benefit from *Affiliated Ute*'s presumption because NASDAQ had no independent duty of disclosure to them—fiduciary, contractual, or otherwise. The Supreme Court placed great stock in the fact that the plaintiff-sellers in *Affiliated Ute* were entitled to know if the defendant-buyers, who had assumed an "affirmative duty" to the sellers, stood to benefit from the proposed transactions. *Affiliated Ute*, 406 U.S. at 153 (citing this Court's *Chasins* decision, which concerned a stock broker defendant with a direct duty to the investor plaintiff). As the Fifth Circuit has noted, "[t]he logic of *Affiliated Ute* is that, where a plaintiff is entitled to rely on the disclosures of someone who owes him a

duty, requiring him to prove 'how he would have acted if omitted material information had been disclosed' is unfair." *Regents of the Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 385 (5th Cir. 2007) (quoting *Basic*, 485 U.S. at 245). The court elaborated: "It is natural to expect a plaintiff to rely on the candor of one who owes him a duty of disclosure," so it is fair to put the burden on the defendant to prove that the plaintiff did not actually rely on the defendant. *Regents*, 482 F.3d at 385. Where, conversely, "the plaintiffs had no expectation that the [defendants] would provide them with information, there is no reason to expect that the plaintiffs were relying on their candor." As a result, "it is only sensible to put plaintiffs to their proof that they individually relied on the banks' omissions." *Id.*

Indeed, as one district court has explained, *Affiliated Ute*'s "application of the presumption of reliance turned as much, if not more, on the special relationship that existed between the Native American tribe and the bank in question" as on the omission/misstatement distinction. *In re Credit Suisse-AOL Secs. Litig.*, 253 F.R.D. 17, 26 (D. Mass. 2008). Therefore, the court concluded, "it seems clear that *Affiliated Ute* applies to 'omissions cases' only where there is *a special affirmative 'obligation to disclose' material information rather than merely a duty to speak truthfully*." *Id.* (emphasis added); *see also DeMarco v. Lehman Bros., Inc.*, 222 F.R.D. 243, 248 n.2 (S.D.N.Y. 2004) (*Affiliated Ute* does not apply where the duty

to disclose only arises from the duty to speak truthfully). As in *Credit Suisse*, "[i]n the instant case, defendants dealt with investors at arms' length, releasing their [statements] to the public." *Credit Suisse*, 253 F.R.D. at 26. Unlike in *Affiliated Ute* and again like in *Credit Suisse*, NASDAQ "did not take on any special obligations" and formed "[n]o special relationship . . . ; had they simply remained silent there would be no cause of action. Thus, the *Affiliated Ute* framework is inapplicable here." *Id.* at 26-27.

This Court's recent ruling in *Levitt* supports the conclusion that a special duty born of a relationship between the defendant and the plaintiff—not merely a duty not to speak misleadingly or a duty to correct previous statements—is an integral element of *Affiliated Ute*. In *Levitt*, the plaintiffs argued that the defendant clearing broker triggered a duty of disclosure by continuing to clear transactions "despite alleged knowledge of [an] ongoing manipulative scheme" and failing to cancel unpaid trades. 710 F.3d at 457. This Court rejected that argument after analyzing whether the defendant's role and relationship with the plaintiffs triggered any enhanced duty to the plaintiff. *Id.* at 457, 465-69.[6]

[6] *Levitt* cites *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993), for the proposition that "an omission is actionable under the securities laws only when the [defendant] is subject to a duty to disclose the omitted facts." Although *Time Warner* discusses two types of duties, those arising out of a relationship and those arising out of having previously made a statement that must

Such an analysis is faithful to the Supreme Court's conclusion that the *Affiliated Ute* defendants could be held liable because their acts were "performed when they were obligated to act on behalf of" the plaintiff sellers. 406 U.S. at 154. In contrast, here, the Plaintiffs do not even attempt to allege that NASDAQ had any affirmative duty to disclose alleged technological problems with its systems. As a third-party service provider and systems operator with no fiduciary or contractual relationship—indeed, no direct relationship of any kind—with the Plaintiffs, NASDAQ owed no affirmative duty of disclosure to them. NASDAQ had even less of a relationship with Plaintiffs than the hypothetical "mere[] . . . transfer agent" the Court distinguished in *Affiliated Ute*. 406 U.S. at 151-52. This Court should clarify that *Affiliated Ute* does not apply to such defendants.

II. THE *AFFILIATED UTE* PRESUMPTION SHOULD NOT BE EXPANDED IN WAYS THAT WOULD SWALLOW THE RELIANCE ELEMENT OF A SECURITIES FRAUD CLAIM.

In light of the Supreme Court's rationale in *Affiliated Ute*, the presumption of reliance in material omission cases is a narrow one that cannot be divorced from the unusual circumstances presented in *Affiliated Ute* itself. By attempting to

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not be rendered misleading, it does so in the context of assessing whether the plaintiffs had adequately alleged a false or misleading statement. *Time Warner* does not cite *Affiliated Ute* or address whether both types of duties are equally amenable to *Affiliated Ute*'s presumption of reliance. *Amicus* submits that they are not, for the reasons stated above.

recast their misstatement allegations as omission allegations, Plaintiffs disregard the essential elements of reliance and causation that must be proven in private securities fraud claims. "As many courts have noted, a statement is misleading when it omits the truth. Thus, in most securities fraud cases, an affirmative misstatement can be cast as an omission and vice versa." *Goodman*, 2014 WL 1452048, at *11 (internal quotations and alteration omitted). As a result, to avoid allowing the exception to swallow the rule, it is imperative that courts properly apply the rationale of *Affiliated Ute*, as discussed above. To the extent courts allow artful pleading or argument to misappropriate the *Affiliated Ute* presumption, courts risk creating a harmful loophole that would allow plaintiffs to evade the critical requirement of pleading and proving reliance in securities fraud claims. That requirement is the essential foundation for establishing a basic causal link between the defendant's actions and the plaintiff's actions. *See Dura Pharm.*, 544 U.S. at 339; *Binder*, 184 F.3d at 1065. It must not be cast aside as the Plaintiffs urge. The District Court's erroneous ruling should be reversed.

CONCLUSION

For all the foregoing reasons, this Court should reverse the ruling below that Plaintiffs have adequately alleged reliance based solely on the presumption of reliance on material omissions under *Affiliated Ute*.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 4,733 words.

/s/ Steven G. Bradbury
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