No. 11-1173

IN THE

Supreme Court of the United States

CHRISTOPHER BROWN,
Petitioner,

v.

JOHN P. CALAMOS, SR., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question for which petitioner seeks review is not presented in this case. Both the district court and the court of appeals ruled that petitioner's complaint contained allegations of misrepresentation and omission of material facts and that those allegations were not mere background but rather were the basis for petitioner's claim. As a result, the district court dismissed petitioner's complaint with prejudice, in accordance with the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), and the court of appeals affirmed that dismissal. Thus, the question actually presented is:

Whether petitioner's purported class action under state law, seeking to recover for alleged losses in the value of covered securities, was properly dismissed under SLUSA where: (i) petitioner alleged the misrepresentation and omission of material facts in connection with the purchase or sale of the securities at issue; (ii) those allegations were the basis for petitioner's claims; and (iii) petitioner never sought to amend his complaint in an effort to plead a claim not precluded by SLUSA.

RULE 29.6 STATEMENT

Respondent Calamos Convertible Opportunities and Income Fund, a Delaware statutory trust, has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Calamos Advisors LLC is an indirect, wholly-owned subsidiary of Calamos Asset Management, Inc., a publicly traded corporation that owns 10% or more of the membership interest of Calamos Advisors LLC. No other publicly held company owns 10% or more of the membership interest of Calamos Advisors LLC.

Respondent Calamos Asset Management, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

A. Background

Respondent Calamos Convertible Opportunities and Income Fund (the "Fund") is a Delaware statutory trust and a closed-end investment company registered under the Investment Company Act of 1940, as amended ("ICA"). App. 23a, 27a. Respondents Weston W. Marsh, John E. Neal, William Rybak, Stephen B. Timbers, and David Tripple are Independent Trustees of the Fund, and respondent Joe F. Hanauer is a former Independent Trustee. App. 24a-25a. Respondent John P. Calamos, Sr. is a

Trustee of the Fund and an employee of what petitioner's complaint called the "Calamos Sponsorship Group," consisting of respondents Calamos Advisors LLC (the investment adviser to the Fund) and Calamos Asset Management, Inc. (the adviser's indirect corporate parent). App. 25a-26a, 30a.

Petitioner has owned common shares of the Fund since 2006. App. 24a.[1] He alleges that the "primary investment objective" of the common shares, as stated by the Fund in reports filed with the Securities and Exchange Commission ("SEC"), "is to provide total return through a combination of capital appreciation and current income," and that a "key" to this return is the Fund's use of leverage. App. 27a, 30a. At the time of petitioner's purchase of common shares, this leverage was provided by auction market preferred shares ("AMPS") issued by the Fund, which provided the Fund with very favorable financing. App. 23a, 28a-29a. The beneficial effect of this leverage was "described in the Fund's regular reports to its shareholders." App. 30a.

A central theme of petitioner's complaint is that the Fund created a false expectation in the minds of investors by purportedly representing publicly that the leverage provided by AMPS was perpetual, and that common shareholders therefore would enjoy its benefits indefinitely. Thus, the Fund is alleged to have made public statements indicating that "one of the significant benefits of . . . [an] . . . investment" in common shares was "leverage that would continue indefinitely, because . . . the term of the AMPS was

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[1] Unlike shares issued by an open-end mutual fund, once common shares of a closed-end fund have been issued, they typically trade publicly on a stock exchange. *Green v. Nuveen Advisory Corp.*, 295 F.3d 738, 740 n.1 (7th Cir. 2002).

perpetual." App. 30a. The Fund also is alleged to have represented publicly that AMPS conferred unique benefits on the Fund (and through the Fund, on common shareholders) in that "'[T]he perpetual nature of the [AMPS] makes them . . . a more attractive source of leverage than borrowing, which by its terms must be repaid or refinanced at or before a stated maturity date.'" App. 42a.

The holders of the AMPS were entitled, as preferred shareholders, to receive a regular dividend payment from the Fund based on a rate that was reset periodically through an auction process in which AMPS could be purchased and sold. App. 23a. During the severe economic downturn of 2008, however, the periodic auctions failed beginning in February of that year, and they continued to fail thereafter. The collapse of the auction market left the Fund's preferred shareholders, and countless other investors in AMPS issued by other closed-end funds, with illiquid investments. App. 34a.

The AMPS liquidity crisis prompted putative securities class action lawsuits brought by preferred shareholders. The crisis also resulted in Congressional hearings, as well as written requests from the Chairman of the House Financial Services Committee directed to investment companies (like the Fund), urging them to act as quickly as possible to resolve the AMPS liquidity crisis, and to the SEC, urging it to act on pending requests from closed-end funds seeking regulatory clearance for action facilitating the redemption of AMPS.[2] One of the actions taken by the SEC was to grant investment companies

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[2] Press Release, U.S. House of Representatives Committee on Financial Services (July 31, 2008), *available at* http://financialservices.house.gov/press110/press073108.shtml.

temporary exemptions from asset coverage requirements otherwise imposed by the ICA to facilitate their use of debt financing to redeem their outstanding auction rate preferred shares, such as the AMPS. App. 43a-45a. The SEC's Order as to the Fund contained the Agency's finding that "granting the requested exemption is appropriate in and consistent with the public interest, and consistent with the protection of investors and the purposes fairly intended by the policy and provisions" of the ICA.[3]

It was in this environment that the Fund redeemed its outstanding AMPS. App. 36a-37a. That action gave rise to the claims petitioner asserted in this case, which he purported to bring on behalf of a putative class of beneficial owners of Fund common shares. App. 22a-23a, 49a. Petitioner alleged that contrary to the Fund's purported representations regarding the assertedly "perpetual" benefits of AMPS financing, the individual respondents authorized the redemption of the AMPS using "Replacement Borrowing" that was not perpetual, and allegedly was more risky and costly to the Fund. App. 39a-46a. The redemption is alleged to have "defeated a significant feature of the investment rationale for the common shareholders," depriving them of "the benefits of an investment in the fund, as described in the Fund's statements to the SEC and the public," diminishing the capacity of the Fund to pay dividends, and depressing the value of the Fund's common shares. App. 47a-49a, 52a.

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[3] In re Calamos Convertible Opportunities and Income Fund, Investment Company Act of 1940 Release No. 28615 (Feb. 10, 2009), *available at* www.sec.gov/rules/ic/2009/ic-28615.pdf.

Petitioner further alleged, "[o]n information and belief," that the non-Fund respondents caused the Fund to redeem the AMPS in order to "placate" certain investment banks and brokers who were "a key part" of the respondents' business model, and integral to the ability to continue marketing additional funds for respondents' collective financial benefit. App. 37a-38a. The redemption is alleged to have "further[ed] the business objectives of the Calamos Sponsorship Group" at the expense of the interests of the Fund's common shareholders. App. 37a.

B. Petitioner's Federal and State Court Actions

On July 15, 2010, petitioner filed an action in the District Court for the Northern District of Illinois, Case No. 1:10-cv-4422, against each of the respondents, invoking federal jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"). The complaint in that action contained allegations substantively identical to, and pleaded the same purported claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment as the complaint in this case. Petitioner voluntarily dismissed his federal case on September 7, 2010, and then filed this action in the Circuit Court of Cook County, Illinois, a week later, asserting the same causes of action but this time alleging that jurisdiction pursuant to CAFA did *not* exist "*because the claims concern covered securities*"—a reference to a CAFA exclusion incorporating provisions in SLUSA. App. 26a-27a (emphasis supplied).[4] Defendants timely

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[4] CAFA excludes claims "concerning a covered security as defined under [section] 16(f)(3) of the Securities Act of 1933 (15 U.S.C. [77p(f)(3)]) and section 28(f)(5)(E) of the Securities

removed the action to the Northern District of Illinois pursuant to SLUSA on October 13, 2010. 15 U.S.C. § 77p(c); 15 U.S.C. § 78bb(f)(2).

C. The District Court Decision

Following removal, respondents moved to dismiss pursuant to SLUSA. 15 U.S.C. § 77p(b); 15 U.S.C. § 78bb(f)(1). Petitioner, in turn, moved to remand the case to state court.

The district court denied petitioner's motion to remand and dismissed the action as precluded by SLUSA, observing that petitioner's claims "plainly include . . . [SLUSA] . . . 'covered concepts,' alleging both misrepresentations (that the AMPS were 'perpetual') and omissions (defendants' undisclosed conflict of interest)." App. 67a.[5] The district court rejected petitioner's contention that these allegations were "merely background facts, rather than the basis

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Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E))." 28 U.S.C. § 1332(d)(9)(A). The definitions of "covered security" referenced in this exclusion from CAFA were added by SLUSA and define the term to mean, in pertinent part, "a security that satisfies the standards for a covered security . . . *at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred* . . . ." 15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E) (emphasis supplied).

[5] Petitioner asserts that before the district court, respondents did not "seriously allege that petitioner's three claims relied on proof of any misrepresentation or omission" (Pet. 10), but the district court's decision makes short work of this spurious contention: "Defendants insist that . . . alleged misrepresentations are at the heart of plaintiff's claims . . . . Defendants argue that the 'overarching theme' of the complaint is that defendants misled common shareholders . . . . Defendants liken this case to numerous others in which courts have dismissed claims that they concluded amounted to 'a securities fraud wolf dressed up in a [state law] sheep's clothing.'" App. 65a-66a.

for his claim," while noting as "telling" and "striking" the "absence of *any* authority [in petitioner's brief] in which claims such as those . . . [petitioner] . . . asserts were allowed to proceed under state law." App. 68a (emphasis in original). (In fact, petitioner did not cite a *single* authority, on *any* subject, in briefing before the district court. App. 68a. His arguments to the district court centered on the contention that his complaint did not allege a misrepresentation or omission.) Dkt. 23 (Petitioner's Mem. in Supp. of Mot. to Remand). The district court also concluded, consistent with the Circuit and district court authorities, that an allegation in petitioner's complaint purporting to disclaim the assertion of any claim for securities fraud was ineffective to evade SLUSA preclusion. App. 66a.

Petitioner mischaracterizes the district court's decision when he contends that the district court "recognized that petitioner's actual *claims* do not rely on proof of a misrepresentation or omission," and ostensibly held that SLUSA requires dismissal even where a misrepresentation "plays no role in the plaintiff's claims." Pet. 11-12 (emphasis in original). To the contrary, the district court dismissed petitioner's complaint because "the alleged misstatements are *at the heart* of plaintiff's claims, which thus fall squarely within SLUSA's broad sweep." App. 67a (emphasis supplied).

While in the district court, Petitioner made no effort to amend his complaint as a matter of course within the time allowed by Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure and, after that time expired, did not request leave to file an amended complaint. Petitioner also did not move the district court to reconsider its order of dismissal, nor did he

raise the issue that the dismissal was with prejudice when he appealed to the Seventh Circuit. In fact, when questioned during oral argument on appeal whether petitioner "[c]ould have" asked the district court for leave to amend by deleting any suggestion of fraud from his complaint, petitioner's counsel responded that "[t]he bulk of the case law indicates that plaintiffs would not be permitted to amend in that circumstance" (*i.e.*, following removal). Oral Argument Audio Recording, No. 11-1785 at 6:11, 10:40 (7th Cir. Sept. 22, 2011) (*available at* http://www.ca7.uscourts.gov/fdocs/docs.fwx?dname=arg). As is evident from this exchange, the lack of amendment below was no fault of the district court; rather, petitioner decided to forego seeking leave to amend based on his reading of "the bulk of the case law."

D. The Seventh Circuit Decision

The court of appeals affirmed, and petitioner did not seek rehearing.

Petitioner now systematically misstates the Seventh Circuit's ruling, beginning in the very first paragraph of his discussion of that ruling. Petitioner asserts that "like the district court, the court of appeals recognized that petitioner's claims themselves neither allege nor implicitly rely on any allegation or proof of any misrepresentation or omission by any of the respondents." Pet. 12. But this is not correct. In fact, the court of appeals ruled, just as the district court had ruled, that petitioner's allegations that the Fund had publicly represented that investors would "indefinitely" enjoy the benefits of "perpetual" AMPS financing "is interpreted most naturally as alleging a misrepresentation: that the AMPS would never be redeemed." App. 8a. Like the district court, the court of appeals also held that "[a] misleading omission is

also alleged, at least implicitly: the omission to state that the fund might at any time redeem AMPS on terms unfavorable to the common shareholders because motivated by the broader concerns of the entire family of 20 Calamos mutual funds . . . ." *Compare* App. 8a, *with* App. 67a (referring to petitioner's "allegations that undisclosed conflicts of interest drove defendants' decision to redeem the AMPS").[6]

Petitioner's further suggestion (Pet. 19, 30) that the court of appeals somehow acknowledged that his claim is a garden-variety breach of fiduciary duty claim "unrelated to any misrepresentation or omission" is equally wrong. The court of appeals' reference to a "straightforward suit for a breach of the duty of loyalty" (App. 14a) was not a characterization of *petitioner's* claims, but rather a description of the kind of claim that might have been asserted in a *hypothetical* derivative action without fear of SLUSA preclusion, since derivative actions are expressly excluded from SLUSA's coverage. App. 14a-15a ("So it might seem that had the fund said nothing about the leverage advantages conferred by the absence of a maturity date for the AMPS, this would be a straightforward suit for breach of the duty of loyalty" which "would not be barred by SLUSA, though it would have to be brought as a derivative suit").[7]

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[6] Nowhere did the court of appeals hold, as petitioner asserts, that "the complaint must be dismissed on the basis of the mere fact that petitioner alleged a breach of fiduciary duty and the existence of a conflict of interest, which automatically alleged by implication . . . a failure to disclose the conflict" (Pet. 31), or that "SLUSA requires dismissing a complaint on the basis of what the plaintiff might assert if his actual claims failed." Pet. 32.

[7] The Seventh Circuit observed that such a hypothetical derivative action, although excluded from SLUSA, would be

Having concluded that petitioner's complaint alleges both a misrepresentation and an omission, the court of appeals addressed decisions of the Third and Sixth Circuits discussing whether the presence of allegations of misrepresentation or omission, standing alone, is sufficient to trigger SLUSA preclusion, or whether the mere presence of such allegations would not bar suit if the allegations were inessential to the pleaded claim. App. 8a-9a. Although the court of appeals noted the difference in the formulation of the standards articulated by the Third and Sixth Circuits, as will be discussed, *infra*, those differences in formulation had no effect on the disposition of the cases in question, nor would they alter the outcome in this case. Indeed, in the decision below, the court of appeals did not find it necessary to adopt one formulation or another or to develop and apply a standard of its own. Rather, the court concluded that petitioner "must lose" under either approach and that his claims would be precluded by SLUSA "under any reasonable standard" because "[t]hough the suit is for breach of fiduciary obligations, the breach appears to rest on an allegation of fraud" that would be "difficult and maybe impossible to disentangle from the charge of breach of the duty of loyalty . . . ." App. 13a, 18a. The court observed that "without the allegation that the . . . Fund misrepresented the characteristics of its

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subject to a requirement that the plaintiff either make demand on the board of trustees of the Fund or plead facts demonstrating the futility of demand—a daunting task given the presence of five independent trustees on the Fund's six member board. App. 15a-16a. Respondents and petitioner are in agreement that the court's discussion of a hypothetical derivative claim is *dicta*. Pet. 34. The court of appeals did nothing "improper" in discussing the course a hypothetical derivative action might have taken.

capital structure," petitioner's claim that respondents had breached a duty of loyalty by redeeming the AMPS might not be plausible. App. 18a.

Although petitioner had not sought leave to amend at any stage of the proceedings below, the court of appeals concluded its opinion with the observation that the district court would not have been required to allow an amendment deleting "the passage that injected fraud into the case." App. 18a. It noted that permitting amendment would facilitate forum manipulation and that, in any case, an amendment to delete "the fraud allegation" would not be credible because fraud "may well be central to the plaintiff's case" (App. 19a)—a conclusion buttressed by the fact that petitioner's original federal complaint and his subsequent state complaint were substantively identical.

REASONS FOR DENYING THE PETITION

The petition does not accurately describe the decisions below, and it therefore seeks review of a question that is not presented by this case. The district court correctly ruled that plaintiff's claims allege both misrepresentations and omissions and that "the alleged misstatements are at the heart of plaintiff's claims," requiring dismissal under SLUSA. App. 67a-68a. The court of appeals agreed with the district court's reading of the complaint and affirmed the district court's dismissal, holding that the suit "is . . . barred by SLUSA under any reasonable standard." App. 8a, 18a.

Petitioner incorrectly asserts that his complaint "contains no claim for relief 'alleging a misrepresentation or omission of a material fact.'" Pet. i. This is contrary to the decisions of both courts below. The court of appeals held that petitioner's complaint "is

interpreted most naturally as alleging a misrepresentation: that the AMPS would never be redeemed." App. 8a. Likewise, the court explained that a misleading omission "is also alleged, at least implicitly: the omission to state that the fund might at any time redeem AMPS on terms unfavorable to the common shareholders because motivated by the broader concerns of the entire family of 20 Calamos mutual funds . . . ." *Id*. The court of appeals therefore ruled that, although petitioner's suit was cast in terms of breach of fiduciary duty, the breach "appears to rest on an allegation of fraud, as is often the case." App. 18a. Moreover, the court said, "[t]he allegation of fraud would be difficult and maybe impossible to disentangle from the charge of breach of the duty of loyalty that the defendants owed their investors." App. 13a. The factual premise of the petition thus is erroneous.

Nor is this a proper case for resolving any alleged conflict among the courts of appeals regarding the proper application of SLUSA. Given petitioner's allegations of fraud and the centrality of those allegations to petitioner's claim, the court of appeals here held that petitioner's claims would be precluded "under any reasonable standard." App. 18a. Resolution of the purported conflict therefore would make no difference in this case. Moreover, as discussed further below, the alleged conflict is more apparent than real, since the cases cited by petitioner would have been decided the same way regardless of which articulation of the SLUSA dismissal standard had been applied.

Petitioner also is mistaken in arguing (Pet. 27-28) that the decision below is inconsistent with this Court's decision in *Merrill Lynch, Pierce, Fenner &*

Smith, Inc. v. Dabit, 547 U.S. 71 (2006). Contrary to petitioner's contention, *Dabit* did not import into SLUSA a rule—nowhere to be found in the language of the statute—that preclusion of claims under SLUSA occurs only if those claims contain all of the elements needed for the successful assertion of a private right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated under that statute. Rather, *Dabit* held a claim precluded by SLUSA even though the allegations did *not* state a private claim for relief for securities fraud. 547 U.S. at 86-89. And, in any event, as already explained, the deception necessary to state a securities fraud claim is alleged in the complaint in this case, as both the district court and the court of appeals ruled.

Finally, petitioner complains that the decision below improperly prevented him from proceeding on a hypothetical revised complaint that would delete any allegation of fraud. Pet. 2-3, 34. But petitioner never sought leave to amend in either court below; much less did he tender a proposed amended pleading or any explanation of how his complaint allegedly could be amended to avoid SLUSA preclusion. Petitioner therefore cannot raise the point for the first time in this Court. Moreover, none of the authorities on which petitioner relies would have permitted amendment under the circumstances of this case. Further review is not warranted.

I. The Seventh Circuit's Decision Does Not Create A Conflict With Decisions Of Other Courts Of Appeals

Petitioner argues that there exists a split between the Third and Sixth Circuits "Over SLUSA's Applica-

tion To A Complaint That Does Not Seek Relief Based On Any Misrepresentation" (Pet. 20), and contends that the Seventh Circuit exacerbated that split by adopting its own "intermediate" standard. Pet. 15. In the first place, respondents do not agree that petitioner's complaint "does not seek relief based upon any misrepresentation," nor did the district court or court of appeals agree with that proposition. App. 8a, 18a, 67a-68a. Moreover, the "Circuit split" petitioner attempts to fashion from decisions of the Third and Sixth Circuits does not reflect a true conflict, and the outcome in this case would have been unchanged regardless of which court of appeals heard petitioner's appeal.

A. The Seventh Circuit's Decision Is Consistent With The Decisions Of The Third And Sixth Circuits Applying SLUSA

In its decision affirming the dismissal of petitioner's complaint, the Seventh Circuit acknowledged a difference in the formulations articulated by the Third and Sixth Circuits in the application of SLUSA to complaints that *allege* fraud, but purport to assert state law-based causes of action *other* than statutory or common law fraud. The panel described the approach taken by the Sixth Circuit in *Atkinson v. Morgan Asset Management, Inc.*, 658 F.3d 549, 555 (6th Cir. 2011), and *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 3326 (2009), as a "literalist" approach, under which a covered class action is precluded if it meets the literal requirements of SLUSA (*i.e.*, an allegation of a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security), without more.

App. 8a-9a. The panel described the Third Circuit's decision in *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008), and *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005), as distinguishing between allegations constituting only "extraneous details" (not triggering SLUSA preclusion), and those critical to the assertion of a successful claim in a particular case (triggering preclusion). App. 9a. It is this difference that petitioner belatedly attempts to elevate to a conflict warranting review.[8]

1. In his attempt to place the Sixth Circuit's decisions in *Segal* and *Atkinson* in conflict with the decisions of the Third Circuit in *Rowinski* and *LaSala*, petitioner argues that in the Sixth Circuit, a "mere assertion" of a misrepresentation requires dismissal under SLUSA. Pet. 20. According to petitioner, the misrepresentations alleged in *Segal* were merely "background" facts that nonetheless triggered preclusion under the Sixth Circuit view. *Id.* This new interpretation of *Segal* differs sharply and

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[8] Before the district court, petitioner did not cite any of the decisions that he now posits create a "Circuit split" in the construction of SLUSA. (Indeed, petitioner did not cite *even a single decision* in briefing before the district court, much less any decisions of the Third and Sixth Circuits.) Before the court of appeals, petitioner argued for application of a so-called "necessary component" test derived from a pre-*Dabit* district court decision, *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258 (S.D.N.Y. 2004), a test never adopted by any federal court of appeals. (Petitioner has abandoned any reliance on *Xpedior* in his Petition.) Petitioner never mentioned the decisions in *Segal* and *Atkinson* until respondents cited them to the court of appeals, and when he did address those cases, he never argued that they conflicted with the law of the Third Circuit.

fundamentally from petitioner's position in the court of appeals, where he argued that although *Segal* is "phrased in broad terms," the claims in *Segal* "were expressly premised on fraud" and fraud was "central to the claims" asserted in that case. Dkt. 19 at 14 (Petitioner's Reply Brief). Similarly, petitioner argued in the court of appeals that "[t]he allegations of fraud in *Atkinson* were central to the plaintiffs' claims." Dkt. 32 at 1 (Petitioner's Sept. 16, 2011 Letter Response to Respondents' Sept. 15, 2011 Letter).

Petitioner's original readings of *Segal* and *Atkinson* were more accurate. In *Segal*, plaintiffs alleged, as the Sixth Circuit noted, that "'the gravamen of this Complaint is that the defendants did not deal honestly, ethically, fairly and/or in good faith with [the plaintiffs].'" 581 F.3d at 311. Thus, far from being mere "background," Segal alleged that misrepresentation formed the "gravamen" of his complaint. Moreover, Segal incorporated this allegation in each count of his complaint. *Id*. at 310. Similarly, in *Atkinson*, the Sixth Circuit "agree[d] with the district court that fraud-based concepts invade each of Plaintiff's claims. . . ." *Atkinson*, 658 F.3d at 556.

Thus, although the Sixth Circuit's formulation of the scope of SLUSA preclusion differs from that of the Third Circuit, its application in *Segal* and *Atkinson* was consistent with the Third Circuit formulation. As the Seventh Circuit recognized, the Third Circuit "distinguishes . . . between an inessential factual allegation . . . and a factual allegation that while not a necessary element of the plaintiff's cause of action could be critical to his success in the particular case. The former type of factual allegation does not doom the suit, but the latter does." App. 9a. As

petitioner correctly argued to the Seventh Circuit in the proceedings below, fraud was "central" to the claims in *Segal* and *Atkinson*, and thus met the Third Circuit's formulation of the standard.

2. Even if there were some difference between the law of the Third and Sixth Circuits beyond mere variations in language, petitioner's case does not present an appropriate opportunity for review of any such differences because the Seventh Circuit found it unnecessary to choose between one formulation or the other. As the Seventh Circuit recognized, petitioner's action is "barred by SLUSA under *any* reasonable standard." App. 18a (emphasis supplied). The result in this case would be the same regardless of whether petitioner's action had been filed in the Third, Sixth or Seventh Circuits.

Petitioner concedes that if the Sixth Circuit were faced with the complaint in this case (and agreed that it alleges misrepresentation), that court would reach the same result as the court of appeals did here, and conclude that dismissal is proper. Pet. at 21. Petitioner thus is forced to argue that his complaint would survive SLUSA preclusion in the Third Circuit because his so-called "background statement" alleging the misrepresentation and omission of facts bearing directly on "a significant feature of the investment rationale for the common shareholders" (App. 48a) is somehow an "irrelevant," "extraneous detail" (Pet. 22) in a case involving an alleged loss in value of shareholder investments.

Putting aside the fact that the language in *LaSala* relied upon by petitioner was *dicta*, all that language requires to trigger SLUSA preclusion is that an alleged misrepresentation be a "factual predicate" of a state law claim. Nothing in *LaSala* requires that

misrepresentation be an element of the state law cause of action asserted by a plaintiff; in fact, the opposite is true. *LaSala*, 519 F.3d at 141 (reaffirming that SLUSA applies "when an allegation of a misrepresentation in connection with a securities trade is a 'factual predicate' of the claim, *even if misrepresentation is not a legal element of the claim*") (emphasis supplied).

Here, misrepresentation surely is a "factual predicate" of petitioner's purported breach of fiduciary duty, aiding and abetting, and unjust enrichment claims. According to the complaint, respondents lured investors to the Fund's common shares with a promise of favorable financing that would last "indefinitely," and then acted in a contrary manner because it supposedly was in their self-interest to do so. As the Seventh Circuit observed, the inclusion of these allegations was not fortuitous. App. 12a ("the plaintiff . . . must have thought these allegations added *something* to his case, as why else had he made them?" (emphasis in original)). To the contrary, these allegations were important to the state law claims petitioner sought to assert.

3. Under Delaware law, in order to state a direct claim against corporate directors or officers, as petitioner has tried to do here, a stockholder must demonstrate "that he or she can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004). In this case, each of the ostensibly adverse consequences of the redemption of the Fund's AMPS (*e.g.*, allegedly increased costs and risk) were injuries to the Fund, rather than the shareholders directly. It is for this reason that the Seventh Circuit concluded, correctly, that if this *were* a "straight-

forward suit for a breach of the duty of loyalty," it "would have to be brought as a derivative suit. . . ." App. 14a-15a.[9]

In an attempt to make this case something other than a "straightforward" derivative action, it was necessary for petitioner to allege facts demonstrating that he could prevail "without showing injury to the corporation," *Tooley*, 845 A.2d at 1039, *i.e.*, a claim based on an injury ostensibly suffered by shareholders alone.[10] But the means he selected to do this—allegations of fraud upon common shareholders concerning the (supposedly) sempiternal benefits of AMPS financing, ostensibly motivated by personal gain to the respondents from the redemption of the AMPS—steered petitioner's complaint directly into SLUSA's path.

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[9] Amici observe that absent deception, "[m]ere claims of corporate mismanagement" do not state a cause of action under Section 10(b) and Rule 10b-5. Eleven Law Professors Br. 4. What amici overlook is that, absent deception, "[m]ere claims of corporate mismanagement" do not state a direct shareholder cause of action of *any* kind, since mismanagement claims belong to a corporation, not its shareholders. *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1998) (claim for devaluation of stock due to mismanagement is "entirely derivative in nature"); *Feldman v. Cutaia*, 951 A.2d 727, 734-35 (Del. 2008) (claims for mismanagement resulting in decrease in value of stock are derivative in nature).

[10] Under Delaware law, disclosure-based claims generally are direct claims. *Dieterich v. Harrer*, 857 A.2d 1017, 1029 (Del. Ch. 2004); *Big Lot Stores, Inc. v. Bain Capital Fund VII, LLC*, 922 A.2d 1169, 1181 n.54 (Del. Ch. 2006). Moreover, as the Seventh Circuit correctly observed, absent fraud allegations, a claim for breach of the duty of loyalty leveled at a board consisting primarily of *independent* trustees "might not be plausible." App. 18a.

Thus, petitioner's allegations of fraud were, of necessity, a "factual predicate" of the direct (rather than derivative) claims he purported to assert. The Seventh Circuit correctly concluded that petitioner's complaint is "barred by SLUSA under any reasonable standard." App. 18a.

B. The Dismissal Of Plaintiff's Complaint With Prejudice Does Not Warrant Review

Petitioner contends that decisions in four Circuits would have permitted petitioner to "Pursue His Claims After Removing Any Allegation Of Fraud" (Pet. 24) (presumably a euphemism for "amend"), and that the Seventh Circuit's affirmance of the dismissal of petitioner's complaint with prejudice conflicts with the authorities in those Circuits.

At no time in the proceedings below did petitioner seek leave to amend his claims or to assert new claims not within the scope of SLUSA. Consequently, the issue of amendment was not preserved for review. *See Ellis v. Dixon*, 349 U.S. 458, 460 (1955) (dismissing writ of certiorari as improvidently granted and stating that questions not raised below are not open for review by this Court); *Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below"). Moreover, because petitioner never sought amendment, the Seventh Circuit's discussion of amendment is *dicta*. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 563 n.3 (1981). But even if the issue of amendment had properly been presented, it would not warrant this Court's review, since the Seventh Circuit's decision does not conflict with the authorities cited by petitioner.

1. Petitioner's argument conflates Circuit decisions addressing two analytically distinct issues: first, whether SLUSA requires the dismissal of *all* claims asserted in a complaint notwithstanding the presence of some claims that are not precluded by SLUSA; and second, whether a claim or claims otherwise precluded by SLUSA may be amended to state a claim not within the scope of the Act. The first issue is addressed in *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226-28 (9th Cir. 2009) (affirming dismissal of precluded state law class action claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, but holding that SLUSA did not require dismissal of non-precluded derivative claim), and *In re Lord Abbett Mutual Funds Fee Litigation*, 553 F.3d 248, 255-56 (3d Cir. 2009) (reversing district court decision dismissing both precluded state law claims and non-precluded federal claims). S*ee also Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), *vacated*, 547 U.S. 71 (2006) (declining to read SLUSA to preclude entire action, including claims that do not contain allegations triggering preclusion).

The second issue is addressed in *Stoody-Broser v. Bank of America*, N.A., 442 Fed. Appx. 247 (9th Cir. 2011) (reversing district court decision dismissing a SLUSA-precluded complaint with prejudice). *See also U.S. Mortg. Inc. v. Saxton*, 494 F.3d 833, 842-43 (9th Cir. 2007) (concluding that "SLUSA does not prohibit amendment of the complaint after removal"); *Dabit*, 395 F.3d at 47 (stating that dismissal ordinarily should be without prejudice in order to permit plaintiff "to plead a claim sounding only in state law if possible").

The Seventh Circuit's decision does not conflict with the authorities addressing either issue.

2. This case does not present the question whether SLUSA requires the dismissal of an entire action where only some of the claims asserted in a complaint are precluded. In this case, petitioner incorporated his fraud allegations into each count, and as petitioner acknowledges, Count II (a secondary liability "aiding and abetting" claim) and Count III (for unjust enrichment) are merely "derivative of Count I. . . ." Pet. 9. Consequently, each claim pleaded in petitioner's complaint is precluded, necessitating the dismissal of the action in its entirety. *Anderson v. Merrill Lynch Pierce Fenner & Smith*, 521 F.3d 1278, 1287 n.6 (10th Cir. 2008) (dismissing an entire complaint as preempted under SLUSA where plaintiffs had incorporated their fraud allegations into each of their claims, each of which was based on state law). The Third Circuit, which rendered the decision in *In re Lord Abbett*, has itself concluded that the dismissal of all claims is required in such circumstances. *Rowinski*, 398 F.3d at 305.

3. Because petitioner failed to raise the issue of amendment in the proceedings below, each of the Circuits in the *Stoody-Broser* line of cases would join the Seventh Circuit in affirming dismissal with prejudice here. Each of these Circuits agrees that it is not an abuse of discretion to dismiss a complaint with prejudice and deny leave to amend where a plaintiff has failed to file a motion for leave to amend, has not tendered an amended complaint, has failed to seek reconsideration of the district court's dismissal order, or has raised the issue of amendment for the first time on appeal. *See, e.g., Horoshko v. Citibank, N.A.*, 373 F.3d 248, 249-50 (2d Cir. 2004) ("The

Horoshkos' contention that the District Court abused its discretion in not permitting an amendment that was never requested is frivolous"); *Ramsgate Court Townhome Ass'n v. West Chester Borough*, 313 F.3d 157, 161 (3d Cir. 2002) ("Ramsgate never filed a motion to amend, nor did it provide the district court with a proposed amended complaint. As a consequence, the court had nothing upon which to exercise its discretion . . . . The district court committed no abuse of discretion"); *Alaska v. United States*, 201 F.3d 1154, 1163-64 (9th Cir. 2000) ("Where a party does not ask the district court for leave to amend, the request on appeal to remand with instructions to permit amendment comes too late"); *Novoneuron Inc. v. Addiction Research Institute, Inc.*, 326 Fed. Appx. 505, 507 (11th Cir. 2009) ("a district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court") (internal quotations omitted). This also was the rule in the Seventh Circuit well before its decision in the proceedings below. *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396, 401 (7th Cir. 2006) ("District judges are not mind readers . . . . Even assuming that . . . [the plaintiff] . . . properly moved to amend, the district court did not abuse its discretion in dismissing with prejudice, since it had no way of knowing what the proposed amendment entailed").

In the decisions cited by petitioner in which an opportunity for amendment was allowed, the issue was first addressed in the district court. For example, in *U.S. Mortgage*, the district court granted leave to amend but subsequently found that the second amended complaint also was precluded by

SLUSA, and dismissed it with prejudice. 494 F.3d at 839-40.[11] On appeal, the Ninth Circuit recognized "the fact that the granting or denial of leave to amend is ordinarily a matter left to the discretion of the district court" and affirmed the district court's dismissal with prejudice. *Id.* at 843. In *Stoody-Broser*, the issue of whether leave to amend should be granted also arose in the district court, which denied leave to amend because the plaintiff was unable to articulate a claim that would not be precluded by SLUSA. 442 Fed. Appx. at 247. Thus, the issue was properly before the Ninth Circuit when it held that the district court should have allowed an opportunity for amendment. *Id.* And in *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095-96 (11th Cir. 2002), an amended complaint was filed as a matter of right immediately after removal. The district court concluded that the amended complaint also fell within the scope of SLUSA, and the Eleventh Circuit affirmed the dismissal of the complaint *with prejudice*. *Id.*[12] In this case, in contrast to each of the foregoing cases,

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[11] Petitioner appears to cite *U.S. Mortgage* for the proposition that decisions in the Second, Third, Ninth and Eleventh Circuits "straightforwardly" "hold that SLUSA does not prohibit amendment of the complaint following removal." Pet. 25, quoting 494 F.3d at 843. But in that decision, the Ninth Circuit did not purport to characterize the positions of other Circuits on the amendment issue except to acknowledge that "other circuits that have considered the issue have *not* allowed a plaintiff class to amend its way around a SLUSA dismissal, at least where the amended complaint, 'fairly read,' still contains allegations of fraud or deception . . . ." 494 F.3d at 842 (emphasis supplied).

[12] In *Dabit*, like the cases cited above, the issue of amendment was addressed in both the district court, where the court dismissed the original complaint without prejudice and an amended complaint with prejudice, and in the court of appeals. 395 F.3d at 28.

petitioner failed to raise the issue of amendment below.

II. Nothing In The Seventh Circuit's Decision Conflicts In Any Way With This Court's Precedents

Petitioner maintains that the Seventh Circuit's decision somehow conflicts with this Court's decision in *Dabit*, as well as its decisions interpreting Section 10(b) and Rule 10b-5. Both contentions share an essential, and incorrect, premise, *i.e.*, that the Seventh Circuit "recognized" that petitioner's "claim is unrelated to any misrepresentation or omission by respondents." Pet. 30. (The amici curiae brief submitted in support of the Petition is based, in its entirety, on a similar assumption.) This, petitioner contends, puts the Seventh Circuit's decision at odds with a construction of SLUSA paralleling Section 10(b) and Rule 10b-5, which do not reach "garden-variety" breach of fiduciary duty claims. Petitioner embellishes his argument with the assertion that this Court has "rigorously enforced" a requirement that Section 10(b) claims must "expressly" allege deception or fraud in order to avoid transforming every breach of fiduciary claim into a federal securities violation. Pet. 29, citing *SEC v. Zanford*, 535 U.S. 813, 825 n.4 (2002). None of these contentions has any merit.

1. The Seventh Circuit's decision in no way "recognize[s]" that petitioner's "claim is unrelated to any misrepresentation or omission . . . ." Pet. 30.[13] Nor

[13] In the passage of the court of appeals' opinion cited by petitioner for this proposition, the Seventh Circuit described how petitioner might have brought a "straightforward suit for breach of the duty of loyalty," unadorned by allegations of fraud,

did the court of appeals hold that "SLUSA requires dismissing a complaint on the basis of what the plaintiff might assert if his actual claims failed" (Pet. 32), or based upon a hypothetical possibility that petitioner might "later abandon his fiduciary duty claim and assert instead that respondents committed a misrepresentation . . . ." Pet. 31. To the contrary, the district court found that alleged misstatements "are at the heart of plaintiff's claims" (App. 67a) and the Seventh Circuit affirmed, finding that "[t]hough the suit is for breach of fiduciary obligations, the breach appears to rest on an allegation of fraud . . . ." App. 18a.

In light of these findings, petitioner's argument reduces to the contention that the Seventh Circuit was simply wrong in concluding that SLUSA precludes petitioner's complaint absent express allegations using the words "misrepresentation" and "omission" *in haec verba*, or a claim expressly designated as a cause of action for fraud. Pet. 29. Even if this were correct, it would not warrant review by this Court. Sup. Ct. R. 10. But it is not correct.

2. SLUSA "stands as an express exception to the well-pleaded complaint rule," *Rowinski*, 398 F.3d at 304-05, and thus cannot be evaded by the simple expedient of avoiding the words "misrepresentation" or "omission," or labeling a claim alleging misrepresentation or omission as something other than a fraud claim. The statutory test for SLUSA preclusion (whether a covered class action "alleg[es]" a misrep-

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as a derivative suit, had petitioner been willing to do so and been able to establish demand futility. App. 14a-15a. The court of appeals was not describing petitioner's complaint as it actually was pleaded.

resentation or material omission) cannot be evaded by "artfully pleading." *See Anderson*, 521 F.3d at 1286 ("courts have generally held that SLUSA precludes those claims" that "meet all of the elements of SLUSA," "regardless of how artfully or cleverly plaintiffs attempt to plead them"); *LaSala*, 519 F.3d at 128 (SLUSA bars claims that, "no matter how pleaded, in essence allege securities fraud"); *Rowinski*, 398 F.3d at 304 (under SLUSA, the focus is on what a "reasonable reading of the complaint evidences"); *U.S. Mortg.*, 494 F.3d at 842 (SLUSA cannot be "circumvented by artful drafting"); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004) (plaintiffs cannot "articulate pleadings that dodge SLUSA") (citing with approval *In re WorldCom, Inc. Sec. Litig.*, 308 F. Supp. 2d 236, 244 (S.D.N.Y. 2004)); *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 879 (8th Cir. 2002) (SLUSA preclusion cannot be avoided by "artfully concealing the federal question in an otherwise well-pleaded complaint under state law"). It is for this reason that a disclaimer of an intention to assert a fraud claim, like the one found ineffective by both the district court and the court of appeals below, cannot avert preclusion where SLUSA's requirements are met. *Segal*, 581 F.3d at 311 ("a claimant does not have the . . . authority to disclaim the applicability of SLUSA to a complaint").

3. It is unclear precisely how petitioner contends that the court of appeals decision conflicts with this Court's decision in *Dabit*. Petitioner focuses on *Dabit*'s observations concerning the similarity of the language of SLUSA, on the one hand, and Section 10b and Rule 10b-5 on the other (Pet. 27), but nothing in *Dabit* requires that a complaint must plead each of the elements of a private cause of action for securities fraud—including, for example, scienter

and loss causation—to trigger SLUSA preclusion. Indeed, SLUSA itself bases preclusion on whether an action at issue "alleg[es] a misrepresentation or omission of material fact," 15 U.S.C. § 78bb(f)(1)(A), not whether it alleges a violation of Section 10(b) and Rule 10b-5. Thus, petitioner's argument that his complaint should not be precluded by SLUSA because his allegations "unquestionably could not have been brought under Section 10(b) and Rule 10b-5" is irrelevant. Pet. 30. Nothing in SLUSA conditions the Act's application upon a plaintiff's ability to bring a *successful* federal securities claim based upon the allegations of his or her complaint. To the contrary, *Dabit* itself holds that SLUSA preclusion is not limited to claims that state a private cause of action under Section 10(b) and Rule 10b-5. *Dabit*, 547 U.S. at 74.[14]

Moreover, an "express" misrepresentation is not a prerequisite to a violation of Section 10(b) and Rule 10b-5. In *In re Charter Communications, Inc. Securities Litigation*, 443 F.3d 987, 992 (8th Cir. 2006), the court of appeals observed, citing *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 474-75 (1997), that "[a] device or contrivance is not 'deceptive,' within the meaning of § 10(b), absent some misstatement or a failure to disclose by one who has a duty to disclose." This Court affirmed the result in the case, but

[14] Amici similarly decry the fact that SLUSA may bar state law investor class actions which could not have been brought under the federal securities laws. Eleven Law Professors Br. 3. But this is an argument better directed to Congress than this Court. It also overlooks the fact that SLUSA expressly preserves derivative actions brought under state law, as well as individual actions and certain putative class actions. *See* the discussion *infra* p. 31.

qualified the Eighth Circuit's observation, stating: "If this conclusion were read to suggest there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5, it would be erroneous." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). Thus, an implied misrepresentation in connection with the purchase or sale of securities is enough to give rise to a federal securities fraud claim, *VanCook v. SEC*, 653 F.3d 130, 140-41 (2d Cir. 2011), and sufficient to trigger SLUSA preclusion. *Behlen*, 311 F.3d at 1096 (complaint which "implicitly alleged" a failure to disclose material facts was within the scope of SLUSA); *Prof'l Mgmt. Assoc., Inc. Employees Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003) (same), *cert. denied*, 540 U.S. 1162 (2004).

If a plaintiff could avoid SLUSA preclusion by the simple expedient of omitting from a complaint allegations of loss causation, or by failing to plead scienter with the specificity required by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), SLUSA would be rendered toothless. SLUSA was intended to foreclose state court securities class actions as an avenue to escape the stringent requirements of the PSLRA. *Dabit*, 547 U.S. at 81-82. It would be anomalous, to say the least, if SLUSA could be avoided simply by a failure to comply with some or all of those very same requirements. *Id.* at 86 (observing that a narrow construction of SLUSA would undercut the effectiveness of the PSLRA and run contrary to SLUSA's stated purpose, and adding that "[i]t would be odd, to say the least, if SLUSA exempted" a "particularly troublesome subset of class actions from its pre-emptive sweep").

4. Petitioner asserts that the ruling below "has no stopping point" and ostensibly would "convert[ ] almost every permissible state law suit for breach of fiduciary duty into a claim of fraud forbidden by federal law." Pet. 31. This is hyperbole, no more true here than was a similar prediction rejected by the Court in *Zanford*, 535 U.S. at 825 n.4 (reversing dismissal of a complaint describing a fraudulent scheme in which securities transactions and breaches of fiduciary duty coincided; "our analysis does not transform every breach of fiduciary duty into a federal securities violation"). *See also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 596 (2001) (rejecting contention that application of securities laws to claim arising from failure to honor stock option would "permit numerous plaintiffs to bring federal securities claims that are in reality no more than ordinary state breach-of-contract claims").

Although allegations of a breach of fiduciary duty, standing alone, will not support a private action under Section 10(b) and Rule 10b-5, *Santa Fe*, 430 U.S. at 473-76, it is equally true that the fact that alleged fraudulent misconduct may constitute a breach of fiduciary duty does not *insulate* that conduct from the federal securities laws—or from SLUSA preclusion. Imposing liability under the federal securities laws in such circumstances "does not transform every breach of fiduciary duty into a federal securities violation." *Zanford*, 535 U.S. at 825 n.4; *see also United States v. O'Hagan*, 521 U.S. 642, 655 (1997) (distinguishing *Santa Fe* on the ground that in that case, "all pertinent facts were disclosed by the persons charged with violating § 10(b) and Rule 10b-5"). Thus, in *Dabit*, it was no bar to the application of SLUSA that the plaintiff alleged a breach of fiduciary duty by the dissemination of

misleading research reports to brokers, indirectly harming investors.

SLUSA does not preclude every breach of fiduciary duty class action asserted under state law; it precludes only those alleging, like petitioner's complaint, a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security.[15] Moreover, as the Court observed in *Dabit*, Congress "did not by any means act 'cavalierly' here." 547 U.S. at 87. It carefully exempted specific categories of cases (including certain class actions) from SLUSA preclusion and, most importantly for purposes of fiduciary litigation, altogether excluded derivative actions. 15 U.S.C. § 77p(d)(1)-(3), (f)(2)(B); 15 U.S.C. § 78bb(f)(3)(A)-(C), (f)(5)(C). "The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions." *Dabit*, 547 U.S. at 87-88. In this case, petitioner simply chose not to pursue any of the avenues open to him under SLUSA.

5. Petitioner contends that "[a]t the very least, petitioner should have been permitted to proceed without the single offending sentence that respondents contend [and the district court and Seventh

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[15] Petitioner contends that his claims "would be utterly unaffected" by proof at trial that respondents had acted truthfully and disclosed all material information. Pet. 30. But SLUSA preclusion does not hinge on the proof at trial, by which time a defendant will have been subjected to the full costs of litigation. It is prophylactic, and triggered by the allegations made in a complaint. Further, as the court of appeals recognized, if petitioner proved at trial only a breach of the duty of loyalty, without more, he would be left with a derivative claim on behalf of the Fund, for which he has not satisfied the procedural prerequisites. App. 14a-15a.

Circuit found] implicitly alleges a misrepresentation." Pet. 34. As discussed *supra* at pages 7-8, however, petitioner made the decision to forego seeking leave to amend based on his reading of the case law that would not permit amendment.

In support of the very different position he has adopted before this Court, petitioner again cites the Third Circuit's decision *In re Lord Abbett*, which in turn relied upon *Jones v. Bock*, 549 U.S. 199 (2007), in concluding that SLUSA does not require the dismissal of an entire "action" where, in addition to precluded state law claims, a complaint also pleads valid federal claims not within SLUSA's reach. 553 F.3d at 257. But *In re Lord Abbett* has no application here, where the fraud allegations triggering SLUSA preclusion are incorporated in each count of the complaint, and Counts II and III are "derivative" of Count I. Pet. 9. *See* the discussion *supra* p. 21. For the same reasons, this is not a case, as in *Jones*, 549 U.S. at 221, where a complaint contains both good and bad claims. *All* of the claims asserted by petitioner were bad, and precluded.

Given petitioner's failure to request leave to amend at any stage of the proceedings below, petitioner's assertion that the court of appeals purportedly concluded that amendments to SLUSA-precluded complaints are "categorically forbidden" (Pet. 35) is academic. But the court of appeals did not so hold. It observed that even if the opportunity for forum manipulation were not a bar to amendment, the probability that fraud would find its way back into the case even after amendment meant that the district court "would . . . not have been *required* to allow such an amendment" if one had been sought. App. 19a (emphasis supplied). Of course, none was.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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