NO.

In the

Supreme Court of the United States

PROSKAUER ROSE LLP,

PETITIONER,

v.

SAMUEL TROICE, HORATIO MENDEZ, ANNALISA MENDEZ, PUNGA PUNGA FINANCIAL, LTD., individually and on behalf of a class of all others similarly situated,

RESPONDENTS.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1), prohibit private class actions based on state law only where the alleged purchase or sale of a covered security is "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud?

2. Does SLUSA preclude a class action in which the defendant is sued for aiding and abetting fraud, but a non-party, rather than the defendant, made the only alleged misrepresentation in connection with a covered securities transaction?

PARTIES TO THE PROCEEDING

Petitioner is Proskauer Rose LLP, a defendant below.

The other defendants below are Thomas V. Sjoblom, P. Mauricio Alvarado, and Chadbourne & Parke LLP.

Respondents, plaintiffs below, are Samuel Troice, Horatio Mendez, Annalisa Mendez, Punga Punga Financial, Ltd., individually and on behalf of a class of all others similarly situated.

RULE 29.6 STATEMENT

Petitioner Proskauer Rose LLP, a law firm, is a limited liability partnership with no parent company. No entity of any kind has a 10 percent or greater ownership in Proskauer.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Proskauer Rose LLP ("Proskauer") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which is codified in Section 28 of the Securities Exchange Act of 1934 ("Exchange Act"), prohibits class actions of fifty or more persons based on state law that allege "[a] misrepresentation or omission of a material fact in connection with the purchase or sale of a covered [*i.e.*, nationally traded] security." 15 U.S.C. § 78bb(f)(1)(A). In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, this Court held that Congress intended the phrase "in connection with" to have the same meaning in SLUSA as it does in § 10(b) of the Exchange Act, a different provision of the same statute. 547 U.S. 71, 85-86 (2006).

In the decision below, the Fifth Circuit adopted a standard for SLUSA preclusion that is different from, and significantly more restrictive than, the standard applicable to § 10(b) actions. After concluding that the complaint in this action alleges purchases and sales of covered securities, the Fifth Circuit determined that SLUSA did not apply because the alleged transactions are not "more than tangentially related" to the "heart, crux or gravamen" of the alleged fraud. Appendix ("App.") 34a, 44a. This standard squarely conflicts with SLUSA's statutory text and this Court's precedents interpreting § 10(b)'s identical requirement, which establish that a misrepresentation and a securities transaction are "in connection with" one another if they merely "touch[]," *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971), or "coincide," *SEC v. Zandford*, 535 U.S. 813, 825 (2002). The Fifth Circuit's decision ignores controlling law and clouds the "in connection with" standard under both SLUSA and § 10(b).

Absent a grant of certiorari, there is a substantial risk that the identical language in these two provisions of the Exchange Act will be interpreted inconsistently. Indeed, it is significant that in a related enforcement action brought by the U.S. Securities and Exchange Commission ("SEC") against the actual perpetrators of the Ponzi scheme at issue in this case (who are not defendants here), the SEC asserted that § 10(b)'s "in connection with" requirement was satisfied based upon some of the *same* securities transactions that the Fifth Circuit rejected below as too tangential under SLUSA's identical requirement. Likewise, the Fifth Circuit's interpretation of SLUSA would render meaningless Congress's determination to give the SEC authority to bring claims for aiding and abetting § 10(b) violations. The Fifth Circuit imposed upon SLUSA an additional element in aiding and abetting cases such as this one, holding—without reference to the statutory text—that the "in connection with requirement" can be satisfied only where the defendant aider (rather than a primary violator) allegedly made a misrepresentation in connection with a purchase or sale of SLUSA-covered securities.

Giving § 10(b)'s "in connection with" requirement the same interpretation would similarly render aiding and abetting non-actionable by the SEC unless the aiders themselves (*i.e.*, the defendants) were also primary violators who made misrepresentations in connection with a securities transaction.

The Court should also grant this petition to resolve a deep and pervasive split among the courts of appeals regarding the scope of SLUSA's "in connection with" requirement, which the Fifth Circuit's decision below has further enlarged. In adopting the "more than tangentially related" test, the Fifth Circuit explicitly rejected the standards employed by the Second, Sixth, Seventh, Eighth and Eleventh Circuits, and instead announced that it was aligning itself with the Ninth Circuit's standard. In fact, however, the Fifth Circuit formulated a new test by requiring that the relevant securities transaction be at the "heart, crux and gravamen" of the fraud, as well as by evaluating the layers of separation between the plaintiff's transaction and a covered security, plaintiff's investment purpose and the identity of the speaker of the alleged misrepresentations. No other court of appeals, including the Ninth Circuit, has considered these factors in any SLUSA case for good reason: such factors conflict with SLUSA.

Furthermore, by confining SLUSA preclusion to aiding and abetting cases in which the defendants also made the alleged misrepresentations, the Fifth Circuit's decision below not only conflicts with a decision from the Eleventh Circuit, but also disregards congressional intent. In light of the substantial risk of abuse presented by aiding and abetting suits, Congress chose not to permit private plaintiffs (as opposed to the SEC) to bring aiding and abetting claims under the federal securities laws, which would have been subject to heightened pleading requirements and other restrictions. Although Congress's decision to prohibit private aiding and abetting claims must be "give[n] weight" in interpreting the requirements of the securities laws, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159, 163 (2008), the Fifth Circuit ignored Congress's choice. As a result, aiding and abetting actions against defendants, like petitioner, who did not commit fraud but may be targeted for their perceived "deep pockets" can now proceed under state law without *any* restrictions at all, even though, perversely, related claims against primary violators will be barred by SLUSA.

This case, moreover, presents an appropriate—and rare—vehicle to resolve these important issues of federal law. Most cases invoking SLUSA are commenced in state court and are removed to federal court pursuant to SLUSA's removal provision. The Fifth Circuit's decision, however, if allowed to stand, will chill or prevent removal of cases on SLUSA grounds in the first place; and if such cases are removed pursuant to SLUSA, they will have to be remanded by the district court. Because district court remand orders ordinarily are non-appealable, future applications of the Fifth Circuit's decision below may not be subject to any review at all. Thus, there may be no future opportunity to review the

Fifth Circuit's interpretation of SLUSA's "in connection with" requirement.

Accordingly, petitioner respectfully requests that certiorari be granted so that this Court may clarify and restore the proper application of the "in connection with" requirement under both SLUSA and § 10(b).

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 675 F.3d 503 and is reprinted at App. 1a-44a. The Fifth Circuit's order denying rehearing *en banc* is reprinted at App. 76a-79a. The district court's order granting petitioner's motion to dismiss the second amended complaint is reprinted at App. 45a-46a. The opinion of the district court in *Roland v. Green*, which was consolidated with this action on appeal, and upon which the district court relied in granting petitioner's motion to dismiss, is reprinted at App. 47a-75a.

JURISDICTION

The Fifth Circuit entered its opinion and order on March 19, 2012, App. 1a, and denied a timely petition for rehearing on April 19, 2012, with three judges recused, App. 76a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Securities Litigation Uniform Standards Act of 1998

("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, which are codified in § 16 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77p(b), and § 28 of the Exchange Act, 15 U.S.C. § 78bb(f), are reproduced in full at App. 80a-93a. Section 10(b) of the Exchange Act is reproduced in full at App. 94a-96a.

STATEMENT OF THE CASE

1. a. Congress enacted SLUSA to prevent private plaintiffs from frustrating the purposes of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737; *Dabit*, 547 U.S. at 81-82. The PSLRA was passed in part to curb abuses of the class action device in federal securities cases. *Id.* Among other things, the PSLRA imposed certain restrictions on federal securities claims, including heightened pleading requirements, a discovery stay pending resolution of any motion to dismiss and limitations on recoverable damages. *Id.*

The PSLRA also reflects other congressional policy choices, including "Congress' determination" that advisors and other alleged "aiders and abettors . . . should be pursued by the SEC and not by private litigants." *Stoneridge Inv. Partners, LLC*, 552 U.S. at 159, 162-63.[1] Claims for aiding and abetting

[1] *Accord* S. Rep. No. 104-98, at 20-21 (1995) (finding that "peripheral" "deep-pocket defendants" face "overwhelming" "pressure to settle . . . regardless of the defendant's culpability" because "[t]he exposure in securities fraud class actions is enormous because of the amount of total damages claimed"); (…continued)

securities law violations present a significant potential for abuse, in that they expose additional classes of defendants to potentially vast liability for amorphous conduct removed from any actual securities transactions, thereby creating significant pressure for such defendants to settle claims regardless of their merit. *Id.* at 163-64. Before the PSLRA was enacted, this Court had held that an implied right of action against aiders and abettors was inconsistent with the text of § 10(b) of the Exchange Act. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). In the PSLRA, Congress restored the SEC's authority to bring aiding-and-abetting claims, but conspicuously chose not to empower private plaintiffs to bring such claims. *Stoneridge*, 552 U.S. at 162-63. "Congress' amendment to the [Exchange] Act restoring aiding and abetting liability in certain cases but not others" should be "give[n] weight" in interpreting the federal securities laws. *Id.* at 162.

The enactment of the PSLRA had the "unintended consequence" of channeling some securities class actions into state court, as a means to circumvent the restrictions the statute imposed. *Dabit*, 547 U.S. at 82. Recognizing that these

(continued…)

H.R. Rep. No. 104-369, at 31 (1995) ("The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: . . . the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability.").

lawsuits threatened to undermine the purpose of the PSLRA, in 1998 Congress enacted SLUSA to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the PSLRA. SLUSA § 2(2), (5); 112 Stat. 3227.

b. Congress endowed SLUSA with an expansive preclusive effect and intended it to have a "broad construction" that is fully coextensive with the scope of the SEC's authority to bring cases under § 10(b) of the Exchange Act. *Dabit*, 547 U.S. at 86. The scope of SLUSA preclusion thus extends beyond the class of cases that private plaintiffs can bring under § 10(b), because SLUSA's "in connection with" requirement is not limited by the prudential standing and other requirements applicable to private § 10(b) actions. For example, while private plaintiffs cannot pursue "holder" actions under the federal securities laws because holders do not themselves buy or sell any securities, such actions can be brought by the SEC (which does not need to satisfy the purchaser-seller standing requirement) and therefore are precluded by SLUSA, so long as they satisfy the statute's other requirements. *See id.* at 88-89. SLUSA's "core provision" prohibits any "covered class action based upon the statutory or common law of any State or subdivision thereof . . . alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security.[2] *Id.* at 82-83 (quoting 15 U.S.C. § 78bb(f)(1)).

This Court held in *Dabit* that Congress must be presumed to have intended the phrase, "in connection with," as used in SLUSA, to have the same "broad interpretation" as that phrase has in § 10(b). *Id.* at 85. This conclusion was compelled both by "ordinary principles of statutory construction" as well as "the particular concerns that culminated in SLUSA's enactment." *Id.* at 86. This Court's precedents interpreting § 10(b)'s identical requirement establish that a misrepresentation and a securities transaction are sufficiently connected if they merely "touch[]," *Bankers Life & Cas. Co.*, 404 U.S. at 12, or if they "coincide," *Zandford*, 535 U.S. at 825.

This Court's decisions have "rejected th[e] view" that "an alleged fraud is 'in connection with' a purchase or sale of securities only when the plaintiff himself was defrauded into purchasing or selling particular securities." *Dabit*, 547 U.S. at 85. Under both § 10(b) *and* SLUSA, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Id.* (citing *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)). As the terms "touching" and "coincide"

[2] A "covered class action" is defined as a lawsuit in which damages are sought on behalf of more than 50 people, and a "covered security" includes one traded nationally and listed on a regulated national exchange. *Dabit*, 547 U.S. at 83, nn. 8 & 9.

connote, the requisite connection between the fraud and the securities transaction need not be close. For example, "[t]he identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities." *Id.* at 89. Similarly, the "in connection with" requirement does not turn on whether the misrepresentation concerns the value of a security or even whether the fraud concerns a particular security. *Zandford*, 535 U.S. at 821.

2. a. Respondents are purchasers of certificates of deposit ("CDs") issued by the Stanford International Bank ("SIB"). App. 48a. In their second amended complaint, respondents alleged that the CDs were part of a Ponzi scheme run by R. Allen Stanford and the Stanford Financial Group (collectively, "Stanford"). Stanford is not named as a defendant in this action.

The complaint alleges that Stanford induced respondents and a class of similarly situated investors to buy CDs through false representations that the CDs were "safe[] and secur[e]" and paid "high return rates." Record ("R.") 183.[3] According to the complaint, Stanford attributed these features to SIB's investment of the CD proceeds in "stocks and bonds" and a diversified portfolio of highly liquid, marketable securities "issued by stable governments, strong multinational companies and major

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[3] Citations in the form "R." are to the record on appeal in the Fifth Circuit.

international banks." R. 179-80, 183, 190-91, 200. Stanford allegedly emphasized the "'liquidity/marketability of SIB's invested assets'"—*i.e.* covered securities—as "the '*most important factor* to provide security to SIB clients . . . .'" R. 180 (emphasis added).

In addition, to grow the Ponzi scheme, Stanford allegedly "'head hunt[ed]' for U.S. brokers and financial advisers" by paying them large bonuses and commissions to "transfer their book of clients over to Stanford Financial" and to "'push' the SIB CDs on investors like Plaintiffs." R. 176-77. By 2009, Stanford had allegedly sold over $7 billion in CDs. R. 183. As these allegations necessarily entail—and as the SEC confirmed in a related action against Stanford, Record Excerpts ("R.E.") 114[4]—some investors who transferred their brokerage accounts to Stanford liquidated their holdings of covered securities to reinvest in the allegedly fraudulent CDs.

Petitioner Proskauer is an international law firm that was hired as outside counsel to represent Stanford in an SEC investigation. R. 164, 216. Respondents do not allege that petitioner made misrepresentations to them or was involved in any way in selling the CDs or perpetuating the Ponzi scheme. Instead, they assert that petitioner aided and abetted Stanford's violations of the Texas

[4] Citations in the form "R.E." are to the record excerpts filed by petitioner in the Fifth Circuit.

Securities Act and common law by allegedly stalling an SEC investigation into Stanford's operations. R. 216.

b. The district court (Godbey, J.) granted petitioner's motion to dismiss the complaint, holding that SLUSA precludes respondents' state law class action claims. App. 45a-46a. In granting petitioner's motion, the district court applied the reasoning set forth in its decision in *Roland v. Green*, No. 10-cv-223 (N.D. Tex. Aug. 31, 2011).

The district court determined that the *Roland* action alleged fraud "in connection with" a covered securities transaction in two ways: (1) the plaintiffs' purchases of SIB CDs were allegedly "induced" by the misrepresentation that SIB invested plaintiffs' funds in a portfolio that included SLUSA-covered securities; and (2) "at least one of the [plaintiffs] acquired SIB CDs with the proceeds of selling SLUSA-covered securities in their IRA portfolios." App. 74a (internal quotation marks omitted). In interpreting SLUSA's "in connection with" requirement, the district court adopted the test employed by the Eleventh Circuit, which asks whether the complaint alleges "fraud that induced [the plaintiffs] to invest with [the defendants] . . . or a fraudulent scheme . . . that coincided and depended upon the purchase or sale of securities." App. 64a (alteration in original) (*citing Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) ("*IPM*")). Concluding that the purchases and sales of covered securities alleged in the *Roland* action satisfied this standard, the district court dismissed the complaint. App. 75a.

c. Respondents timely appealed the dismissal of this action to the Fifth Circuit, where this case was consolidated with *Roland* and another Stanford action dismissed by the district court on SLUSA grounds, *Troice v. Willis of Colorado*, No. 11-10932.

The Fifth Circuit reversed the district court's orders dismissing all three cases. Identifying the scope of SLUSA's "in connection with" requirement as one of "first impression" within the circuit, the Fifth Circuit noted that guidance from this Court that a fraud must "coincide" with a securities transaction was "not particularly descriptive." App. 14a, 17a. In attempting to interpret what it means for a fraud and a securities transaction to "coincide," the court of appeals did not examine prior Fifth Circuit precedent or this Court's decisions construing § 10(b).

Instead, the Fifth Circuit surveyed decisions from six other circuits interpreting SLUSA's scope. The Fifth Circuit rejected the tests used by the Sixth, Seventh and Eighth Circuits, concluding that they did not sufficiently define what it means for a securities transaction and a fraud to "coincide." App. 18a. The Fifth Circuit also rejected the standards of the Eleventh and Second Circuits. The Fifth Circuit held that insofar as the Eleventh Circuit considers whether a complaint alleges a fraud that "induced" the plaintiff's securities transaction, that test analyzes the "in connection with" requirement from the plaintiff's point of view, which the Fifth Circuit believed was the "wrong" perspective. App. 33a. The Fifth Circuit also disapproved, as "too stringent a standard," the portion of the Eleventh Circuit's test that considers whether an alleged fraudulent scheme "depends on" a securities transaction. App. 33a. The Fifth Circuit rejected the Second Circuit's test, which asks whether the plaintiff's claims "necessarily" allege, involve or rest on a securities transaction, for the same reason. *Id.* Ultimately, the Fifth Circuit announced that it was adopting the Ninth Circuit's test: whether " 'there is a relationship in which the fraud and the stock sale . . . are *more than tangentially related* . . . .'" App. 34a (quoting *Madden v. Cowen & Co.*, 576 F.3d 957, 965-66 (9th Cir. 2009)).

The Fifth Circuit went beyond merely applying the Ninth Circuit test, however. Relying primarily on a series of district court decisions from the Southern District of New York, the Fifth Circuit held that the purchase or sale of a covered security must also be more than tangentially related "to the '*heart,' 'crux,' or 'gravamen*' *of the defendants' fraud*." App. 38a (emphasis added). Although the Fifth Circuit agreed with the district court that the complaints in *Roland* and *Willis* alleged that purchases and sales of covered securities occurred as "part of the fraud," App. 41a, the court of appeals nonetheless concluded that this connection was insufficient because the plaintiffs did not invest in the CDs for the "'purpose of purchasing covered securities'" and because "there are 'multiple layers of separation' between the CDs and any security purchased by SIB," App. 40a (citations omitted).

With respect to the complaint in this action, the Fifth Circuit likewise concluded that the connection between the alleged fraud and the covered securities transaction was "not more than tangential[]." App. 44a. But in making this determination, the Fifth Circuit did not evaluate the connection between the alleged fraud by *Stanford* and the covered securities transactions, which was the only connection petitioner had discussed in its motion to dismiss and on appeal, and the connection upon which the district court relied in granting the motion to dismiss. Instead, the Fifth Circuit reasoned that because petitioner was sued solely for aiding and abetting Stanford and had not made any misrepresentations to respondents, the court should focus its analysis on petitioner's purported communications with the SEC. App. 43a-44a. Finding that these were "one level removed" from the representations made to respondents and the transactions in covered securities, the Fifth Circuit held, as a result, that SLUSA does not preclude respondents' claims. App. 43a-44a.

d. Petitioner timely filed a petition for rehearing en banc, which the court denied on April 19, 2012, with three judges (Chief Judge Jones, Judge Smith, and Judge Haynes) recused.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for two separate reasons.

First, the Fifth Circuit's "more than tangentially related" test is clearly different from—and more restrictive than—the standard that applies under § 10(b). This is directly contrary to Congress's expressed intent for the "in connection with" requirement to have the same "broad construction" in SLUSA and § 10(b). *Dabit*, 547 U.S. at 85-86. As a result of the Fifth Circuit's decision, lower courts will be forced to choose between two untenable alternatives: interpreting the "in connection with" requirement differently in the two provisions of the Exchange Act or narrowing § 10(b) actions by the SEC and private plaintiffs to conform them to the Fifth Circuit's rule in the SLUSA context.

Second, the Fifth Circuit's decision compounds an already pervasive split among at least six circuits concerning the proper scope of SLUSA preclusion. Moreover, because SLUSA issues arise most frequently in the removal context, if the Court does not grant this petition, it may not soon have another opportunity to reaffirm the relationship between SLUSA and § 10(b) and to resolve the circuit split because defendants in the Fifth Circuit either will not remove close cases on SLUSA grounds, or they will remove them and the cases will be subject to an immediate, non-reviewable remand order by the district court.

I. The Fifth Circuit's Decision Creates Substantial Doubt About the Meaning of the "In Connection With" Requirement Under Both SLUSA and § 10(b)

1. a. The Fifth Circuit's test for SLUSA—that the "heart, crux or gravamen" of the alleged fraud must be "more than tangentially related" to a

covered securities transaction, App. 34a, 38a—engrafts additional elements onto the statutory language. The Fifth Circuit's test thus differs from the approach this Court has taken when interpreting the "in connection with" requirement of § 10(b).

Rather than seek to identify specific elements that must always be present in a case for the "in connection with" requirement to be satisfied, this Court has routinely eschewed such a "technical[] and restrictive[]" interpretation of this provision of the statute. *Zandford*, 535 U.S. at 819. Instead, this Court has assessed whether the connection in the case before it was "enough," *id.* at 822, and has often focused on what elements are *not* necessary for a fraud to be "in connection with" a securities transaction.

In *Bankers Life*, for example, this Court held that the "in connection with" requirement of § 10(b) was satisfied where a plaintiff had "suffered an injury as a result of deceptive practices *touching* [the purchase or] sale of securities." *Bankers Life & Cas. Co.*, 404 U.S. at 12-13 (emphasis added); *accord Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977). To "touch[]" in this way, the fraud and the securities transaction did not need to be contemporaneous or to occur in a single transaction; because the scheme, taken as a whole, incorporated both a material misstatement and a securities transaction, § 10(b)'s requirements were met. *Bankers Life & Cas. Co.*, 404 U.S. at 9-10, 12 (rejecting argument that § 10(b)'s requirements were not satisfied where full market price was received for sale of securities, and misrepresentations merely concerned use of proceeds in subsequent transaction); *accord Zandford*, 535 U.S. at 820-22 (requirement was satisfied where "[t]he securities sales and respondent's fraudulent practices were not independent events"). As this Court subsequently has affirmed, the fraud does not need to deceive any party to the securities transaction itself, *O'Hagan*, 521 U.S. at 656, nor must it concern "the value of a security" or even any "particular security," *Zandford*, 535 U.S. at 821 (citation and internal quotation marks omitted). "It is enough that the scheme to defraud and the sale of securities coincide." *Zandford*, 535 U.S. at 822.

The Court's broad interpretation of the "in connection with" requirement is the standard that Congress imported into SLUSA. *See Dabit*, 547 U.S. at 85. By definition, however, the Fifth Circuit's test requires something more than the "touching" to satisfy the "in connection with" standard. According to the Fifth Circuit, SLUSA's "in connection with" requirement cannot be met unless there is a "more than tangential[]" relationship between the covered securities transaction and the "heart, crux or gravamen" of the defendants' fraud. App. 38a. The word "tangential" means "touching lightly," *Webster's Third New International Dictionary* 2337 (1993), so "more than tangential" necessarily requires something more substantial than touching.[5]

[5] The root of "tangent" is the Latin "tangere," which means "to touch." *The Concise Oxford Dictionary of English Etymology* 482 (1993).

See also Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 344 F.3d 1359, 1369 (Fed. Cir. 2003) (citing *The New Shorter Oxford Dictionary* 3215-16 (1993) for its definition of tangential as "merely touching").[6]

b. The allegations in this case highlight why these distinctions are not merely semantic. The decision below specifically found that "covered securities were in fact traded as a part of the fraud." App. 41a. It also acknowledged that the complaint alleged that the SIB CDs were marketed to investors based, in part, on false representations that the proceeds would be invested in SLUSA-covered securities, and that these alleged misrepresentations were made to induce respondents' purchases. App. 37a. Under this Court's precedents, these same allegations are more than enough to establish that the purported fraud and the securities transactions "touch[]" and "coincide." *See, e.g.*, *Bankers Life & Cas. Co.*, 404 U.S. at 9-10 (fraudulent scheme induced plaintiff to sell treasury bonds and reinvest proceeds in allegedly worthless CD); *see also Zandford*, 535 U.S. at 821-22. According to the Fifth Circuit, however, such allegations are not sufficient because the transactions in covered securities were

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[6] *See also, e.g.*, *United States v. Gruenberg*, 989 F.2d 971, 976 (8th Cir. 1993) ("The plaintiff need not establish a direct or close relationship between the fraudulent transaction and the purchase or sale of a security. . .[i]nstead, the plaintiff need only show that the fraudulent conduct 'touches' the purchase or sale of the securities.") (citation and quotation marks omitted).

not at the "heart, crux or gravamen" of the alleged fraud.

2. Because the standard applied by the Fifth Circuit in this case is actually different from the standard applicable to actions under § 10(b), the Fifth Circuit's decision leaves lower courts with an untenable choice. Lower courts will be forced either to interpret SLUSA differently from § 10(b)—in violation of congressional intent as reflected in the statutory text, *see Dabit*, 547 U.S. at 85-86—or to restrict the scope of § 10(b) actions so that they conform to the Fifth Circuit's newly minted, more narrow standard.

The latter result would place novel and significant burdens not only on private plaintiffs asserting damages claims, but also on the SEC when it seeks to enforce § 10(b)'s prohibitions. The SEC's related action against Stanford presents a stark example of this problem. [7] Six months before respondents filed this action, the SEC brought a § 10(b) complaint against Stanford seeking a preliminary injunction and the appointment of a receiver; it was the SEC action, in fact, that permanently shut down the Stanford Ponzi scheme. R.E. 110-14. The SEC argued in its application to the district court for the preliminary injunction that it could satisfy § 10(b)'s "in connection with"

[7] Respondents, in the very first paragraph of their complaint, specifically alleged that this action was related to the SEC action. R. 162.

requirement in part based on the fact that some Stanford investors were induced to liquidate their portfolios of stocks and bonds to reinvest the proceeds in the SIB CDs. R.E. 112-13. The SEC supported this argument through a forensic audit of several investor accounts, R.E. 115-24, of which the district court took judicial notice in granting the motion to dismiss in this action, App. 69a-70a. Yet these are the *same* securities sales that the Fifth Circuit found to be insufficiently related to the "heart, crux or gravamen" of the fraud to satisfy SLUSA's "in connection with" requirement. App. 38a. If that is correct, then by the same token, these securities sales likewise could not satisfy § 10(b)'s requirements, and the SEC would not have been able to rely on them to bring the § 10(b) claim it asserted against Stanford.

3. For similar reasons, the Fifth Circuit's decision muddles the "in connection with" requirement under both SLUSA and § 10(b) to the extent that it holds that aiding and abetting claims are precluded under SLUSA only if the "*defendants*' fraud" (as opposed to the primary violator's fraud) is sufficiently connected to a covered securities transaction. App. 32a-34a (emphasis added). This interpretation of SLUSA's "in connection with" requirement not only conflicts with the statutory text, but also renders meaningless Congress's provision for SEC enforcement of claims against those who aid and abet § 10(b) violations.

a. As an initial matter, there is no support in the language of SLUSA itself for the Fifth Circuit's rule exclusively limiting the misstatements relevant for the SLUSA analysis in an aiding and abetting case to the ones allegedly made by the defendants in the action. SLUSA merely requires an allegation of "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). The statute does not place any limits on the identity of the maker of the misrepresentation.[8]

b. But the Fifth Circuit's limitation of SLUSA's "in connection with" requirement must also be applied reciprocally to § 10(b)'s identical requirement, so that—as this Court held in *Dabit*—the two provisions are given the same meaning. As a result, claims by the SEC for aiding and abetting violations of § 10(b) would rarely if ever be actionable against an aider who assisted another's fraud but did not itself make a misrepresentation "in connection with" a securities transaction, in direct conflict with the scheme Congress has enacted for enforcing the federal securities laws. As part of the PSLRA, Congress passed § 20(e) of the Exchange

[8] Elsewhere in SLUSA's text, Congress was explicit in indicating when preclusion would turn on the defendant's involvement in the alleged misconduct. For example, the very next sub-paragraph of § 28(f) provides for preclusion of class actions alleging "that the *defendant* used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. § 78bb(f)(1)(B), App. 87a (emphasis added). Had Congress wished to limit SLUSA preclusion in false statement cases to actions involving a defendant's misrepresentations, it could have done so.

Act, which authorizes the SEC to pursue aiding and abetting claims, but only if there is a primary violation of another provision of the Exchange Act, such as § 10(b). 15 U.S.C. § 78t(e). To establish the underlying violation of § 10(b) for an aiding and abetting claim, the SEC must still satisfy the "in connection with" requirement. In an aiding and abetting case, moreover, meeting this requirement *necessarily* will entail establishing the "connection" between the securities transaction and a fraud by the primary violator—that is, someone *other* than the aider because an aider, by definition, did not commit the fraud.

Interpreting § 10(b)'s "in connection with" requirement consistent with the decision below would thus negate the authority that Congress has conferred on the SEC through § 20(e), by confining the class of aiding and abetting claims that are actionable by the SEC to only those in which the alleged aider both aided the fraud and committed the fraud itself. This nonsensical result, which directly follows from applying the Fifth Circuit's construction of SLUSA to § 10(b)'s "in connection with" requirement, cannot be correct. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009).

4. These differences between the Fifth Circuit's interpretation of SLUSA's "in connection with" requirement and this Court's interpretation of that phrase—both in *Dabit* and in the § 10(b) cases, *see, e.g.*, *Zandford*, 535 U.S. at 820-22; *O'Hagan*, 521 U.S. at 656, *Bankers Life & Cas. Co.*, 404 U.S. at 12-13—are stark and significant. Left undisturbed, the

Fifth Circuit's decision below will cast significant doubt about the proper scope of the "in connection with" requirement under both provisions of the Exchange Act.

II. The Court Should Resolve the Acknowledged Circuit Split and Restore the Plain Meaning of SLUSA

In purporting to adopt the Ninth Circuit's interpretation of SLUSA's "in connection with" requirement, the Fifth Circuit expanded an already vast split among the federal courts of appeals. Granting this petition therefore is necessary to restore "the congressional preference for national standards for securities class action lawsuits involving nationally traded securities." *Dabit*, 547 U.S. at 86-87.

1. a. In articulating its "more than tangentially related" standard, the Fifth Circuit explicitly acknowledged the deep circuit split over SLUSA's meaning. It recognized that no fewer than six circuit courts had already weighed in on the issue, and that each one formulated the test differently. App. 17a, 21a. The Fifth Circuit initially rejected the tests of the Sixth, Seventh and Eighth Circuits as being insufficiently concerned with defining what it means for a fraud and a securities transaction to "coincide." App. 18a (rejecting *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009), *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122, 1127 (8th Cir. 2008), and *Gavin v. AT&T Corp.*, 464 F.3d 634, 639 (7th Cir. 2006)). The Fifth Circuit similarly rejected the tests of the Second and Eleventh Circuits as incorrect. App. 33a

(rejecting *Romano v. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010) and *IPM*, 546 F.3d at 1349).

b. While the Fifth Circuit announced that it was adopting the Ninth Circuit's formulation of the "in connection with" test as the "best articulation" of the standard, App. 34a, the Fifth Circuit in fact did no such thing. Although both the Fifth and Ninth Circuits have used the locution that the fraud and the securities transaction must be "more than tangentially related," App. 34a; *Madden*, 576 F.3d at 965-66, that is where the similarities between these standards begin and end. When the Ninth Circuit adopted this test for both § 10(b) and SLUSA, it explained that the subject matter of the alleged misrepresentation merely had to be connected in some way to the relevant securities:

> The fraud in question must relate to the nature of the securities, the risks associated with their purchase or sale or some other factor with similar connection to the securities themselves. While the fraud in question need not relate to the investment value of the securities themselves, it must have more than some tangential relationship to the securities transaction.

Falkowski v. Imation Corp., 309 F.3d 1123, 1130-31 (9th Cir. 2002) (quoting *Ambassador Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1026 (9th Cir. 1999)).

Had the Fifth Circuit actually adopted this standard, it would have had to affirm the district court's dismissal of this case under SLUSA. Here, there is no dispute—and the Fifth Circuit itself found—that the complaint alleged misrepresentations concerning "SIB's portfolio containing instruments that might be SLUSA-covered securities," and that these misrepresentations were made in order to convince respondents "that the CDs were good investments." App. 8a, 39a. Indeed, as alleged in the complaint, "the 'liquidity/marketability of SIB's invested assets'"—*i.e.*, the SLUSA-covered securities—was emphasized as "the '*most important factor* to provide security to SIB clients . . . .'" R. 180 (emphasis added).) Such misrepresentations clearly "relate to the nature of the securities" and their associated risks, *Falkowski*, 309 F.3d at 1130-31, and thus fall squarely within the scope of the Ninth Circuit's standard.

c. Instead, the Fifth Circuit went far beyond the Ninth Circuit's standard to formulate its own test. In practice, the Fifth Circuit's standard is substantially more restrictive than the test used by *any* other circuit.

The Fifth Circuit now requires the requisite connection to exist between the SLUSA-covered securities transaction and the "*heart, crux or gravamen*" of the defendants' fraud. App. 38a (emphasis added). This analysis—which focuses on the importance of the covered securities transactions to the alleged fraudulent scheme—presents a concrete and case-dispositive conflict with the tests used by the Sixth and Second Circuits. The Sixth

Circuit, for example, has specifically rejected an assessment of the centrality of the securities transaction to the fraud as improper under SLUSA: "The Act does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple." *Segal*, 581 F.3d at 311. The Second Circuit's approach to SLUSA also does not consider the relationship between the securities transactions and the "heart, crux or gravamen" of the purported fraud. Thus, in *Romano v. Kazacos*, it was enough that the "harm incurred" by plaintiffs "rest[ed] on and ar[o]se[] from securities transactions." 609 F.3d at 524. Even though the alleged misstatements themselves concerned retirement planning and not securities, and the SLUSA-covered securities transactions occurred much later, SLUSA's "in connection with" requirement was still satisfied because the misstatements induced the plaintiffs to invest in covered securities to implement the retirement plan, and it was the failure of the securities to perform as anticipated that caused the plaintiffs' injury. *Id.* at 523-24. Under the Fifth Circuit standard, however—in which a misrepresentation (about a covered security) that induces the plaintiff's investment in or sale of a covered security is neither necessary or sufficient, App. 32a, 37a—*Romano* would undoubtedly have had a different result.

Further, the Fifth Circuit engrafted additional factors onto the Ninth Circuit's formulation—factors that have not been endorsed by *any* other court of appeals. The Fifth Circuit purported to distill these factors primarily from decisions of the Southern District of New York in cases concerning the Bernard Madoff Ponzi scheme. App. 39a-40a. They include "the 'separation' between the [plaintiff's] investment in the financial product and the subsequent transactions (real or purported) in covered securities" and the plaintiff's "'purpose(s)" in making the investment. App. 23a.

But these additional factors are consistent with neither SLUSA's text nor this Court's precedents. Both factors involve a "plaintiff-oriented" assessment of SLUSA, which the Fifth Circuit itself recognized would be inappropriate. App. 32a-33a. Indeed, the proper analysis should not give *any* consideration to the plaintiff's investment purpose or the particular financial products in which the plaintiff transacted, because SLUSA does not require any transaction by the plaintiff *at all*. *Dabit*, 547 U.S. at 85 ("[I]t is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else."); *accord U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 844-45 (9th Cir. 2007) (holding that plaintiff's investments were "irrelevant" to the SLUSA analysis).[9]

[9] Requiring a necessarily fact-intensive assessment of the plaintiff's subjective investment "purpose," moreover, is completely at odds with SLUSA's goals—to ensure compliance with the PSLRA's restrictions, including the pre-motion discovery stay. *See Dabit,* 547 U.S. at 81-82.

d. Finally, the Fifth Circuit's exclusive focus on a *defendant's* alleged misrepresentations—even in an aiding-and-abetting case such as this—not only contravenes SLUSA's text, *supra* at 21-22, but it squarely conflicts with the Eleventh Circuit's decision in *IPM*. In *IPM*, the Eleventh Circuit held that an allegation that the defendant "failed to stop the fraudulent misrepresentations that induced [plaintiff] to invest in PFA" was "enough" to satisfy SLUSA. 546 F.3d at 1350. The Eleventh Circuit thus looked, appropriately, to the relationship between the covered securities transaction and the fraud alleged—that is, the misrepresentations by the primary violator. The Fifth Circuit's defendant-oriented analysis, by contrast, leads to a nonsensical result that invites abusive lawsuits against perceived deep-pocket defendants who did not commit any fraud: although claims against a primary violator who actually engages in fraud—for example, Stanford in the instant case—would be barred by SLUSA, claims against an alleged aider—for example, petitioner—would not be barred.

The Fifth Circuit's interpretation, moreover, gives no weight to Congress's determination in the PSLRA not to restore private aiding and abetting liability under the federal securities laws because of the vast potential for abuse such claims present. *See Stoneridge*, 552 U.S. at 163-64. It thus "would be odd, to say the least, if SLUSA exempted that particularly troublesome subset of class actions from its pre-emptive sweep." *See Dabit*, 547 U.S. at 86. The Fifth Circuit's interpretation also is not faithful to SLUSA itself. Because SLUSA is designed to advance the goals of the PSLRA, *see id.* at 81-82, any interpretation that does not give weight to Congress's policy choices in enacting that statute cannot square with SLUSA, either.

* * * * *

In short, every aspect of the Fifth Circuit's test has already been rejected by one or more of the other six circuits to have analyzed the scope of SLUSA preclusion. SLUSA cannot mean something different in each of the federal circuits. Certiorari is therefore needed to resolve the dispute among the circuits and restore the uniform application of SLUSA.

III. This Case Presents a Suitable Vehicle to Resolve Important Issues of Federal Law

Not only are the issues raised by this case extremely important, but this case presents an appropriate—and likely rare—opportunity for this Court to resolve them.

1. As an initial matter, this case was decided on a motion to dismiss based on a single issue of controlling law. There are no factual disputes of any moment among the parties, and the Fifth Circuit and the district court agreed on what the key facts are that are relevant to the SLUSA analysis (although not on their significance). This case thus presents a pure legal issue that does not require the Court to resolve any other threshold legal questions that might prevent or complicate this Court's review.

2. This case also presents a potentially rare opportunity to resolve important questions about SLUSA that might otherwise elude review, at least for some time. Typically, SLUSA issues arise in connection with cases that are filed in state court and are removed to federal court. *See, e.g.*, *Romano*, 609 F.3d at 515; *Madden*, 576 F.3d at 961; *Saxton*, 494 F.3d at 836; *Gavin*, 464 F.3d at 636; *Falkowski*, 309 F.3d at 1127. If the Fifth Circuit's overly restrictive decision is left undisturbed, however, it will prevent many cases that may actually satisfy SLUSA's requirements from being removed on SLUSA grounds in the first place.[10] Because the decision below is controlling law within the Fifth Circuit, it likely will chill defendants from removing such cases on the basis of SLUSA, because an improper removal can subject the defendant to an award of costs and expenses, including attorney's fees. 28 U.S.C. § 1447(c). Furthermore, many of these cases, if they are removed pursuant to SLUSA, will immediately be subject to remand under the test that the Fifth Circuit adopted. Ordinarily, district court remand orders are "not reviewable on appeal or otherwise." *Id.* § 1447(d); *accord Kircher v. Putnam Funds Trust*, 547 U.S. 633, 639 (2006) (holding no appellate jurisdiction to review district court remand orders of cases removed pursuant to

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[10] While certain cases might be subject to removal on grounds other than SLUSA, removals based on other statutory provisions obviously will not present the SLUSA questions at issue here.

SLUSA). Such cases will never reach this Court for resolution.

3. Finally, the important questions of federal law raised by this case do not require further consideration by the lower courts. The circuit split regarding the scope of SLUSA preclusion is already well developed. Moreover, the confusion engendered by the Fifth Circuit's decision regarding the relationship between the requirements of SLUSA and § 10(b) presents an imminent and significant risk that should be resolved at the earliest opportunity.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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July 18, 2012 *Counsel for Petitioner*

Filed March 19, 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11-10932

JAMES ROLAND; MICHAEL J. GIAMBRONE; THOMAS E. BOWDEN, Individually and On Behalf Of Thomas E. Bowden S.E.P. I.R.A.; T. E. BOWDEN, SR., Ret. Trust; G. KENDALL FORBES, Individually and on Behalf of G. Kendall Forbes I.R.A.; ET AL,

Plaintiffs–Appellants

v.

JASON GREEN; CHARLES JANTZI; TIFFANY ANGELLE; JAMES FONTENOT; THOMAS NEWLAND; GRADY LAYFIELD; HANK MILLS; JOHN SCHWAB; RUSS NEWTON; JIM WELLER; SEI INVESTMENTS COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON, in Syndicates 2987, 1866, 1084, 1274, 4000 & 1183; ET AL,

Defendants–Appellees

LEAH FARR; ET AL,

Plaintiffs–Appellants

v.

JASON GREEN; DIRK HARRIS; TIMOTHY E. PARSONS; CHARLES JANTZI; TIFFANY ANGELLE; GRADY LAYFIELD; HANK MILLS; JOHN SCHWAB; RUSS NEWTON; JIM WELLER; SEI INVESTMENTS COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON, in Syndicates 2987, 1866, 1084, 1274, 4000 & 1183; ET AL,

Defendants–Appellees

Consolidated with 11-11031

SAMUEL TROICE; HORACIO MENDEZ; ANNALISA MENDEZ; PUNGA PUNGA FINANCIAL, LIMITED, individually and on behalf of a class of all others similarly situated,

Plaintiffs–Appellants

v.

PROSKAUER ROSE, L.L.P.; THOMAS V. SJOBLOM; P. MAURICIO ALVARADO; CHADBOURNE AND PARKE, L.L.P.,

Defendants–Appellees

Consolidated with 11-11048

SAMUEL TROICE; MARTHA DIAZ; PAULA GILLY-FLORES; PUNGA PUNGA FINANCIAL, LIMITED, Individually and on behalf of a class of all others similarly situated; PROMOTORA VILLA MARINO, CA; DANIEL GOMEZ FERREIRO; MANUEL CANABAL,

Plaintiffs–Appellants

v.

WILLIS OF COLORADO INCORPORATED; WILLIS GROUP HOLDGINGS LIMITED; AMY S. BARANOUCKY; ROBERT S. WINTER; BOWEN, MICLETTE & BRITT, INCORPORATED; WILLIS LIMITED,

Defendants–Appellees

Appeals from the United States District Court
for the Northern District of Texas

Before REAVLEY, DAVIS, and PRADO, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:

This consolidated appeal arises out of an alleged multi-billion dollar Ponzi scheme perpetrated by R. Allen Stanford through his various corporate entities. These three cases deal with the scope of the preclusion provision of the Securities Litigation Uniform Standards Act ("SLUSA"). That provision states: "No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). All three cases seek to use state class-action devices to attempt to recover damages for losses resulting from the Stanford Ponzi scheme. Because we find that the purchase or sale of securities (or representations about the purchase or sale of securities) is only tangentially related to the fraudulent scheme alleged by the Appellants, we hold that SLUSA does not preclude the Appellants from using state class actions to pursue their recovery and REVERSE.

I

A

In 1995, because of "perceived abuses of the class-action vehicle in litigation involving nationally traded securities," Congress passed the Private Securities Litigation Reform Act ("PSLRA"). *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). "Its provisions limit recoverable damages and attorney's fees, provide a 'safe harbor' for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss." *Id.* (citing 15 U.S.C. § 78u-4). These reforms were enacted to combat the "rampant" "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests," and manipulation of clients by class counsel in securities litigation. *Id*. (citing H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). Perhaps the most consequential reform, however, was that the PSLRA "impose[d] heightened pleading requirements in actions brought pursuant to § 10(b) [of the Securities and Exchange Act of 1934] and Rule 10b-5." *Id*.

The reforms had their intended effect, "[b]ut the effort also had an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." *Id*. at 82. "[R]ather than confronting the restrictive conditions set forth by the PSLRA, plaintiffs began filing class-action securities lawsuits under state law, often in state court." *In re Enron Corp. Secs*., 535 F.3d 325, 337 (5th Cir. 2008) (citing *Dabit*, 547 U.S. at 82). "To stem this shift from Federal to State courts and prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the [PSLRA], Congress enacted SLUSA." *Dabit*, 547 U.S. at 82 (internal quotation marks omitted).

"The stated purpose of SLUSA is 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the PSLRA . . . [by advancing] 'the congressional preference for national standards for securities class action lawsuits involving nationally traded securities.'" *In re Enron*, 535 F.3d at 338 (quoting *Dabit*, 547 U.S. at 86–87). Specifically, the "core provision," Dabit, 547 U.S. at 82, provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security."[1] 15 U.S.C. § 78bb(f)(1)(A). To effectuate this, SLUSA mandates: "Any covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending" and subject to dismissal. *Id*. at § 78bb(f)(2).

B

In February 2009, the Securities and Exchange Commission ("SEC") brought suit against the Stanford Group Company, along with various other Stanford corporate entities, including the Antigua-based Stanford International Bank ("SIB"), for allegedly perpetrating a massive Ponzi scheme.

> According to the SEC, the companies' core objective was to sell certificates of deposit ("CDs") issued by SIB. Stanford achieved and maintained a high volume of CD sales by promising above-market

[1] Although various courts have referred to this provision as a preemption provision, *see*, *e.g.*, *Dabit*, 547 U.S. at 74; *In re Enron*, 535 F.3d at 341, the Supreme Court has said that because SLUSA "does not itself displace state law with federal law but makes some state-law claims nonactionable through the class-action device in federal as well as state court," the provision is best characterized as a preclusion provision. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 637 n.1 (2006).

> returns and falsely assuring investors that the CDs were backed by safe, liquid investments. For almost 15 years, SIB represented that it consistently earned high returns on its investment of CD sales proceeds. . . . In fact, however, SIB had to use new CD sales proceeds to make interest and redemption payments on pre-existing CDs, because it did not have sufficient assets, reserves and investments to cover its liabilities.
>
> . . . At the SEC's request, the district court issued a temporary order restraining the payment or expenditure of funds belonging to the Stanford parties. The district court also appointed [a] Receiver for the Stanford interests and granted him the power to conserve, hold, manage, and preserve the value of the receivership estate.

Janvey v. Alguire, 647 F.3d 585, 590 (5th Cir. 2011) (internal quotation marks omitted). Lastly, the district court in the SEC action entered a case management order requiring all lawsuits against SIB's service providers or third parties to be filed as ancillary proceedings to the SEC action.

1

Two groups of Louisiana investors, represented by the same counsel, filed separate lawsuits in the 19th Judicial District Court, East

Baton Rouge Parish on August 19, 2009—*Roland v. Green* and *Farr v. Green*. In those actions, each set of plaintiffs sued the SEI Investments Company ("SEI"), the Stanford Trust Company (the "Trust"), the Trust's employees, and the Trust's investment advisors (collectively, the "SEI Defendants") for their alleged role in the Stanford Ponzi scheme. The plaintiffs alleged violations of Louisiana law including breach of contract, negligent representation, breach of fiduciary duty, unfair trade practices, and violations of the Louisiana Securities Act.

The plaintiffs in the *Roland* and *Farr* actions (the "*Roland* Plaintiffs") allege that SIB sold CDs to the Trust (located in Baton Rouge, Louisiana), which in turn served as the custodian for all individual retirement account ("IRA") purchases of CDs. According to the plaintiffs, the Trust contracted with SEI to have SEI be the administrator of the Trust, thereby making SEI responsible for reporting the value of the CDs. Plaintiffs finally allege misrepresentations by SEI induced them into using their IRA funds to invest in the CDs. Specifically, the plaintiffs allege that the SEI Defendants represented to them that the CDs were a good investment because (1) they could be "readily liquidated"; (2) SEI had evaluated SIB as being "competent and proficient"; (3) SIB "employed a sizeable team of skilled and experienced analysts to monitor and manage [its] portfolio"; (4) "independent" auditors "verified" the value of SIB's assets; (5) the SEI Defendants had "knowledge" about the companies that SIB invested in and that those companies were adequately capitalized; (6) the

Antiguan government regularly "examined" SIB; (7) the CDs were a "safe investment vehicle suitable for long term investment with little or no risk"; (8) SIB had "retained legal counsel" that ensured that the investments were structured so as to comply with state and federal law; (9) the CDs would produce "consistent, double-digit returns"; and (10) SIB's assets were "invested in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks."

The SEI Defendants sought removal to the United States District Court for the Middle District of Louisiana on the basis that SLUSA precluded the state court from entertaining the suits. The Multi-District Litigation ("MDL") Panel subsequently transferred the case to the Northern District of Texas (Judge Godbey) where the separate *Roland* and *Farr* suits were consolidated. The *Roland* Plaintiffs then filed a motion to remand their cases back to the Louisiana state court.

2

The *Roland* action has been consolidated on appeal with two other actions. In these cases, a group of Latin American investors (the "*Troice* Plaintiffs") brought two separate class actions against, respectively, SIB's insurance brokers (the "Willis Defendants") and SIB's lawyers (the "Proskauer Defendants"). The *Troice* Plaintiffs brought claims under Texas law—specifically, violations of the Texas Securities Act, aiding and abetting these violations, and civil conspiracy.

Similar to the *Roland* Plaintiffs, the *Troice* Plaintiffs allege that the Willis Defendants represented to them that the CDs were a good investment because (1) SIB was based in the United States and "regulated by the U.S. Government"; (2) SIB was "insured by Lloyd's"; (3) SIB was "regulated by the Antiguan banking regulatory commission"; (4) SIB was "subjected to regular stringent risk management evaluations" conducted by "an outside audit firm"; (5) the CDs were safe and secure; (6) SIB's portfolio produced "consistent, double-digit returns"; (7) the CDs' "high return rates . . . greatly exceed those offered by commercial banks in the United States"; and (8) SIB's assets were "invested in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." The *Troice* Plaintiffs only alleged aiding and abetting violations of the Texas Securities Act and civil conspiracy against the Proskauer Defendants. That is to say that the *Troice* Plaintiffs did not allege that the Proskauer Defendants made any (mis)representations to them.

The *Troice* Plaintiffs sued the Willis Defendants and Proskauer Defendants in separate suits in the United States District Court for the Northern District of Texas, invoking that court's jurisdiction under the Class Action Fairness Act. *See* 28 U.S.C. § 1332 (d)(2)(B). Both suits were assigned to Judge Godbey pursuant to the MDL order. The Willis and Proskauer Defendants moved to dismiss the suits pursuant to SLUSA.

C

Judge Godbey, due to the "multitude of Stanford-related cases" pending before him with similar issues, decided to "select one case initially in which to address the applicability of [SLUSA]." The case the district court chose was *Roland v. Green*. On August 31, 2010, the district court issued its opinion on the applicability of SLUSA preclusion to the Stanford litigation.

In that opinion, after briefly discussing the history and purpose of SLUSA, *see supra* I.A, the district court turned to the central question of "whether the plaintiff alleges the use of misrepresentations, omission, or deceptive devices 'in connection with the purchase or sale of a covered security.'" First, the district court concluded that the SIB CDs themselves were not "covered securities" within the meaning of SLUSA because SIB never registered the CDs, nor were they traded on a national exchange. *See* 15 U.S.C. § 77r(b). This finding, the district court stated "did not end the SLUSA inquiry."

Noting that the Supreme Court has urged a "'broad interpretation[]' of the 'in connection with' [requirement] . . . in order to further the PSLRA's goals," the district court stated that "the strength of the nexus between an allegedly fraudulent scheme and the securities transactions serves as the primary thread tying the caselaw together." Given the "melange" of other circuit courts' formulations of the test to determine what connection between a fraud and transactions in covered securities is required for

SLUSA preclusion to apply and the "apparent absence of controlling Fifth Circuit authority," the district court decided to employ the Eleventh Circuit's approach from *Instituto de Prevision Militar v. Merrill Lynch* ("*IPM*"), 546 F.3d 1340 (11th Cir. 2008).

Applying the Eleventh Circuit's test, the district court found that the *Roland* Plaintiffs had alleged two distinct factual bases connecting the fraud to transactions in covered securities. First, the district court found that "[t]he [*Roland*] Plaintiffs' purchases of SIB CDs were 'induced' by the misrepresentation that SIB invested in a portfolio including SLUSA-covered securities." It noted that the CDs' promotional material touted that the bank's portfolio of assets was invested in "highly marketable securities issued by stable governments, strong multinational companies and major international banks." The district court also found that the purported investment of the bank's portfolio in SLUSA-covered securities gave its CDs certain qualities that induced Plaintiffs' purchases. The instruments were labeled CDs "to create the impression . . . that the SIB CDs had the same degree of risk as certificates of deposit issued by commercial banks regulated by the FDIC and Federal Reserve." However, they were advertised to function "[l]ike well-performing equities" by offering "liquidity combined with the potential for high investment returns." This was supposedly made possible by "the consistent, double-digit returns on the bank's investment portfolio," which stemmed, in part, from the presence of SLUSA-covered securities. The *Roland* Plaintiffs allege in their petition that had they "been aware of the truth" that SIB's "portfolio consisted primarily of illiquid investments or no investments at all," they "would not have purchased the SIB CDs." The district court therefore found that the *Roland* Plaintiffs sufficiently alleged that their "CD purchases were induced by a belief that the SIB CDs were backed in part by investments in SLUSA-covered securities."

Additionally, the district court found the *Roland* Plaintiffs' "allegations . . . reasonably imply that the Stanford scheme coincided with and depended upon the [*Roland*] Plaintiffs' sale of SLUSA-covered securities to finance SIB CD purchases." It noted that the *Roland* Plaintiffs claim that the fraud was a scheme targeting recent retirees who were urged to roll the funds in their retirement account into an IRA administered by SEI, of which the Trust was the custodian and which was fully invested in the CDs. The district court noted that "retirement funds come in a variety of forms that might not all involve SLUSA-covered securities," but that "stocks, bonds, mutual funds, and other SLUSA-covered securities commonly comprise IRA investment portfolios." From this, the court stated "that at least one of the [*Roland*] Plaintiffs acquired SIB CDs with the proceeds of selling SLUSA-covered securities in their IRA portfolios," and therefore, this "modest finding" independently supported the district court's ruling that the *Roland* Plaintiffs' claims were precluded by SLUSA. Accordingly, the district court denied the Roland Plaintiffs' motion for remand and dismissed the action pursuant to 15 U.S.C. § 78bb(f)(1)(A).

In a separate order, the district court considered the Willis Defendants' and the Proskauer Defendants' motions to dismiss. Stating "[b]ecause [the *Troice*] Plaintiffs bring class claims 'based upon the statutory or common law of' Texas and 'alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security,'" the discussion in the district court's order in *Roland v. Green* compels the finding that SLUSA precludes the *Troice* Plaintiffs' action, and therefore it must be dismissed.

The *Roland* and *Troice* Plaintiffs timely appealed their dismissals, which this court consolidated for the purposes of oral argument and disposition.

II

The *Roland* case is before us from a denial of a motion to remand, and the *Troice* cases are before us on motions to dismiss. On each procedural posture, our review is the same—de novo. *Martin v. PepsiAmericas, Inc.*, 628 F.3d 738, 740 (5th Cir. 2010) (motion to dismiss); *In re 1999 Exxon Chem. Fire*, 558 F.3d 378, 384 (5th Cir. 2009) (motion to remand).

III

A

Though the question of the scope of the "in connection with" language under SLUSA is one of first impression in this circuit, we do not write on a blank slate. The Supreme Court directly addressed the issue of what constitutes "in connection with the purchase or sale of a covered security" in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*. In that case, a former broker joined with customers of Merrill Lynch in a class action against the firm for breaches of fiduciary duty and contract, alleging that Merrill Lynch had issued biased research and investment recommendations. *Dabit*, 547 U.S. at 75. These misrepresentations, according to Dabit's complaint, harmed the class members in two ways. First, as to the customers, the misrepresentations allegedly "caused them to hold onto overvalued securities." *Id*. at 76. Second, as to the brokers, the misrepresentations allegedly caused them to "los[e] commission fees when their clients, now aware that they had made poor investments, took their business elsewhere." *Id*. The district court dismissed all of the claims based on SLUSA. *Id*. The Second Circuit affirmed as to the claims of buyers and sellers, but said SLUSA did not preclude the claims of "holders," those who had not purchased or sold a security but suffered merely by retaining or "holding" their existing shares in reliance on Merrill Lynch's allegedly fraudulent research. *Id*. at 77. The central question in *Dabit*, therefore, was whether the holders' claims were precluded given SLUSA's requirement that a fraud alleged be "in connection with the purchase or sale of a covered security." *Id*. at 84.

After discussing the purposes of Section 10(b) and the history of Rule 10b-5 litigation, the Court noted that the reason it had barred holders from asserting a private right of action under Rule 10b-5 in *Blue Chip Stamps v. Manor Drug Stores* was "policy considerations," including the special danger that "'vexatious[] . . . litigation'" posed in the realm of securities. *Dabit*, 547 U.S. at 80 (quoting *Blue Chip Stamps*, 421 U.S. 723, 739 (1975)). The same policy considerations that led to that limitation on Rule 10b-5's private right of action, *see supra* I.A, motivated Congress in its passage of the PSRLA and SLUSA. *Dabit*, 547 U.S. at 81–82. In using the "in connection with" language that had been the focus of so much litigation in the Rule 10b-5 context, the Court found that "Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC." *Id*. at 85. It also found that by using the exact same language—"in connection with the purchase or sale of [covered] securities"—Congress intended to incorporate the judicial interpretations given to that phrase into SLUSA as well. *Id*. at 85–86.

Since Congress intended "in connection with" to mean the same thing in SLUSA as it does in Section 10(b), "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else. The requisite showing, in other words, is 'deception "in connection with the purchase or sale of any security," not deception of an identifiable purchaser or seller.'" *Id*. at 85 (quoting *United States v. O'Hagan*, 521 U.S. 642, 651, 658 (1997) (internal citation omitted)); *see also SEC v. Zandford*, 535 U.S. 813, 824 (2002) ("[T]he SEC complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore 'in connection with' securities sales within the meaning of § 10(b)."). From these principles, the Court held that SLUSA precludes state-law holder class actions like *Dabit's*. *Dabit*, 547 U.S. at 87.

B

Since *Dabit*, six of our sister circuit courts have tried to give dimension to the "coincide" requirement announced in *SEC v. Zandford* and brought into the SLUSA scheme in *Dabit*. *Romano v. Kazacos*, 609 F.3d 512 (2d Cir. 2010); *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009); *Madden v. Cowen & Co.*, 576 F.3d 957(9th Cir. 2009); *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008); *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122 (8th Cir. 2008); *Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir. 2006). To be sure, we are only bound by decisions of the Supreme Court, which has stated that "in connection with" must be interpreted broadly, *Zandford*, 535 U.S. at 819. But the test it has offered—whether or not "the fraud alleged '*coincide*[*s*]' with a securities transaction," *Dabit*, 547 U.S. at 85 (emphasis added)—is not particularly descriptive. Moreover, when the Court first set forth the "coincide" requirement, it cautioned that "the statute must not be construed so broadly as to convert every common-law fraud that *happens to involve* [*covered*] *securities* into a violation of § 10(b)." *Zandford*, 535 U.S. at 820 (emphasis added). In light of this tension, consideration of how our sister circuits have construed and applied this "coincide" requirement is helpful in deciding how best to approach our present case. *Cf. United States v. Villegas*, 494 F.3d 513, 514 (5th Cir. 2007).

In our consideration, we find most persuasive the decisions from the Second, Ninth, and Eleventh Circuits. The cases from the other circuits do not attempt to define the "coincide" requirement, but merely discuss what connection above and beyond "coincide" is sufficient. For example, in *Segal*, the Sixth Circuit noted that fraud allegations that "depend on" transactions in covered securities meet the "coincide" requirement, but it does not state that for a fraud to "coincide" *requires* that the fraud "depend on" transactions in covered securities. It narrowly holds that where fraud depends on transactions in covered securities, the fraud will also coincide with transactions in covered securities. *Segal*, 581 F.3d at 310; *see also Siepel*, 526 F.3d at 1127 (8th Cir.); *Gavin*, 464 F.3d at 639 (7th Cir.) (discussing how the "coincide" requirement requires plaintiffs to allege fraud "involving" covered securities but noting that a simple "but for" relationship between an alleged fraud and the purchase or sale of securities is insufficient).

The Second, Ninth, and Eleventh Circuits have, however, attempted to give dimension to what is sufficiently connected/coincidental to a transaction in covered securities to trigger SLUSA preclusion. The Eleventh Circuit in *Instituto de Prevision Militar v. Merrill Lynch* ("*IPM*") dealt with claims brought by a Guatemalan government agency that administered a pension fund for Guatemalan military veterans, which invested in Pension Fund of America ("PFA"), and other Latin American PFA investors against Merrill Lynch. 546 F.3d at 1342–43. According to their complaint, Merrill Lynch "actively promot[ed] PFA and vouch[ed] for the character of PFA's principals." *Id.* at 1343 (internal quotation marks omitted). After determining that the class met SLUSA's definition of a "covered class action," *see* 15 U.S.C. § 78bb(f)(5)(B), the Eleventh Circuit turned to the "coincide" requirement. *IPM*, 546 F.3d at 1345–48. It held that requirement met if either "fraud . . . induced [plaintiffs] to invest with [the defendant(s)]" or "a fraudulent scheme . . . coincided and depended upon the purchase or sale of [covered] securities." *Id.* at 1349. The court found that "IPM is complaining about fraud that induced it to invest with PFA, which means that its claims are 'in connection with the purchase or sale' of a security under SLUSA." *Id.*

The Ninth Circuit articulated its test for the "coincide" requirement slightly differently in its *Madden v. Cowen & Co.* opinion. That case involved shareholders of two medical care providers that were looking to merge with a larger company. 576 F.3d at 962. In attempting to merge these two medical care providers, the shareholders retained an investment bank, Cowen, "to look for prospective buyers, give advice regarding the structure of any potential sale, and render a fairness opinion regarding any proposed transaction." *Id.* (internal quotation marks omitted). Two suitors stepped up—one closely-held corporation and another publicly-traded company. *Id.* Cowen recommended to the shareholders that they accept the bid from the publicly-traded company. *Id.* After the merger was complete, the stock price of the publicly-traded company tumbled. *Id.* at 963. The shareholders then brought suit against Cowen for "negligent misrepresentation and professional negligence under California law." *Id.*

Based on *Dabit's* statement that "in connection with" must be interpreted the same way under SLUSA as it is under Section 10(b), the Ninth Circuit looked to its prior precedent and held fraud is "'in connection with' the purchase or sale of securities if there is 'a relationship in which the fraud and the stock sale coincide or are more than tangentially related.'" *Id.* at 966 (quoting *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131 (9th Cir. 2002)). Applying the "more than tangentially related" test, the court found that "the misrepresentations and omissions alleged in the complaint are more than tangentially related to [the shareholders'] purchase of the [publicly-traded company's] securities." *Id.* (internal quotation marks omitted).

The most recent circuit to consider the scope of the "coincide" requirement post-*Dabit* was the Second Circuit in *Romano v. Kazacos*. *Romano* dealt with two consolidated cases—one brought by Xerox retirees and one by Kodak retirees—alleging that Morgan Stanley "misrepresented that if appellants were to retire early, their investment savings would be sufficient to support them through retirement." 609 F.3d at 515. Based on these alleged misrepresentations, the retirees "deposited their retirement savings into Morgan Stanley IRA accounts, where covered securities were purchased on their behalf." *Id.* at 520. In discussing the "coincide" requirement, the Second Circuit stated that "SLUSA's 'in connection with' standard is met where plaintiff's claims turn on injuries caused by acting on misleading investment advice—that is, where plaintiff's claims necessarily allege, necessarily involve, or rest on the purchase or sale of securities. . . . [Additionally,] the more exacting induced standard satisfies § 10(b)'s 'in connection with' requirement." *Id*. at 522 (citations and internal quotation marks omitted).

Each of the circuits that has tried to contextualize the "coincide" requirement has come up with a slightly different articulation of the requisite connection between the fraud alleged and the purchase or sale of securities (or representations about the purchase or sale of securities): *Segal*, 581 F.3d at 310 (6th Cir.) ("depend on"); *Siepel*, 526 F.3d at 1127 (8th Cir.) ("related to"); *Gavin*, 464 F.3d at 639 (7th Cir.) ("involving," meaning more than "but for"); *IPM*, 546 F.3d at 1349–50 (11th Cir.) ("induced by" or "depended upon"); *Madden*, 576 F.3d at 966 (9th Cir.) ("more than tangentially related to"); *Romano*, 609 F.3d at 522 (2d Cir.) ("necessarily allege, necessarily involve, or rest on"). Beyond these various interpretations, we also think it useful before our standard to consider cases more factually analogous to ours than *Dabit* and much of its progeny. That is, cases where the fraud alleged was centered around the purchase or sale of an uncovered security, like the CDs at issue in this appeal.

C

The preclusion analysis under SLUSA is slightly more complex in cases where the fraudulent scheme alleged involves a multi-layered transaction, like the one at issue in our case. In these cases, the plaintiffs often are fraudulently induced into investing in some kind of uncovered security, like a

CD or a share in a "feeder fund," which has some relationship either through the financial product's management company or through the financial product itself to transactions (real or purported) in covered securities, such as stocks. Some of the more analogous cases arise out of the slew of recent suits stemming from the Bernie Madoff Ponzi scheme, especially the so-called "feeder fund" cases.[2] From

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[2] The basic facts surrounding Madoff's historic Ponzi scheme are now well known. Madoff was a prominent and respected member of the investing community . . . . Madoff's investment company, BMIS, had operated since approximately 1960. Madoff, who was notoriously secretive, claimed he utilized a "split-strike conversion strategy" to produce consistently high rates of return on investment. The split-strike conversion strategy supposedly involved buying a basket of stocks listed on the Standard & Poor's 100 index and hedging through the use of options.

> However, since at least the early nineties, Madoff did not actually engage in any trading activity. Instead, Madoff generated false paper account statements and trading records; if a client asked to withdraw her money, Madoff would pay her with funds invested by other clients. During this time, Madoff deceived countless investors and professionals, as well as his primary regulators, the Securities and Exchange Commission ("SEC") and the Financial Industry Regulatory Authority ("FINRA"). On December 11, 2008, news broke that Madoff had been operating a multi-billion dollar Ponzi scheme for nearly twenty years. Madoff pleaded guilty to securities fraud and related offenses on March 12, 2009, and was subsequently sentenced to 150 years in prison.

our reading of these uncovered securities cases, we glean three approaches: (1) focus the analysis on whether the financial product purchased was a covered security (the "product approach"); (2) focus on the "separation" between the investment in the financial product and the subsequent transactions (real or purported) in covered securities (the "separation approach"); and (3) focus on the "purpose(s)" of the investment (the "purposes approach").

1

Courts that take the product approach focus their analysis on the type of financial product upon which the alleged fraudulent scheme centers. In doing so, the crux of the analysis is not whether or not the "coincide" requirement of SLUSA is met, but rather whether the financial product qualifies as a "covered security" under 15 U.S.C. § 78bb(f)(5)(E). In *Ring v. AXA Financial, Inc.*, the Second Circuit held that claims of fraud relating to the sale of an interest in a term life insurance policy, a Children's Term

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> Many individuals and institutions that invested with Madoff did so through feeder funds . . . . Investors would invest in the feeder fund, which would then invest its assets with Madoff. . . . After Madoff's fraud became public, the [funds'] managing members[usually] decided to liquidate the [funds] and distribute [their]remaining assets. The fund[s'] liquidation forms the subject matter of [the lawsuits].

In re Beacon Assocs. Litig., 745 F. Supp. 2d 386, 393–94 (S.D.N.Y. 2010).

Rider ("CTR") (a "classic insurance product" and an uncovered security) were not SLUSA-precluded merely because the insurance company held covered securities in its portfolio, which in turn backed the plaintiffs' interest in the CTR. 483 F.3d 95, 96, 99 (2d Cir. 2007). It likewise found the fact that the CTR was attached to a variable life insurance policy, which is a covered security under SLUSA, was insufficient to preclude all claims relating to the CTR because "the CTR and the policy to which it is appended must be considered separately." *Id.* at 96. *But see IPM*, 546 F.3d at 1351 ("[H]ybrid securities . . . are 'covered securities.'" (citing *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252 (11th Cir. 2003) (per curiam))). Similarly, in *Brehm v. Capital Growth Financial*, the district court held that "private placement securities or debentures" were not covered securities. No. 8:07CV315, 2008 WL 553238, at *2 (D. Neb. Feb. 25, 2008). Moreover, it found that allegations that the defendants were also going to invest in "securities and other intangible instruments that are traded in the public markets or issued privately" were insufficient to bring the case within SLUSA's preclusive ambit. *Id.* at *3 (internal quotation marks omitted).

The most-cited case using this approach is *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 750 F. Supp. 2d 450 (S.D.N.Y. 2010). That case was an "action to recover losses stemming from the liquidation of two British Virgin Islands based hedge funds . . . in which [the plaintiffs] held shares." *Id.* at 451. The *Montreal Pension* court held, "Because plaintiffs purchased shares in hedge funds, rather than covered securities, SLUSA does not preempt plaintiffs' state-law claims." *Id.* at 453–54. It went on to discuss *Dabit* and distinguished it by stating,

> The interpretation of SLUSA urged by the [Defendants] stretches the statute beyond its plain meaning. There are no grounds on which to justify applying *Dabit* to statements made by the [Defendants] concerning *uncovered hedge funds*—even when a portion of the assets in those funds include covered securities. This outcome is required because the alleged fraud relates to those hedge funds rather than to the covered securities in the portfolios.

Id. at 454–55. Lastly, using some language more characteristic of the purpose and separation approaches, the court also distinguished its case from the Madoff feeder fund cases where SLUSA preclusion was found. It noted that the feeder funds in those cases were "nothing but ghost entities—easily pierced," and that those funds essentially "did not exist and had no assets. Thus," it found, the plaintiffs in those cases "could claim that they deposited their money [in the funds] for the purpose of purchasing covered securities." *Id.* at 455 n.27. None of those conditions were present in the funds purchased by the plaintiffs; therefore, it concluded, "covered securities are not 'at the heart' of this case." *Id.* at 455.

The separation approach considers the degree of separation between the fraud inducing the plaintiffs to buy the uncovered securities and the downstream transactions in covered securities. This focus is somewhat like *Montreal Pension's* concern about what is at the "heart" of the case. The most cited case using the separation approach is *Anwar v. Fairfield Greenwich Ltd.* (*Anwar II*). *Anwar II* dealt with a feeder fund to invest in Madoff's funds. 728 F. Supp. 2d 372, 387 (S.D.N.Y. 2010). The district court in *Anwar II*, however, found distinct differences in how the funds at issue in that case operated and the usual way Madoff feeder funds operated. *Compare id.* at 398–99 *with supra* note 2. Finding that the funds at issue were "not . . . cursory, pass-through entit[ies]," *id.* at 398, the *Anwar II* court held that "[t]hough the [c]ourt must broadly construe SLUSA's 'in connection with' phrasing, stretching SLUSA to cover this chain of investment—from [p]laintiffs' initial investment in the [f]unds, the [f]unds' reinvestment with Madoff, Madoff's supposed purchases of covered securities, to Madoff's sale of those securities and purchases of Treasury bills—snaps even the most flexible rubber band." *Id.* at 399. Therefore, the court found that the "coincide" requirement was not met because "[t]he allegations in [that] case present[ed] multiple layers of separation between whatever phantom securities Madoff purported to be purchasing and the financial interests [p]laintiffs actually purchased." *Id.* at 398; *cf. Levinson v. PSCC Servs., Inc.* (*Levinson II*), No. 3:09-CV-269, 2010 WL 5477250, at *8 (D. Conn. Dec. 29, 2010) ("A third party's fraud—although the intervening and primary cause of the plaintiff's losses—does not supplant the fraudulent conduct on the part of the defendant that is necessary to trigger SLUSA preemption."). *But see In re Herald, Primeo, & Thema Secs. Litig.*, No. 09 Civ. 289, 2011 WL 5928952, at *7 (S.D.N.Y. Nov. 29, 2011) ("[C]laims against these [d]efendants are integrally tied to the underlying fraud committed by Madoff.").

3

The third and most widely adopted approach is the purpose approach, which primarily concerns itself with what the purpose of the investment was. The clearest articulation of this approach asks whether the uncovered securities (feeder funds) "were created for the purpose of investing in [covered] securities." *Newman v Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 312 (S.D.N.Y. 2010); *see also In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 430 (S.D.N.Y. 2010) ("[T]he objective of the fund was to manage [p]laintiffs' investment using a strategy that inevitably included the purchase and sale of covered securities."); *Levinson v. PSCC Servs., Inc.* (*Levinson I*), No. 3:09-CV-269, 2009 WL 5184363, at *7 (D. Conn. Dec. 23, 2009) ("[T]he omnibus account created by [d]efendants was clearly for the purpose of allowing Madoff to purchase and sell securities using [p]laintiffs' funds.").

In ascertaining the purpose of the investment, these courts have considered what the fraud "at the heart of the case" was. *In re Kingate Mgmt., Ltd. Litig.*, No. 09 Civ. 5386, 2011 WL 1362106, at *9 (S.D.N.Y. Mar. 30, 2011); *see also Montreal Pension*, 750 F. Supp. 2d at 455; *Backus v. Conn. Cmty. Bank, N.A.*, No. 3:09-CV-1256, 2009 WL 5184360, at *5 (D. Conn. Dec. 23, 2009). They have also looked to the centrality of transactions in covered securities to the fraud. *See Barron v. Igolnikov*, No. 09 Civ. 4471, 2010 WL 882890, at *5 (S.D.N.Y. Mar. 10, 2010); *Backus*, 2009 WL 5184360, at *8. Finally, some courts have considered the "nature of the parties' relationship, and whether it necessarily involved the purchase or sale of securities." *Levinson I*, 2009 WL 5184363, at *11 (citing *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 302 (3d Cir. 2005)); *see also Backus*, 2009 WL 5184360, at *8 ("[T]he very purpose of the relationship . . . was to trade in securities.").

D

Given the Supreme Court's express reliance on "policy considerations" in its determination of the scope of the "in connection with" language in Section 10(b), *Blue Chip Stamps*, 421 U.S. at 737, and SLUSA, *Dabit*, 547 U.S. at 81, we find it useful to consider such arguments in our formulation of the standard. Specifically, we find persuasive Congress's explicit concern about the distinction between national, covered securities and other, uncovered securities.

As we have stated previously, "SLUSA advances 'the congressional preference for national standards for securities class action lawsuits involving *nationally* traded securities.'" *In re Enron*, 535 F.3d at 338 (quoting *Dabit*, 547 U.S. at 87) (emphasis added). The rationale for this preference is clear: Because

> companies can not control where their securities are traded after an initial public offering . . . , companies with publicly-traded securities can not choose to avoid jurisdictions which present unreasonable litigation costs. Thus, a single state can impose the risks and costs of its peculiar litigation system on all national issuers. The solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving nationally traded securities.

H.R. Rep. No. 105-803, at 15 (1998) (Conf. Rep.). Such concerns are unique to the world of national securities. That SLUSA would be applied only to transactions involving national securities appears to be Congress's intent: "[T]he securities governed by this bill—and it is important to emphasize this point—are by definition trading on national exchanges. As we all know, securities traded on national exchanges are bought and sold by investors in every State, and those investors rely on information distributed on a national basis." 144 Cong. Rec. 4799 (1998) (statement of Sen. Joseph Lieberman); *see also* 144 Cong. Rec. 10780 (1998) (statement of Rep. Anna Eshoo) ("This legislation is limited in scope and only affects class action lawsuits involving nationally traded securities.").

Exempting non-national securities from SLUSA's preclusive scope does not render them unregulated. When enacting SLUSA, Congress recognized the importance of maintaining the vital role of state law in regulating non-national securities. Congress found "that in order to avoid . . . thwarting . . . the purpose of the [PSLRA], national standards for nationally traded securities must be enacted, while preserving the appropriate enforcement powers of state regulators, and the right of individuals to bring suit." S. Rep. 105-182, at 8 (1998). Notably, state common law breach of fiduciary duty actions provide an important remedy not available under federal law. *See* Securities & Exchange Commission, *Study on Investment Advisers and Broker-Dealers* (Jan. 2011), http://sec.gov/news/studies/2011/913studyfinal.pdf, at 54. In addition to fiduciary duty actions, over-extension of SLUSA also threatens state creditor-debtor regimes, which we have held are likely available to the Appellants. *See Janvey v. Adams*, 588 F.3d 831, 835 (5th Cir. 2009). The differences between the federal and state remedies have led our colleagues on the Eleventh Circuit to note that "[s]ince not every instance of financial unfairness or breach of fiduciary duty will constitute a fraudulent activity under § 10(b) or Rule 10b-5, federal courts should be wary of foreclosing common law breach of fiduciary duty actions which supplement existing federal or state statutes." *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987). This wariness is echoed by the members of Congress appearing as *amici* on behalf of the Appellants: "The interpretation of SLUSA and the 'in connection with' requirement adopted by the District Court . . . could potentially subsume any consumer claims involving the exchange of money or alleging fraud against a bank, without regard to the product that was being peddled." As they point out, every bank and almost every company owns some covered securities in its portfolio, and every debt instrument issued by these banks and companies is backed by this portfolio in the same way the CDs here were ultimately backed by the assets in SIB's portfolio. Precluding any group claim against any such debt issue merely because the issuer advertises that it owns these assets in its portfolio would be a major change in the scope of SLUSA.

IV

It is against this backdrop that we must go about formulating our standard for judging the connection of claims like the Appellants' to the purchase or sale of covered securities. As noted previously, there is tension in the law between following the Supreme Court's command that "in connection with" must be interpreted broadly, *Zandford*, 535 U.S. at 819, and its concurrent instruction that the same language "must not be construed so broadly as to convert every common-law fraud that happens to involve [covered] securities into a violation of § 10(b)," *id*. at 820.

The Eleventh Circuit's test from *IPM*, employed by the district court, is a good starting point because it identifies the two different perspectives from which to approach the question of connectivity. *IPM* held that the "coincide" requirement is met if either "fraud . . . *induced* [plaintiffs] to invest with [the defendant(s)]" or "a fraudulent scheme . . . coincided and *depended upon* the purchase or sale of [covered] securities." *IPM*, 546 F.3d at 1349 (emphasis added). The "induced" prong examines the allegations from the plaintiffs' perspective by asking essentially whether the plaintiffs thought they were investing in covered securities or investing because of (representations about) transactions in covered securities. The "depended upon" prong views the allegations from the opposite perspective, the defendants', essentially asking whether the defendants' fraudulent scheme would have been successful without the (representations about) transactions in covered securities. These two perspectives—plaintiffs' and defendants'—are also seen in the various uncovered securities cases in the district courts. *Compare Levinson I*, 2009 WL 5184363, at *11 ("[T]he crux of [the p]laintiffs' allegations is that [the defendants'] fraudulent statements caused [the p]laintiffs to make poor investment decisions.") (plaintiffs' perspective) *with In re Beacon*, 745 F. Supp. 2d at 430 ("[T]he objective of the fund was to manage [p]laintiffs' investment using a strategy that inevitably included the purchase and sale of covered securities.") (defendants' perspective).

Viewing the allegations from the plaintiffs' perspective, however, asks the wrong question. By tying the "coincide" requirement to "inducement," it unnecessarily imports causation into a test whose language ("coincide") specifically disclaims it. The defendant-oriented perspective, like *IPM*'s "depends upon" prong, is more faithful to the Court's statement that "[t]he requisite showing . . . is deception in connection with the purchase or sale of any security, *not deception of an identifiable purchaser or seller*." *Dabit*, 547 U.S. at 85 (emphasis added) (internal quotation marks omitted). *Dabit*'s formulation focuses the analysis on the relationship between the defendants' fraud and the covered securities transaction without regard to the fraud's effect on the plaintiffs. Additionally, *IPM*'s "depended upon" prong appears very similar to the Second Circuit's test from *Romano*, which found SLUSA preclusion is appropriate where "plaintiff's claims 'necessarily allege,' 'necessarily involve,' or 'rest on' the purchase or sale of securities." *Romano*, 609 F.3d at 522.

Though the defendant-oriented perspective is the proper point of view from which to consider the allegations, the problem we see with the test from that perspective as articulated by the Second and Eleventh Circuits is that it is too stringent a standard. Specifically, a reading of the opinions of the Sixth and Eighth Circuits on SLUSA preclusion suggests that those courts would find the "depended upon" standard to be too high a bar. The Sixth Circuit in *Segal* seemed to suggest that while a claim that "depended on" a securities transaction was sufficient, there were other connections that would also meet the "coincide" requirement. *Segal*, 581 F.3d at 310 ("Segal's allegations do not merely 'coincide' with securities transactions; they depend on them. Under these circumstances, the district court properly concluded that SLUSA requires the dismissal of this complaint." (citations omitted)); *compare id. with IPM*, 546 F.3d at 1349 (The "coincide" requirement is met if "a fraudulent scheme . . . coincided and depended upon the purchase or sale of [covered] securities."). In *Siepel*, the Eighth Circuit found that the "coincide" requirement is less stringent than a standard requiring the fraud "relate to" transactions in covered securities. *Siepel*, 526 F.3d at 1127; *compare id. with Romano*, 609 F.3d at 522 (SLUSA preclusion is appropriate where "plaintiff's claims . . . 'rest on' the purchase or sale of securities.").

In light of this, we find Ninth Circuit's test from *Madden*, which is that "a misrepresentation is 'in connection with' the purchase or sale of securities if there is a relationship in which the fraud and the stock sale coincide or are *more than tangentially related*," to be the best articulation of the "coincide" requirement. *Madden*, 576 F.3d at 965–66 (emphasis added and internal quotation marks omitted). This articulation nicely deals with the Court-expressed tension in *Zanford* that the requirement "must not be construed so broadly as to [encompass] every common-law fraud that happens to involve [covered] securities." *Zandford*, 535 U.S. at 820. It also heeds the Seventh Circuit's advice that "'the "connection" requirement must be taken seriously.'" *Gavin*, 464 F.3d at 640 (Posner, J.) (quoting *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 189 (7th Cir. 1993) (Easterbrook, J.)). Lastly, it incorporates the significant policy and legislative intent considerations, all of which militate against an overbroad formulation. *See supra* III.D; *see also Dabit*, 547 U.S. at 81. Therefore, we adopt the Ninth Circuit's test. Accordingly, if Appellants' allegations regarding the fraud are more than tangentially related to (real or purported) transactions in covered securities, then they are properly removable and also precluded. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006).

V

Having established the standard by which the Appellants' allegations will be judged, we turn now to the *Roland* and *Troice* complaints. "The plaintiff is 'the master of her complaint,' and, as such, a determination that a cause of action presents a federal question depends upon the allegations of the plaintiff's well-pleaded complaint." *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680 (5th Cir. 2001) (internal quotation marks omitted). The artful pleading doctrine is an independent corollary to the well-pleaded complaint rule: "[u]nder this principle, even though the plaintiff has artfully avoided any suggestion of a federal issue, removal is not defeated by the plaintiff's pleading skills in hiding [a] federal question." *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008). We have stated previously that the artful pleading doctrine "applies *only* where state law is subject to complete preemption." *Id.* (citing *Terrebone Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188–89 (5th Cir. 2001). However, as the Second Circuit has noted, there is another situation where the artful pleading doctrine applies: "when Congress has . . . expressly provided for the removal of particular actions asserting state law claims in state court." *Romano*, 609 F.3d at 519 (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003)).

> Application of the first prong is a bit tricky because SLUSA is a statute of preclusion, rather than preemption. But its effect is the same: where plaintiffs proceed as a class of fifty or more, state law securities claims are no longer available to them and federal law, which compels the dismissal of those claims, controls. Application of the second prong is straightforward. Since SLUSA expressly provides for the removal of covered class actions, it falls under the "removal" exception to the well-pleaded complaint rule. Consequently, we are free to look beyond the face of the amended complaints to determine whether they allege securities fraud in connection with the purchase or sale of covered securities.

Id. (citations and footnotes omitted); see also *Segal*, 581 F.3d at 310 ("Courts may look to—they must look to—the substance of a complaint's allegations in applying SLUSA. Otherwise, SLUSA enforcement would reduce to a formalistic search through the pages of the complaint for magic words . . . and nothing more."); *Rowinski*, 398 F.3d at 298 ("No matter how an action is pleaded, if it is a covered class action involving a covered security, removal is proper." (quotations and alterations omitted)).

Because of the need to examine the actualities of the alleged schemes, we find the product approach taken by some district courts, *see supra* III.C.1, which focuses its analysis on the type of financial product upon which the alleged fraudulent scheme centers, to be too rigid. Our conclusion, in accord with the district court, that the CDs were uncovered securities therefore does not end our inquiry. We must instead closely examine the schemes and purposes of the frauds alleged by the Appellants.

A

With respect to the claims against the SEI Defendants and the Willis Defendants, we find the Appellants' allegations to be substantially similar such that they can be analyzed together.

1

The district court found that Appellants' claims were precluded because Appellants invested in the CDs, at least in part, because they were backed by "covered securities." To be sure, the CDs' promotional material touted that SIB's portfolio of assets was invested in "highly marketable securities issued by stable governments, strong multinational companies and major international banks." This is, however, but one of a host of (mis)representations[3]

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[3] As noted above, *see supra* I.B, the *Roland* Plaintiffs alleged that the SEI Defendants represented to them that the CDs were a good investment because (1) they could be "readily liquidated"; (2) SEI had evaluated SIB as being "competent and proficient"; (3) SIB "employed a sizeable team of skilled and experienced analysts to monitor and manage [its] portfolio"; (4) "independent" auditors "verified" the value of SIB's assets; (5) the SEI Defendants had "knowledge" about the companies that SIB invested in and that those companies were adequately capitalized; (6) the Antiguan government regularly "examined"

made to the Appellants in an attempt to lure them into buying the worthless CDs. Viewing the allegations, as we must, from how the advisors at SEI and Willis allegedly structured their fraudulent scheme, we find the references to SIB's portfolio being backed by "covered securities" to be merely tangentially related to the "heart,"[4] "crux,"[5] or "gravamen"[6] of the defendants' fraud.

SIB; (7) the CDs were a "safe investment vehicle suitable for long term investment with little or no risk"; (8) SIB had "retained legal counsel" that ensured that the investments were structured so as to comply with state and federal law; (9) the CDs would produce "consistent, double-digit returns"; and (10) SIB's assets were "invested in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." Similarly, the *Troice* Plaintiffs allege that the Willis Defendants represented to them that the CDs were a good investment because (1) SIB was based in the United States and "regulated by the U.S. Government"; (2) SIB was "insured by Lloyd's"; (3) SIB was "regulated by the Antiguan banking regulatory commission"; (4) SIB was "subjected to regular stringent risk management evaluations" conducted by "an outside audit firm"; (5) the CDs were safe and secure; (6) SIB's portfolio produced "consistent, double-digit returns"; (7) the CDs' "high return rates . . . greatly exceed those offered by commercial banks in the United States"; and (8) SIB's assets were "invested in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks."

[4] *In re Kingate Mgmt.*, 2011 WL 1362106, at *9 ("Madoff's fraud is at the heart of the case.").

[5] *Levinson I*, 2009 WL 5184363, at *11 ("[T]he crux of [the p]laintiffs' allegations is that [the defendants'] fraudulent

When we look over the complaints against the SEI Defendants and the Willis Defendants, we find that the heart, crux, and gravamen of their allegedly fraudulent scheme was representing to the Appellants that the CDs were a "safe and secure" investment that was preferable to other investments for many reasons. For example, as alleged by the *Roland* Plaintiffs, the CDs were principally promoted as being preferable to other investments because of their liquidity, consistently high rates of return, and the fact that SEI and other regulators were keeping a watchful eye on SIB. Similarly, the so-called "safety and soundness letters" sent by the Willis Defendants focused on the "professionalism" of SIB and the "stringent" reviews. That the CDs were marketed with some vague references to SIB's portfolio containing instruments that might be SLUSA-covered securities seems tangential to the schemes advanced by the SEI and Willis Defendants.

Our conclusion that the allegations do not amount to being "in connection with" transactions in covered securities is bolstered by the distinction between the present cases and the Madoff feeder fund cases. Comparing the allegations in the uncovered securities cases we surveyed, we find the most similarity with the allegations in the *Montreal Pension* case. The CDs, like the uncovered hedge

statements caused [the p]laintiffs to make poor investment decisions.").

[6] *Backus*, 2009 WL 5184360, at *11 ("The gravamen of the Amended Complaint is a fraudulent scheme in connection with the purchase and sale of securities.").

funds in *Montreal Pension*, were not mere "ghost entities" or "cursory pass-through vehicles" to invest in covered securities. The CDs were debt assets that promised a fixed rate of return not tied to the success of any of SIB's purported investments in the "highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." Unlike in the Madoff feeder fund cases, "plaintiffs could [not] claim that they deposited their money in the bank for the purpose of purchasing covered securities." *Montreal Pension*, 750 F. Supp 2d at 455 n.27. Finally, as was the case in *Anwar II*, there are "multiple layers of separation" between the CDs and any security purchased by SIB. *Anwar II*, 728 F. Supp. 2d at 398.

Therefore, we find that the fraudulent schemes of the SEI Defendants and the Willis Defendants, as alleged by the Appellants, are not more than tangentially related to the purchase or sale of covered securities and are therefore not sufficiently connected such purchases or sales to trigger SLUSA preclusion.

2

The district court also justified its decision based on the fact that "at least one of the [*Roland*] Plaintiffs acquired SIB CDs with the proceeds of selling SLUSA-covered securities in their IRA portfolios" and that those transactions brought the action within the ambit of SLUSA preclusion. While we do not quarrel with the district court's finding that some plaintiffs sold covered securities to buy the CDs, we think that the way the district court approached this alleged connection was incorrect. The appropriate inquiry under SLUSA is whether the fraudulent scheme, as alleged by the Appellants, was connected with a transaction in a covered security. While the fact that covered securities were in fact traded as a part of the fraud is evidence of the defendants' intent, it is not dispositive.

Appellants argue that "[t]he source of funds used to buy uncovered securities is irrelevant." In response, the defendants posit that this cannot be the case in light of the Supreme Court's decisions in *Superintendent of Insurance v. Bankers Life & Casualty Co. and Zandford*. In *Bankers Life*, the Court dealt with a company president who allegedly conspired to acquire the company's stock using the company's assets and caused the company to liquidate its bond portfolio and to invest the proceeds in a worthless certificate of deposit. 404 U.S. 6, 8–9 (1971). The Court held that the scheme was "in connection with" the purchase or sale of securities such that suits by defrauded investors of the company could be maintained under Section 10(b). *Id*. at 12–13. In *Zandford*, the Court found that where a broker took over a customer's portfolio to purportedly manage and invest the assets but in fact, liquidated covered securities in order to steal the customer's funds, 535 U.S. at 815–16, the fraud was "in connection with" transactions in securities because "[t]he securities sales and respondent's fraudulent practices were not independent events" and "each sale was made to further respondent's fraudulent scheme." *Id*. at 820.

Based on our reading of the allegations in the Appellants' complaints, the connection between the fraud and sales of covered securities is not met here. Unlike *Bankers Life* and *Zandford*, where the entirety of the fraud depended upon the tortfeasor convincing the victims of those fraudulent schemes to sell their covered securities in order for the fraud to be accomplished, the allegations here are not so tied with the sale of covered securities.[7] To be sure, it was necessary for fraud for the defendants to have the Appellants invest their assets into the CDs, but based on the allegations, there is no similar focus to *Bankers Life* and *Zandford* on the sale of covered securities. Therefore, we find that the fact that some of the plaintiffs sold some "covered securities" in order to put their money in the CDs was not more than tangentially related to the fraudulent scheme and accordingly, provides no basis for SLUSA preclusion.

[7] Construing SLUSA to depend on the source of funds where the defendant does not care leads to absurd results. For example, if two putative class members buy adjacent parcels of fraudulently-marketed Texas ranch land (clearly not a covered security) and one pays for his land out of his checking account but the other pays for his by selling some nationally-traded stock, then the first's claim is not precluded by SLUSA but the second's is, even though their claims and actions are identical. Therefore, absent allegations about the defendant's focus on the source of the funds, the fact that a purchaser may have sold covered securities does not make the injury suffered "in connection with" the purchase or sale of covered securities.

B

We view the claims against the Proskauer Defendants as different in kind from those alleged against the other defendants. Unlike the claims against the SEI Defendants and the Willis Defendants, the *Troice* Plaintiffs' claims against the Proskauer Defendants are solely for aiding and abetting the Stanford Ponzi scheme. That is to say, the allegations against the SEI and Willis Defendants were, *inter alia*, that they made misrepresentations to the Appellants about the liquidity, soundness, and safety of investing in the CDs whereas the *Troice* Plaintiffs do not allege that the Proskauer Defendants made *any* misrepresentations to them. The core allegation is that without the aid of the Proskauer Defendants the Stanford Ponzi could not have been accomplished. However, when we examine the substance of the claims against the Proskauer Defendants, it is clear that there are misrepresentations involved.

Specifically, the Proskauer Defendants allegedly misrepresented to the SEC the Commission's ability to exercise its oversight over Stanford and SIB. By telling the SEC that it could not investigate the operations of Stanford and SIB, the Proskauer Defendants obstructed any chance of an SEC investigation uncovering the fraud, thereby allowing it to continue and harm the *Troice* Plaintiffs to occur. These alleged misrepresentations were one level removed from the misrepresentations made by SIB or the SEI and Willis Defendants. The connection that the Proskauer Defendants would have us find is that the misrepresentations to the SEC about its regulatory authority allowed SIB to recruit the Willis Defendants to sell CDs, who in turn misrepresented to the *Troice* Plaintiffs a host of things in order to convince them that the CDs were good investments, including vague references to SIB's portfolio containing instruments that might be SLUSA-covered securities. Like with the SEI and Willis Defendants, the misrepresentations made by the Proskauer Defendants are not more than tangentially related to the purchase or sale of covered securities and therefore, SLUSA preclusion does not apply.

VI

For the foregoing reasons, the judgments are REVERSED. The *Troice* cases are remanded to the district court, and the *Roland* case is remanded to the state court.

REVERSED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SAMUEL TROICE, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:09-CV-1600-N
	§	
PROSKAUER ROSE LLP, *et al.*,	§	
	§	
Defendants.	§	
	§	
	§	

ORDER

This Order addresses Defendants Chadbourne & Park LLP, Proskauer Rose LLP, Thomas V. Sjoblom, and P. Mauricio Alvarado's motions to dismiss Plaintiffs' second amended class action complaint [29, 31, 36, 44]. Because the Plaintiffs bring claims "based upon the statutory or common law of" Texas and "alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C. § 77p(b)(1), as discussed in the Court's Order of August 31, 2011 in *Roland v. Green* [3:10-cv 0224-N, doc. 72], the Securities Litigation Uniform Standards Act of 1998 precludes this action. Accordingly, the

Court grants Defendants' motions and dismisses Plaintiffs' claims with prejudice.[1]

Signed October 21, 2011.

/s/ David C. Godbey

David C. Godbey
United States District Judge

[1] The Court denies Plaintiffs' motion to stay case pending appeal of SLUSA decision in related case as moot [91].
ORDER – SOLO PAGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAMES ROLAND, *et al.*,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 3:10-CV-0224-N
JASON GREEN, *et al.*,	§	
Defendants.	§	

ORDER

This Order addresses the Plaintiffs' motions to remand and motion for sanctions [4 & 28]. Because the Securities Litigation Uniform Standards Act of 1998 ("SLUSA")[1] expressly provides for the removal of actions similar to this case, the Court denies the motions. And, because the Plaintiffs bring claims "based upon the statutory or common law of" Louisiana and "alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C.

[1] Pub. L. 105-353, 112 Stat. 3227. SLUSA substantively amended identically the Securities Act of 1933 and the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 77p(b) ('33 Act), 78bb(f) ('34 Act). For consistency, the Court refers only to the Securities Act provision.

§ 77p(b)(1), the Court dismisses this action with prejudice.

I. ORIGINS OF THE PLAINTIFFS' SECURITIES FRAUD ACTION

This action presents another episode related to the Securities and Exchange Commission's (the "SEC") ongoing securities fraud action against R. Allen Stanford, his associates, and various entities under Stanford's control (the "Stanford Defendants"). The Stanford Defendants allegedly swindled billions of dollars from investors through an elaborate and international Ponzi scheme. As part of that litigation, this Court "assume[d] exclusive jurisdiction and t[ook] possession of the" "Receivership Assets" and "Receivership Records" (collectively, the "Receivership Estate"). *See* Second Am. Order Appointing Receiver, July 19, 2010 [1130] (the "Receivership Order"), *in SEC v. Stanford Int'l Bank, Ltd.*, Civil Action No. 3:09-CV-0298-N (N.D. Tex. filed Feb. 17, 2009). Among other things, the Receivership Order enjoined litigation involving potential Receivership Estate assets.

In short, the Plaintiffs here invested in Stanford International Bank ("SIB") certificates of deposits ("CDs") on the advice of certain investment advisors (the "Investment Advisor Defendants")[2] and

[2] The following Defendants are Investment Advisor Defendants: Jason Green, Grady Layfield, Hank Mills, Charles Jantzi, Tiffany Angelle, James Fontenot, Dirk Harris, Thomas Newland, and Jay Comeaux. *See* Pls.' Original Pet. at 5-6 [1-3] [hereinafter "Petition"].

with the assistance of the Stanford Trust Company ("Stanford Trust") and its officers and directors (together with Stanford Trust, the "Trust Defendants").[3] Stanford Trust acted as custodian and trustee for the Plaintiffs' individual retirement accounts ("IRAs") and trusts. The Plaintiffs originally filed suit against the Defendants in Louisiana state court. Defendants Grady Layfield, Hank Mills, and John Schwab (the "Removing Defendants") removed to the Middle District of Louisiana, arguing that the Court's litigation injunction supplied federal question jurisdiction. Notice of Removal [1]. Defendant SEI Investments Company ("SEI") later separately consented to removal, simultaneously asserting that SLUSA provided an independent basis for removal because the SIB CDs should qualify as "covered securities" under SLUSA [5]. The MDL Panel subsequently transferred the action to this Court for consideration with other Stanford-related cases [36 & 37].

The Plaintiffs object to this Court's exercise of subject matter jurisdiction on several grounds. The Plaintiffs first move to remand in response to the Removing Defendants' Notice of Removal, contending primarily that the litigation stay fails to provide a cognizable federal question justifying removal. The Plaintiffs' second motion to remand disputes both SEI's SLUSA-based removal

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[3] The following Defendants are Trust Defendants: Stanford Trust, Zack Parrish, Bernard Young, Lena Stinson, Jay Comeaux, Rhonda Lear, Jack Bruno, J.D. Perry, Joe Klingen, Russ Newton, Danny Bogar, Jim Weller, and John Does 1-10. *See* Petition at 6-7.

arguments and whether SEI complied with certain removal requirements articulated in *Getty Oil*. *See Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988). The Plaintiffs' second remand motion also seeks sanctions against SEI both for ignoring the alleged removal deficiencies and for presenting purportedly frivolous arguments. The Court first considers the Plaintiffs' procedural objections to removal before analyzing whether SLUSA mandates dismissal of the Plaintiffs' claims.

II. SEI'S INDEPENDENT BASIS FOR REMOVAL IS PROPERLY BEFORE THE COURT

The Plaintiffs argue that SEI essentially filed a second removal petition when it provided an independent basis for removal. According to the Plaintiffs, that means SEI was required to file its independent basis for removal within thirty days after the Removing Defendants filed their removal petition or the date when the first Defendant waived service of process. The Plaintiffs contend that those two dates are the same in this case, because the Removing Defendants waived service of process upon removal and that, therefore, SEI untimely filed its independent basis for removal. The Plaintiffs also assert that both attempts at removal fail because the Removing Defendants and SEI did not obtain the consent of four Defendants who waived service of process prior to September 28, 2009.[4]

[4] The Plaintiffs do not explain why this date is significant, but it is twenty-nine days before October 27, 2009, the date the Plaintiffs filed their second remand motion. Thus, September 28th appears significant because the Plaintiffs could

The Court disagrees. Stating an alternative justification for removal does not constitute filing a second removal petition. The Plaintiffs point to no caselaw to the contrary. And, to hold otherwise would have the nonsensical and judicially-inefficient result of mandating that all served defendants affirmatively assent to any defendant's theory of federal jurisdiction whenever proffered. Our jurisprudence requires served defendants to consent only once – at the time the removal petition is filed. 28 U.S.C. § 1446(a); *Getty Oil*, 841 F.2d at 1261 & n.9. To allow only first-to-remove defendants to present arguments for removal, moreover, would bind all other defendants to potentially faulty grounds for removal in cases that may otherwise be properly removable. Thus, the Court considers SEI's SLUSA-based justification for removal in addition to that provided by the Removing Defendants. The Court holds that it may retain jurisdiction if either theory is valid.

The Plaintiffs' consent-to-removal argument also fails. Only defendants served prior to removal need affirmatively consent to a properly filed petition. *See Getty Oil*, 841 F.2d at 1263 ("[S]ince all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than

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verify at that time that only four Defendants had not consented to removal within thirty days of waiving service. Several other Defendants filed waivers between September 29 and October 27. *See* Second Mot. to Remand Ex. B [28-5].

thirty days from the day on which the first defendant was served."); *see also Jones v. Houston Indep. Sch. Dist.*, 979 F.2d 1004, 1007 (5th Cir. 1992) ("[Defendant's] failure to join in the removal petition is not a bar to the federal court's jurisdiction. [Defendant] could not have joined in it because, as [Plaintiff] acknowledges, [Defendant] was not even served until after the case had been removed."). The Plaintiffs admit that no Defendants had been served prior to the date the Removing Defendants filed their Notice of Removal. *See* Pls.' Second Mot. for Remand at 25 n.14. And, the Removing Defendants noted that fact in their removal petition. *See* Notice of Removal at 4. Accordingly, neither SEI nor any other Defendant was obligated to join the Removing Defendants' petition; SEI's later-filed formal consent to removal was superfluous for propriety-of-removal purposes.[5] And, in light of the Court's finding that SEI did not file a second notice of removal, the Removing Defendants' notice of removal was the only petition subject to consent-to-removal procedural requirements. The Court therefore finds that the Removing Defendants' removal was procedurally proper.

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[5] In any case, defendants not served at the time of removal and who are dissatisfied with federal jurisdiction remain free to move for remand. *See* 28 U.S.C. § 1448 ("This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case."). No Defendants have apprised the Court of their disagreement with removal.

III. SLUSA "PREEMPTION" PROVIDES A FEDERAL QUESTION JUSTIFYING REMOVAL

SLUSA traces its history to the Private Securities Litigation Reform Act ("PSLRA"). Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) (1995). Believing that the "class-action device was being used to injure the entire U.S. economy," Congress enacted the PSLRA to combat "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (citations and internal quotation marks omitted). Among other provisions, the PSLRA caps damage and attorneys' fee awards, creates a "'safe harbor' for forward-looking statements, impose[s] new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate[s] [the] imposition of sanctions for frivolous litigation, . . . authorize[s] a stay of discovery pending resolution of any motion to dismiss," and "imposes heightened pleading requirements in actions brought pursuant to § 10b and Rule 10b-5." *Id.* at 81-82 (internal citations omitted). Congress hoped that the PSLRA would inhibit "nuisance filings, [the] targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers of the clients whom they purportedly represent," which had "resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors." *Id.* at 81 (citations and internal quotation marks omitted).

The PSLRA worked as designed; the number of meritless federal securities fraud class actions decreased. "But the effort also had an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." *Id.* at 82. Although "state-court litigation of class actions involving nationally traded securities had previously been rare," securities fraud plaintiffs post-PSLRA increasingly turned to state-law causes of action brought in state courts. *Id.*

"To stem this shif[t] from Federal to State courts and prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of [the PSLRA], Congress enacted SLUSA." *Id.* (internal citations and quotation marks omitted) (first alteration in original); *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 535 F.3d 325, 338 (5th Cir. 2008) (explaining that Congress enacted SLUSA to further the PSLRA's purposes). Although commonly viewed as a preemption statute, SLUSA more properly precludes certain actions. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 637 n.1 (2006) ("The preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class-action device in federal as well as state court."). SLUSA provides in relevant part:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained

> in any State or Federal court by any private party alleging –
>
> > (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
> >
> > (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b).

A. SLUSA Expressly Authorizes Removal

SLUSA expressly provides for removal of actions potentially violative of its class action limitations. *See* 15 U.S.C. § 77p(c) ("Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)."). And, a plethora of caselaw supports SLUSA removal. *See, e.g.*, *Kircher*, 547 U.S. at 644 ("[A] motion to remand claiming the action is not precluded [by SLUSA] must be seen as posing a jurisdictional issue."); *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1219-23 (9th Cir. 2009) ("[SLUSA's] separate provision for a preclusion defense requiring the dismissal of covered class actions creates a federal question hook on which removal can hang.") (citations omitted). Accordingly, the Court may retain jurisdiction provided that this action runs afoul of SLUSA's class action limitations.

B. The Court May Look Beyond the Pleadings to Determine Whether SLUSA Applies

The Plaintiffs nonetheless argue under the well-pleaded complaint rule that their decision to bring state-law claims in a state-court forum deserves deference. But, in the SLUSA context, the Plaintiffs are not the "masters of their complaint" able to plead around federal jurisdiction. *See, e.g.*, *Romano v. Kazacos*, 609 F.3d 512, 518-20 & n.2 (2d Cir. 2010) (holding that plaintiffs may not skirt SLUSA by failing to plead "federal claims in state proceedings"). "[T]here exists a corollary to the well-pleaded complaint rule – the 'artful pleading' rule – pursuant to which [a] plaintiff cannot avoid removal by declining to plead 'necessary federal questions.'" *Id.* at 518-19 (quoting *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998)). The artful pleading rule applies when, as here, a federal statute contains an express removal provision or preempts state law. *Id.* at 519. Under the artful pleading rule, "courts look beyond the face of an 'artfully pled' complaint to determine whether [a] plaintiff has 'cloth[ed] a federal law claim in state garb' by pleading state law claims that actually arise under federal law." *Id.* (quoting *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir. 1986)) (latter alteration in original). Accordingly, in conducting its preclusion analysis, the Court is not constrained to take the Plaintiffs' allegations at face value. *Cf. id.* at 519-20 ("'Courts may look to – they must look to – the substance of a complaint's allegations in applying SLUSA.

Otherwise, SLUSA enforcement would reduce to a formalistic search through the pages of the complaint for magic words . . . and nothing more.'" (quoting *Segal v. Fifth Third Bank*, 581 F.3d 305, 310 (6th Cir. 2009))) (omission in original); *see also Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 301 (3d Cir. 2005) (courts "scrutinize[] the pleadings to arrive at the 'essence' of a state law claim, in order to prevent artful drafting from circumventing SLUSA preemption") (collecting cases). Additionally, because SLUSA preclusion necessarily challenges subject matter jurisdiction, the Court may "make factual findings which are decisive of its jurisdiction." *Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986) ("Courts may dismiss for lack of subject matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981))). The Court now turns to consider SLUSA's preclusive effect in this case.

IV. SLUSA PRECLUDES THE PLAINTIFFS' ACTION

SLUSA precludes an action when "four conditions are satisfied: (1) the action is a 'covered class action;' (2) the claims are based on state law; (3) the action involves one or more 'covered securities;' and (4) the claims allege a misrepresentation or omission of material fact 'in connection with the purchase or sale' of the security." *Enron*, at 338-39 (citing *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 701 (5th Cir.

2004); *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252, 1253 (11th Cir. 2003)).[6] The Court addresses these factors below. Because this action plainly meets SLUSA's covered class action definition and brings only state-law claims, the Court begins by analyzing the two elements of SLUSA preclusion most at issue in this case.

A. The Plaintiffs Allege Misrepresentations or Omissions of Material Facts

Because the "issue of [SLUSA] preemption . . . hinges on the content of the allegation – not on the label affixed to the cause of action," *Miller*, 391 F.3d at 702, the Plaintiffs' claims all concern "untrue

[6] Courts have phrased variously the four conditions. The Second Circuit, for example, examines whether a suit "(1) is a 'covered' class action (2) based on state statutory or common law that (3) alleges that defendants made a 'misrepresentation or omission of a material fact' or 'used or employed any manipulative device or contrivance in connection with the purchase or sale' (4) of a covered security." *Romano*, 609 F.3d at 518. Since *Herndon*, the Eleventh Circuit has restated the final two prongs almost identically to *Romano*. *See Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1345 (11th Cir. 2008). The Ninth Circuit uses a five-factor analysis that inquires whether "(1) the class action . . . is a 'covered' class action, and that it alleges (2) state and common law claims and (3) a misrepresentation or omission of material fact. . . . (4) . . . 'in connection with' the purchase or sale of a security under [SLUSA], and (5) . . . involv[ing] 'covered securities.'" *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 843-44 (9th Cir. 2007). The different wordings do not appear materially to affect courts' substantive preclusion analyses.

statement[s] or omission[s] of a material fact."[7] 15 U.S.C. § 77p(b)(1). In paragraphs incorporated into all of their thirteen claims, the Plaintiffs allege certain "material representations" made by the Investment Advisor Defendants. Petition at 10. According to the Plaintiffs, those "representations were inaccurate or false." *Id.* at 11. The Trust Defendants also, among other things, allegedly failed to "inform the IRA and Trust Accounts holders of the" risks associated with SIB CDs, *id.* at 26, and misrepresented the Plaintiffs' IRA and trust account values. *Id.* at 28. SEI, for its part, allegedly aided and abetted the scheme "by joining the SG and Trust sales force to market[,] promote[,] and advertise SIB to prospective clients in order to assist and enable SG and the Trust to continue to sell SIB CD's based on the misrepresentations that they were fully insured." *Id.* at 32.

Finally, the Plaintiffs also have sued Certain Underwriters at Lloyd's of London in Syndicates 2987, 1866, 1084, 1274, 4000, & 1183, XYZ Insurance Company, ABC Bond Company, and the RST Insurance Companies (collectively, the "Insurer Defendants"). The Plaintiffs assert that the Insurer Defendants' coverage obligations include the alleged misrepresentations and omissions; thus those claims

[7] *Cf. LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008) (holding that this principle extends to breach of contract and other claims that technically lack a misrepresentation or omission element because "when one of a plaintiff's necessary facts is a misrepresentation, the plaintiff cannot avoid SLUSA by merely altering the legal theory that makes that misrepresentation actionable").

also satisfy SLUSA's misrepresentation or omission element. *Id.* at 45. Accordingly, this action satisfies SLUSA's misrepresentation or omission element. *Cf. Miller*, 391 F.3d at 702 (holding that SLUSA precluded breach of contract claim and "was designed to ensure that *all* causes of action involving allegations of misrepresentation or omission in connection with covered securities would be subject to the requirements of the [PSLRA]") (emphasis added) (citations omitted); *Segal*, 581 F.3d at 311 ("[SLUSA] does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentations in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple.").

B. The Defendants Allegedly Made Misrepresentations and Omissions "in Connection with" the Sale of "Covered Securities"

The final requirement for SLUSA preclusion is whether the plaintiff alleges the use of misrepresentations, omissions, or deceptive devices "in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b)(1) & (b)(2). Courts have come to varying conclusions on what "in connection with" requires. *See, e.g.*, *Romano*, 609 F.3d at 521-22 n.5 (collecting different "in connection with" standards from the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). But, the caselaw makes clear that direct transactions in "covered securities," such as a plaintiff's purchase of stock on the New York Stock Exchange, most readily present opportunities for SLUSA preclusion. SEI characterizes this case as falling within that category. The Court disagrees.

1. The SIB CDs Are Not SLUSA-Covered Securities, But that Is Not the End of the Story. — SLUSA limits covered securities for its purposes to a subset of those under the Securities and Exchange Acts generally. *See* 15 U.S.C. § 77p(f)(3). For a security to qualify as a covered security under SLUSA, it must be "traded nationally and listed on a regulated national exchange." *Dabit*, 547 U.S. at 83; *see also* 15 U.S.C. § 77r(b)(1). Alternatively, SLUSA also considers any security "issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 [15 U.S.C. § 80a-1 et seq.]" to be a covered security. 15 U.S.C. § 77r(b)(2) (alteration in original).

The SIB CDs do not fall under either category. The Court has some sympathy with SEI's argument that SIB and certain of the Stanford entities should have registered under the Investment Company Act and that, therefore, the SIB CDs should have been covered securities under SLUSA. As SEI notes, a contrary conclusion risks encouraging companies' artful dodging of federal securities laws. But, SLUSA's plain language will not accommodate SEI's interpretation. SIB failed to register under the Investment Company Act, and the SIB CDs themselves were never traded on a national exchange. The Court therefore holds that the SIB CDs are not covered securities under SLUSA.

That, however, does not end the SLUSA inquiry. The Supreme Court has "rejected [the] view" that "an alleged fraud is 'in connection with' a purchase or sale of securities only when the plaintiff himself was defrauded into purchasing or selling particular securities." *Dabit*, 547 U.S. at 85. In line with the Supreme Court's "broad interpretation[s]" of the "in connection with" phrase in section 10(b) and Rule 10b-5 caselaw and in order to further the PSLRA's goals, the *Dabit* Court held that the "in connection with" requirement is met if "the fraud alleged 'coincide[s]' with a securities transaction – whether by the plaintiff or someone else." *Id.* (citing, *inter alia*, *SEC v. Zandford*, 535 U.S. 813, 820, 822 (2002); *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)). "The requisite showing, in other words, is 'deception in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller." *Id.* (quoting *O'Hagan*, 521 U.S. at 658). Significantly here, several courts have held that section 10b, Rule 10b-5, and SLUSA do not require actual dealing in ascertainable securities. *See, e.g.*, *Zandford*, 535 U.S. at 819 (noting that the Securities Exchange Act "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes," and encompasses "accept[ing] payments for securities that [a broker] never intends to deliver") (citations and internal quotation marks omitted);[8] *Grippo v. Perazzo*, 357

[8] *Zandford* notably reversed the Fourth Circuit's more restricted holding that the "in connection with" requirement was not met because the "securities [transactions] were merely incidental to a fraud that lay in absconding with the proceeds of sales that were conducted in a routine and customary

F.3d 1218, 1223 (11th Cir. 2004) (holding that "in connection with" requirement was met in securities fraud case where "no proof exist[ed] that a security was actually bought or sold"); *Scala v. Citicorp Inc.*, 2011 WL 900297, at *4 (N.D. Cal. 2011) ("If a covered class action brought under state law concerns a transaction involving covered securities at all, it is subject to dismissal under SLUSA – even if it also involves non-covered securities or non-securities.") (footnote and citations omitted).[9]

This "dramatically simplified" and expansive interpretation of SLUSA's preclusive reach militates in favor of holding that the Defendants' misrepresentations and omissions were made in connection with transactions in covered securities. *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 844 (9th Cir. 2007). Courts have considered various factors in their "in connection with" analyses, but the strength of the nexus between an allegedly fraudulent scheme and securities transactions serves as the primary thread tying the caselaw together. *See, e.g.*, *Rowinski*, 398 F.3d at 302 & n.7 (providing four nonexclusive "guideposts in a flexible preemption

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fashion" as part of a "scheme [whose purpose] was simply to steal . . . assets rather to engage in manipulation of a particular security." 535 U.S. at 817-18 (citations and internal quotation marks omitted).

[9] *See also Horattas v. Citigroup Fin. Markets Inc.*, 532 F. Supp. 2d 891, 901-903 (W.D. Mich. 2007) (holding that, post-*Dabit*, SLUSA precludes claims even if plaintiffs "did not buy or sell any securities and were not deceived about the value of any securities bought or sold").

inquiry," of which the first consideration is "whether the covered class action alleges a 'fraudulent scheme' that 'coincides' with the purchase or sale of securities" (citing *Zandford*, 535 U.S. at 825)).[10] The Circuits have used different variations of "coincide" in that analysis, including a "more exacting 'induced' standard." *Romano*, 609 F.3d at 522 & n.5.

Given this melange of opinions and in the apparent absence of controlling Fifth Circuit authority on the subject, the Court will follow the Eleventh Circuit's approach, which asks whether a group of plaintiffs premises their claims on either "fraud that induced [the plaintiffs] to invest with [the defendants] . . . or a fraudulent scheme that coincided and depended upon the purchase or sale of securities . . . ." *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008).

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[10] The other three *Rowinski* factors look to "whether the complaint alleges a material misrepresentation or omission disseminated to the public in a medium upon which a reasonable investor would rely . . . ; . . .whether the nature of the parties' relationship is such that it necessarily involves the purchase or sale of securities . . . ; and . . . whether the prayer for relief connects the state law claims to the purchase or sale of securities." 398 F.3d at 302 (internal citations and quotation marks omitted). This case meets those factors. The Plaintiffs allege the existence of a SIB CD "marketing plan" that purportedly adhered to relevant federal and state consumer/investor protection laws. Petition at 8, 11. The investor-investment advisor relationship inherently concerns trading in securities. *See Rowinski*, 398 F.3d at 302 (discussing investor-broker context (quoting *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 944 (3d Cir. 1985))). And, as detailed below, the Plaintiffs' sought-after damages stem from transactions involving covered securities.

The Plaintiffs seek to establish the Defendants' liability for misrepresentations and omissions "in connection with" transactions in SLUSA-covered securities under both theories.

2. The Plaintiffs' Purchases of SIB CDs were "Induced" by the Misrepresentation that SIB Invested in a Portfolio Including SLUSA-Covered Securities. — Among other alleged misrepresentations, the Plaintiffs assert that the Investment Advisor Defendants touted that "SIB's multi-billion dollar investment portfolio of assets employed a sizeable team of skilled and experienced analysts to monitor and manage the portfolio." Petition at 10. The Investment Advisor Defendants also allegedly represented that SIB invested its assets in secure, adequately-capitalized, and properly-leveraged companies and funds. *Id.* at 11. Crucially, those investments allegedly were in "'highly marketable securities issued by stable governments, strong multinational companies and major international banks.'" *Id.* at 13. Although the Plaintiffs' petition does not list the "highly marketable securities," the Court finds that SIB led the Plaintiffs to believe that the SIB CDs were backed, at least in part, by SIB's investments in SLUSA-covered securities.[11]

As evidenced by the Plaintiffs' other allegations, that belief induced the Plaintiffs to

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[11] This inference seems modest given the prevalence of multinational companies on national stock exchanges and the tendency for governments to issue marketable bonds.

purchase SIB CDs. The SIB CDs' allure stemmed in large part from their value as a debt-instrument substitute for equity investments. The SIB CDs "were called 'certificates of deposit' in order to create a perception of security and limited degree of risk for the Plaintiffs and to create the impression and inference that the SIB CDs had the same degree of risk as certificates of deposit issued by commercial banks regulated by the FDIC and Federal Reserve Board." *Id.* at 11. Like well-performing equities, however, the SIB CDs also offered liquidity combined with the potential for high investment returns. Those returns ostensibly were produced by "the consistent, double-digit returns on the bank's investment portfolio." *Id.* SIB claimed to have invested its portfolio at least in part in SLUSA-covered securities; that claim helped explain the CDs' purported low-risk/high-yield nature and, in the Plaintiffs' minds, set them apart from analogous but "highly speculative debt instruments similar to junk bonds." *Id.* at 13.

But, SIB did not invest as advertised. "Instead, [its] portfolio consisted primarily of illiquid investments or no investments at all." *Id.* at 16. And, "[i]f Plaintiffs had been aware of the truth, Plaintiffs would not have purchased the SIB CDs." *Id.* at 15. Accordingly, the Court reads the Plaintiffs' Petition to allege that the Plaintiffs' CD purchases were induced by a belief that the SIB CDs were backed in part by investments in SLUSA-covered securities.[12]

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[12] In this respect, this action resembles the Madoff Ponzi scheme "feeder fund" cases that also applied SLUSA

3. The Plaintiffs Allege a Fraudulent Scheme that Coincided with and Depended on the Sale of SLUSA-Covered Securities. — The Plaintiffs' allegations also reasonably imply that the Stanford scheme coincided with and depended on the Plaintiffs' sale of SLUSA-covered securities to

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preclusion. *See In re Kingate Mgmt. Ltd. Litig.*, 2011 WL 1362106, at *7 (S.D.N.Y. 2011) (noting that "[t]he majority of district courts within the Second Circuit have found, under similar [Madoff-related] facts, that claims like the ones brought here are 'in connection with covered securities'") (collecting cases). The Court sees no substantive difference between the misrepresentations and omissions here; "fraud is at the heart" of the Plaintiffs' claims. *Id.* at *8. This observation does not "stretch[] SLUSA to cover [a] chain of investment . . . [that] snaps even the most flexible rubber band." *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 399 (S.D.N.Y. 2010). Both Stanford and Madoff purported to take investors' funds and purchase covered securities for their investors' benefit. Stanford took the incremental and conceptually immaterial additional step of promising that his investors' returns would come in the form of CD proceeds rather than directly from covered securities. Those returns, however, ostensibly were produced by and directly attributable to Stanford's investing in a portfolio that a reasonable investor would conclude contained SLUSA-covered securities.

The Madoff cases that have declined to apply SLUSA preclusion are distinguishable and represent a minority approach. *See In re Kingate*, 2011 WL 1362106, at *8-9 (noting that Anwar "is the sole case in which a court within the Southern District found that SLUSA did not preempt fraud claims related to a Madoff feeder fund" and distinguishing another case because "the alleged fraud in [that] case . . . related to the hedge funds themselves rather than to any covered securities in the funds' investment portfolios" (citing *Pension Comm. of the Montreal Univ. Pension Plan v. Banc of America Sec., LLC*, 750 F. Supp. 2d 450 S.D.N.Y. 2010))).

finance SIB CD purchases. To begin with, the Plaintiffs clearly plead the existence of a fraudulent scheme. The Plaintiffs assert that the Investment Advisor Defendants initially solicited community leaders to purchase SIB CDs. "These early investors received high returns to establish the legitimacy of the SIB CDs. The Investment Advisor Defendants then used the fact that known business leaders earned the promised return as a means to attract other investors." *Id.* at 14. So long as an ever-expanding pool of new investors purchased SIB CDs, SIB successfully maintained the outward appearance of "'operat[ing]' as a going concern." *Id.* at 15. But, in reality, SIB's revenue consisted almost exclusively of the "cash flow from SIB CD[] sales." *Id.* The Plaintiffs thus plead a classic Ponzi scheme. *See Janvey v. Alguire*, 2011 WL 2937949, at *9 (5th Cir. 2011) ("A Ponzi scheme is a fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments. . . . [A]s new investments [come] in, some of the new money [is] used to pay earlier investors.") (some alterations in original; internal quotation marks and citations omitted); Petition at 9 (characterizing Stanford Defendants' operation as a Ponzi scheme). Because the Plaintiffs' purchase of SIB CDs helped fuel and perpetuate the Stanford scheme, the Plaintiffs' allegations satisfy the coincided-with and depended-upon elements.

The Plaintiffs also almost certainly sold SLUSA-covered securities to purchase SIB CDs. As pled, the Plaintiffs generally encountered the

Stanford scheme in a specific manner: "When a person would retire from a company, Stanford Trust and [the] Investment Advisor Defendants would actively seek the funds from the retirement funds of the former employees and would attempt to have these funds rolled over into IRA's of which either Pershing or the Trust was the custodian." Petition at 24. Although retirement funds come in a variety of forms that might not all involve SLUSA-covered securities, many of the Plaintiffs' retirement accounts consisted of IRAs. And, stocks, bonds, mutual funds,[13] and other SLUSA-covered securities commonly comprise IRA investment portfolios. The Plaintiffs "rolled their IRA[s] into the Stanford Trust Company" and subsequently purchased SIB CDs. *Id.* at 8-9.

The investment process described by the Plaintiffs resembles that described in the SEC's investigation. "During the [SEC's] examination [of SGC], SGC provided a sample of 52 client files wherein SGC's clients liquidated securities to purchase CDs. The documents reflected that from August 2008 through December 2008, approximately $10.7 million in securities were liquidated to purchase SIB CDs." *See* TRO App. at 593 [13] (Yoder Decl.), *in SEC v. Stanford Int'l Bank, Ltd.*, Civil

[13] Mutual funds are SLUSA-covered securities. *See, e.g.*, *Segal*, 581 F.3d 305. Indeed, if a SLUSA-covered security constitutes any part of a security, that security qualifies as a covered security under SLUSA. *See, e.g.*, *Instituto*, 546 F.3d at 1351.

Action No. 3:09-CV-0298.[14] The Court therefore finds that at least one of the Plaintiffs acquired SIB CDs with the proceeds of selling SLUSA-covered securities in their IRA portfolios. Once those transactions were complete, the Plaintiffs' erstwhile retirement funds were then funneled into and furthered the Stanford scheme.[15]

This modest finding effectively extends SLUSA preclusion to all Plaintiffs' claims. Because the Plaintiffs have submitted no evidence of their specific IRA holdings, the Court cannot determine whether any specific Plaintiff's account held SLUSA-covered securities. But, SLUSA preclusion applies even if only a single plaintiff sold a single SLUSA-covered security as part of his acquisition of SIB CDs. The Court reasonably draws that inference on the pleadings and evidentiary record before it. It may be that some Plaintiffs' accounts held securities entirely outside SLUSA's purview. By joining this action, however, they rendered their claims subject

[14] By Order dated July 22, 2011, the Court advised the parties of its intent to take judicial notice of the Yoder Declaration [65]. *See* FED. R. EVID. 201. The Court received no objections or responses to its notice.

[15] The transactions need not have been instantaneous. *See, e.g.*, *Romano*, 609 F.3d at 524 (noting that "*Dabit* . . . does not pivot on temporal limitations" and "declin[ing] to find that the passage of eighteen months between the alleged fraud and the purchase or sale of securities necessarily defeat[ed] SLUSA's 'in connection with' requirement" because that case, as here, concerned "'a string of events that were all intertwined'" (quoting *SEC v. Pirate Investor LLC*, 580 F.3d 233, 245 (4th Cir. 2009))).

to SLUSA preclusion to the same extent as those brought by any Plaintiffs who liquidated SLUSA-covered securities. *See Rowinski*, 398 F.3d at 305 (holding that SLUSA's plain language "does not preempt particular 'claims' or 'counts' but rather preempts 'actions,' suggesting that if any claims alleged in a covered class action are preempted, the entire action must be dismissed") (internal citation omitted); *Segal*, 581 F.3d at 311 (holding that SLUSA's plain language and the *Dabit* Court's expansive interpretation of SLUSA's preclusive reach gives courts "no license to draw a line between SLUSA-covered claims that must be dismissed and SLUSA-covered claims that must not be"); *see also Instituto*, 546 F.3d at 1350 ("[E]ven if SLUSA requires a court to assess preclusion claim-by-claim, [it] does not require district courts to act like a prospector panning for a few non-precluded theories amid a river of precluded ones."). Accordingly, this action also satisfies the "in connection with" element because the Plaintiffs allege that the Stanford Ponzi scheme coincided with and depended upon the sale of SLUSA-covered securities.[16]

C. This Action Is a "Covered Class Action"

Both an individual suit and a group of related suits may qualify as a "covered class action" under SLUSA. 15 U.S.C. § 77p(f)(2). Because this case

[16] The record would support a determination that many Plaintiffs sold many SLUSA-covered securities to buy SIB CDs, but in view of the analysis here, the Court need reach no further than its finding that at least one Plaintiff did so.

presently has been consolidated with *Farr v. Green*,[17] the Court looks to the group provisions.[18] Under SLUSA, "[a] group of lawsuits . . . constitutes a 'covered class action' if: (1) the suits are 'pending in the same court;' (2) the suits involve 'common questions of law or fact;' (3) 'damages are sought on behalf of more than 50 persons;' and (4) 'the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.'" *Enron*, 535 F.3d at 339 (quoting 15 U.S.C. § 78bb(f)(5)(B)(ii)).

This action constitutes a "covered class action" under SLUSA's group provision. After transfer from the MDL Panel, *Roland* and *Farr* both were pending before the Court. Both actions raised largely duplicative questions of law and fact. Together, they sought relief for over fifty plaintiffs. And, the Court previously consolidated this action with *Farr*. The cases therefore are now proceeding as a single

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[17] Civil Action No. 3:10-CV-0225-N (N.D. Tex. transferred by MDL Panel Feb. 5, 2010). *See* Order of May 12, 2011 (consolidating cases) [54]. No parties objected to consolidation. Indeed, the Plaintiffs filed no response to SEI's pre-MDL motion for consolidation [7].

[18] While courts typically consider the propriety of removal as of the time of removal, the SLUSA group provisions are an exception to that rule. *See Enron*, 535 F.3d at 340-41 (rejecting argument that "SLUSA's definition of a 'covered class action' may be applied to preempt claims only at the time of their removal, not at the motion to dismiss stage").

action. Accordingly, this action satisfies SLUSA's covered-class-action element.[19]

D. The Plaintiffs Bring Exclusively State Law Claims

The Plaintiffs indisputably bring claims "based upon the statutory or common law of" Louisiana. 15 U.S.C. § 77p(b). The Plaintiffs assert negligence, breach of contract, negligent misrepresentation, and breach of fiduciary duty claims under Louisiana law. The Plaintiffs also allege violations of the Louisiana Unfair Trade Practices Act and the Louisiana Securities Act. Accordingly, this action satisfies SLUSA's causes-of-action element.

E. The Court Dismisses this Action

This action qualifies for SLUSA preclusion. Both this case and *Farr*, as consolidated and proceeding individually, constitute "covered class

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[19] Neither the reasons for consolidation nor the fact that individual cases in the group may have fewer than fifty plaintiffs matters for the purposes of SLUSA's covered class action definition. It is sufficient that the group of lawsuits collectively seeks relief for more than fifty persons. And, SLUSA requires only that the cases have been "consolidated . . . for any purpose." *Cf. Instituto*, 546 F.3d at 1347. Here, in any case, because both groups of plaintiffs were "act[ing] in unison" from the beginning, they were "proceed[ing] as a single action" and would have satisfied the group provisions of SLUSA's covered class action definition even without consolidation. *Enron*, 535 F.3d at 340; *see also* Pls.' Mot. to Transfer and accompanying exhibits in *Roland* [3] and *Farr* [3].

actions" under SLUSA. The Plaintiffs bring exclusively state-law claims and allege that they suffered damages from the Defendants' misrepresentations and omissions made "in connection with" the sale of SLUSA-covered securities under two separate theories: The Plaintiffs allege that the Defendants induced the Plaintiffs' CD purchases by representing that the SIB CDs were backed by SIB's investments in securities that typically qualify as SLUSA-covered securities. The complaint also suggests that at least one Plaintiff exchanged IRA investments in SLUSA-covered securities for SIB CDs. And, as in *Rowinski*, this Court "need not decide whether a count-by-count analysis is appropriate in this case, because [the Plaintiffs have] incorporated every [relevant] allegation into every count in [their Petition]. [The Court's] SLUSA analysis therefore applies to each of [the Plaintiffs'] counts, and compels the conclusion that each is preempted." 398 F.3d at 305. The Court therefore holds that SLUSA precludes the Plaintiffs from bringing this action.

CONCLUSION

When the Removing Defendants filed their notice of removal, no Defendants had been served. Thus, no Defendants were required to consent to removal. SEI remained free to present an independent basis for removal, and SLUSA provides an appropriate federal jurisdictional hook. Because the Plaintiffs bring claims "based upon the statutory or common law of" Louisiana and "alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," 15 U.S.C. § 77p(b)(1), SLUSA precludes this action. Accordingly, the Court dismisses this action with prejudice.

Signed August 31, 2011.

/s/ David C. Godbey
David C. Godbey
United States District Judge

[Filed: April 19, 2012]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-10932

JAMES ROLAND; MICHAEL J. GIAMBRONE; THOMAS E. BOWDEN, Individually and On Behalf Of Thomas E. Bowden S.E.P. I.R.A.; T. E. BOWDEN, SR., Ret. Trust; G. KENDALL FORBES, Individually and on Behalf of G. Kendall Forbes I.R.A.; ET AL,

Plaintiffs-Appellants

v.

JASON GREEN; CHARLES JANTZI; TIFFANY ANGELLE; JAMES FONTENOT; THOMAS NEWLAND; GRADY LAYFIELD; HANK MILLS; JOHN SCHWAB; RUSS NEWTON; JIM WELLER; SEI INVESTMENTS COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON, in Syndicates 2987, 1866, 1084, 1274, 4000 & 1183; ET AL,

Defendants-Appellees

LEAH FARR; ET AL,

Plaintiffs-Appellants

v.

JASON GREEN; DIRK HARRIS; TIMOTHY E. PARSONS; CHARLES JANTZI; TIFFANY ANGELLE; GRADY LAYFIELD; HANK MILLS; JOHN SCHWAB; RUSS NEWTON; JIM WELLER; SEI INVESTMENTS COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON, in Syndicates 2987, 1866, 1084, 1274, 4000 & 1183; ET AL,

Defendants-Appellees

No. 11-10932

Consolidated with 11-11031

SAMUEL TROICE; HORACIO MENDEZ; ANNALISA MENDEZ; PUNGA PUNGA FINANCIAL, LIMITED, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellants

v.

PROSKAUER ROSE, L.L.P.; THOMAS V. SJOBLOM; P. MAURICIO ALVARADO; CHADBOURNE AND PARKE, L.L.P.,

Defendants-Appellees

Consolidated with 11-11048

SAMUEL TROICE; MARTHA DIAZ; PAULA GILLY-FLORES; PUNGAPUNGA FINANCIAL, LIMITED, Individually and on behalf of a class of all others similarly situated; PROMOTORA VILLA MARINO, CA; DANIEL GOMEZ FERREIRO; MANUEL CANABAL,

Plaintiffs-Appellants

v.

WILLIS OF COLORADO INCORPORATED; WILLIS GROUP HOLDGINGS LIMITED; AMY S. BARANOUCKY; ROBERT S. WINTER; BOWEN, MICLETTE & BRITT, INCORPORATED; WILLIS LIMITED,

Defendants-Appellees

Appeals from the United States District Court for the Northern District of Texas

No. 11-10932

ON PETITION FOR REHEARING EN BANC

Before REAVLEY, DAVIS, and PRADO, Circuit Judges.

PER CURIAM:

Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED.

No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petitions for Rehearing En Banc DENIED.

ENTERED FOR THE COURT:

/s/ Edward C. Prado
United States Circuit Judge

P.S. Chief Judge Jones and Judges Smith and Haynes did not participate in the consideration of the rehearing en banc.

15 USC § 77p

§ 77p. Additional remedies; limitation on remedies

(b) Class action limitations.

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions.

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions.

(1) Actions under State law of State of incorporation.

(A) Actions preserved.

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions.

A covered class action is described in this subparagraph if it involves--

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that--

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions.

(A) In general.

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) State pension plan defined.

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees.

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions.

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction.

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) *Definitions*.

For purposes of this section, the following definitions shall apply:

(1) *Affiliate of the issuer*.

The term “affiliate of the issuer” means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) *Covered class action.*

(A) *In general.*

The term “covered class action” means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) *Exception for derivative actions.*

Notwithstanding subparagraph (A), the term “covered class action” does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) *Counting of certain class members.*

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction.

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security.

The term “covered security” means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) [*15 USCS § 77r(b)*] at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2) [*15 USCS § 77d(a)(2)*].

§ 78bb. Effect on existing law

(f) Limitations on remedies

(1) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(ii) Permissible actions

A covered class action is described in this clause if it involves—

(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(B) State actions

(i) In general

Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(ii) State pension plan defined

For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

(C) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(D) Remand of removed actions

In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(4) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

(A) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(B) Covered class action

The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(E) Covered security

The term “covered security” means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 [15 U.S.C. 77r(b)], at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 [15 U.S.C. 77a et seq.] pursuant to rules issued by the Commission under section 4(2) of that Act [15 U.S.C. 77d(2)].

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(June 6, 1934, ch. 404, title I, § 28, 48 Stat. 903; Pub. L. 94–29, § 21, June 4, 1975, 89 Stat. 160; Pub. L. 97–303, § 4, Oct. 13, 1982, 96 Stat. 1409; Pub. L. 100–181, title III, §§ 327–329, Dec. 4, 1987, 101 Stat. 1259; Pub. L. 104–290, title I, § 103(b), Oct. 11, 1996, 110 Stat. 3422; Pub. L. 105–353, title I, § 101(b)(1), Nov. 3, 1998, 112 Stat. 3230; Pub. L. 106–554, § 1(a)(5) [title II, §§ 203(a)(2), 210], Dec. 21, 2000, 114 Stat. 2763, 2763A–422, 2763A–436; Pub. L. 111–203, title VII, § 767, July 21, 2010, 124 Stat. 1799.)

15 USC § 78j

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities ex-change or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c) (1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act (*12 U.S.C. 1813(q)*)), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 17(a) of the Securities Act of 1933 [*15 USCS § 77q(a)*] and *sections 9, 15, 16, 20*, and *21A* of this *title* [*15 USCS §§ 78i, 78o, 78p, 78t,* *and 78u-1*], and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

(June 6, 1934, ch. 404, title I, §10, 48 Stat. 891; Pub. L. 106-554, §1(a)(5) [title II, §206(g), title III, §303(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A-432, 2763A-454; Pub. L. 111-203, title VII, §762(d)(3), title IX, §§929L(2), 984(a), July 21, 2010, 124 Stat. 1761, 1861, 1932.)