Nos. 12-79, 12-86, & 12-88

IN THE
Supreme Court of the United States

CHADBOURNE & PARKE LLP,
Petitioner,
v.
SAMUEL TROICE, ET AL.,
Respondents.

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

BRIEF FOR TROICE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act ("SLUSA") precludes state-law class actions "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). Here, the plaintiffs were purchasers of certificates of deposit issued by Stanford International Bank ("SIB"). The 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). After canvassing the various formulations that circuit courts have used to describe when fraud occurs "in connection with" an investment, the Fifth Circuit held that the present cases were not precluded by SLUSA. The Fifth Circuit further held that SLUSA did not preclude claims against aiders and abettors who did not make any misrepresentations to claimants "in connection with the purchase or sale of a covered security," but instead made misrepresentations to the SEC obstructing an SEC investigation to uncover the fraud.

The questions presented are:

1. Whether SLUSA precludes state-law class actions alleging that the plaintiffs were fraudulently induced into investing in uncovered debt securities such as CDs by promises of above-market returns and false assurances that the issuing bank's assets were invested in highly-marketable securities.

2. Whether SLUSA precludes state-law class actions alleging that defendants aided and abetted fraud in the sale of uncovered securities when the defendants themselves did not make misrepresentations to the plaintiffs, but did make misrepresentations that obstructed regulatory authorities' investigation of the fraud.

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INTRODUCTION

The petitions for certiorari do not raise any question that warrants review by this Court. There is no substantial outcome-determinative conflict between the Fifth Circuit's holding in this case and the decisions of other courts of appeal over the scope of SLUSA preclusion. Although the lower courts' formulations of the rule for determining when a misrepresentation is made "in connection with the purchase or sale of a covered security" differ slightly, these minor variations do not create a substantial conflict meriting review by this Court. And even if the Court were disposed to clarify the standard for SLUSA preclusion, this case does not present an appropriate vehicle for doing so, because SLUSA would not preclude these actions under any permutation of the rule as adopted by any circuit court. These actions do not allege a fraudulent scheme "involving," "dependent upon," "coinciding with," or "more than tangentially related" to misrepresentations about covered securities.

Nor does the Fifth Circuit opinion create a circuit conflict concerning whether SLUSA precludes claims against alleged aiders and abettors. Because the primary perpetrators in this case did not make misrepresentations in connection with the purchase or sale of covered securities, and hence the claims against those parties were not precluded, claims against the aiders and abettors of those non-precluded parties were likewise not precluded.

The petitions for certiorari should therefore be denied.

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STATEMENT OF THE CASE

A. Statutory Background

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.

To avoid "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).

In pertinent part, SLUSA 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." 15 U.S.C. § 78bb(f)(1)(A). To effectuate this bar, SLUSA provides that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court" and subject to dismissal. 15 U.S.C. § 78bb(f)(2).

B. Factual Background and Procedural History

These cases arise from a massive Ponzi scheme perpetrated by R. Allen Stanford and entities under his control, including Stanford International Bank ("SIB"). App. 6a.[1] The perpetrators sold certificates of deposit issued by SIB by promising above-market returns and falsely assuring investors that the CDs were backed by SIB's safe liquid investments in "highly marketable securities issued by stable governments, strong multinational companies and major international banks." App. 64a. In reality, however, "SIB had to use new CD sales proceeds to make interest and redemption payments on existing CDs, because it did not have sufficient assets, reserves and investments to cover its liabilities." App. 6a, *quoting Janvey v. Alguire*, 647 F.3d 585, 590 (5th Cir. 2011).

The cases in this Court comprise four cases as filed in the trial courts. In the first two cases (*Roland* and *Farr*), numerous (more than fifty) individual plaintiffs, asserting violations of Louisiana law, sued SEI Investments Company ("SEI"), the Stanford Trust Company, and related entities (the "SEI Defendants") in state court. They alleged that the SEI Defendants induced them to purchase SIB CDs by representing: that the CDs could be "readily liquidated"; that SIB was "competent and proficient" and "employed a sizeable team of skilled and experienced analysts to monitor and manage [its] portfolio," the value of which was "verified" by "independent" auditors; that companies in which SIB invested were adequately capitalized; that the CDs were "safe investment vehicles suitable for long-term investment with little or no risk"; that SIB legal counsel ensured that investments were structured to comply with state and federal law; that the

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[1]References in this brief will be to the appendix to the petition for certiorari in No. 12-79, *Chadbourne & Parke, LLP v. Troice*.

CDs would produce "consistent double-digit returns"; and that 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." App. 8a. The cases were removed to federal court, transferred to the Northern District of Texas, and consolidated. *Id.*

A third case (*Willis*) was brought in federal court by the Troice plaintiffs as a class action against SIB's insurance brokers (the "Willis Defendants"). The Troice plaintiffs alleged that the Stanford entities or the Willis Defendants had represented: that the CDs were a good investment because SIB was "regulated by the U.S. government," "insured by Lloyds," "regulated by the Antiguan banking regulatory commission," and "subjected to regular stringent risk management evaluations conducted by an outside audit firm"; that the CDs were safe and secure; that SIB's portfolio produced "consistent double-digit returns" and the CDs' "high return rates . . . greatly exceed those offered by commercial banks in the United States"; and that 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." App. 9a.

The fourth case (*Proskauer*) was brought by the Troice plaintiffs as a class action against the Stanford entities' attorneys (the "Proskauer Defendants," including Chadbourne & Parke LLP), alleging that they conspired with and aided and abetted Stanford in violating the securities laws, by lying to the SEC and assisting Stanford to evade regulatory oversight. App. 9a, 41a.

All the Stanford-related cases were assigned to the same district judge, who decided to "select one case initially in which to address the applicability of [SLUSA]." App. 10a.

The district court chose *Roland/Farr* and held that it was precluded by SLUSA. App. 73a. The court acknowledged that the SIB CDs themselves were not "covered securities within the meaning of SLUSA." App. 60a. Nevertheless, it held that the plaintiffs alleged a fraudulent scheme that coincided with and was dependent upon the sale of SLUSA-covered securities, for two reasons. The first was that "Plaintiffs' CD purchases were induced by a belief that SIB CDs were backed in part by investments in SLUSA-covered securities." App. 66a. Second, the court inferred that "at least one of the Plaintiffs acquired SIB CDs with proceeds of selling SLUSA-covered securities in their IRA portfolios." App. 69a.

The district court applied its reasoning in *Roland/Farr* to dismiss the Troice plaintiffs' complaints against the Willis and Proskauer Defendants. App. 13a.

The plaintiffs appealed to the Fifth Circuit, which consolidated the appeals and ultimately reversed.

Initially, the court found "not particularly descriptive" the rule announced in *SEC v. Zandford*, 535 U.S. 813 (2003), in the Rule 10b-5 context, and imported into SLUSA by *Dabit*, that the fraud in question must "coincide" with a securities transaction. App. 16a. The court noted that when this 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)." App. 16a, *quoting Zandford*, 535 U.S. at 820. In light of this admonition, the Fifth Circuit found it helpful to consider how sister circuits had construed and applied the "coincide" requirement.

The Fifth Circuit found most persuasive the decisions from the Second, Sixth, Ninth, and Eleventh Circuits, because the cases from other circuits "do not attempt to define the ‘coincide’ requirement, but merely discuss what connection above and beyond ‘coincide’ is sufficient.” App. 17a. “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).” App. 20a. Accordingly, the court found it helpful to consider “cases where the fraud alleged was centered around the purchase or sale of an uncovered security, like the CDs at issue in this appeal.” *Id.*

Next, the court analyzed policy considerations, in particular Congress’ explicit concern about the distinction between national covered securities and other, uncovered securities. App. 27a. The court concluded that it was Congress’s intent that SLUSA be applied only to transactions involving nationally-traded securities, recognizing “the importance of maintaining the vital role of state law in regulating non-national securities,” and acknowledging the importance of “‘‘preserving the appropriate enforcement powers of state regulators, and the right of individuals to bring suit.’” App. 28a. In addition, in the circuit court’s view, over-extension of SLUSA would threaten state debtor/creditor regimes because “[e]very 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.” App. 29a. Hence, “[t]he 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 alleged fraud against a bank, without regard to the product that was being peddled.” App. 29a.

The Fifth Circuit then considered the Eleventh Circuit test employed by the district court – whether plaintiffs premise their claims on either "fraud that induced [the plaintiffs] to invest . . . or a fraudulent scheme that coincided and depended upon the purchase or sale of securities." App. 64a, *quoting Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) ("*IPM*"). The court disfavored the first prong of the test – whether the fraud induced the plaintiffs to invest with the defendant – because viewing the allegations from the plaintiffs' perspective unnecessarily imports causation into the test. App. 30a. The court found that the second prong – whether the fraudulent scheme coincided and depended upon the purchase or sale of a covered security – was more faithful to *Dabit* and was very similar to the Second Circuit's test, under which SLUSA preclusion is appropriate where plaintiff's claims "necessarily allege," "necessarily involve," or "rest on the purchase or sale of securities." App. 31a, *quoting Romano v. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010). But it was still too stringent, the court believed, because some securities transactions could "coincide" with but not "depend upon" a securities transaction. App. 31a-32a.

In the circuit court's view, the Ninth Circuit test best articulates the "coincide" requirement: "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." App. 32a, *quoting Madden v. Cowen & Co.*, 576 F.3d 957, 965-66 (9th Cir. 2009).

Applying this standard, the Fifth Circuit held that the fraudulent scheme alleged in the cases at bar was not more than tangentially related to the purchase or sale of covered securities and, therefore, not sufficiently connected to such purchases or sales to trigger SLUSA preclusion. App. 38a. The court determined that the "heart, crux and gravamen" of the SEI and Willis Defendants' allegedly fraudulent scheme was representing that the CDs were a "'safe and secure' investment that was 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." App. 36a-37a. Similarly, the "safety and soundness letters" sent by the Willis Defendants focused on the "professionalism" of SIB and "stringent" reviews. *Id.* "That the CDs were marketed with some vague references to SIB's portfolio containing instruments that might be SLUSA-covered securities" was in the court's view, "tangential to the schemes advanced by the SEI and Willis Defendants." *Id.*

This conclusion was bolstered by the fact that the CDs, like the uncovered hedge funds in *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), 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.'" App. 37a.

Finally, the court concluded that the fact that some of the plaintiffs sold covered securities to purchase CDs was not a sufficient connection between the fraud and the sale of covered securities because, "unlike *Bankers Life*[2] and *Zandford*, 'the entirety of the fraud [did not] depend upon the tortfeasor convincing the victims of those fraudulent schemes to sell their covered securities in order for the fraud to be accomplished.'" App. 39a (footnote supplied).

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[2] *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6 (1971).

The Fifth Circuit acknowledged that the claims against the Proskauer Defendants were different, because the plaintiffs did not allege that the Proskauer Defendants made any misrepresentations to them. App. 40a. Instead, the Proskauer Defendants allegedly aided and abetted the Stanford Ponzi scheme by making misrepresentations to the SEC and obstructing the SEC's investigation of the fraud. App. 41a. Because "these alleged misrepresentations were one level removed from the misrepresentations made by SIB or the SEI or Willis Defendants," they were even more tangential to the purchase or sale of covered securities and, therefore, not precluded by SLUSA. *Id.*

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REASONS FOR DENYING THE PETITION

Contrary to the petitioners' claims, there is no outcome-determinative circuit conflict over the scope of the "in connection with" requirement under SLUSA. Instead, the various formulations employed by the courts of appeals are merely different ways of saying the same thing. But even if the variations were substantively different and could sometimes produce different outcomes, this case would not present an appropriate vehicle for resolving the conflict, because they would not produce different results here. And because the fraud alleged here was not in connection with the purchase or sale of covered securities, claims against aiders and abettors of that fraud who made no misrepresentations to the claimants, but only to regulators, are likewise not barred by SLUSA. The petitions for a writ of certiorari should therefore be denied.

I. THIS CASE PRESENTS NO CERTWORTHY CIRCUIT CONFLICT REGARDING SLUSA'S "IN CONNECTION WITH" REQUIREMENT.

A. Although the Circuits Articulate the Standard Differently, There Is No Substantive Conflict Over the Standard for Applying SLUSA's "In Connection With" Requirement.

SLUSA does not preclude a class action unless a misrepresentation is made "in connection with the purchase or sale of a covered security." This Court in *Zandford* cautioned that the "in connection with" requirement "must not be construed so broadly as to convert every common law fraud that happens to involve securities into a violation of § 10(b)." 535 U.S. at 818. In *Dabit*, the Court explained that fraud that "coincides" with a purchase or sale of a covered security is "in connection with" the purchase or sale of the security and thus triggers SLUSA preclusion. 547 U.S. at 85.

After *Dabit*, circuit courts have used various formulations to describe when fraud "coincides" with a covered transaction. The Second Circuit has found the necessary connection when the fraud induced covered transactions and the claims "necessarily involve" and "necessarily rest" on them. *Romano*, 609 F.3d at 522. The Sixth Circuit has found the "coincide" requirement satisfied where plaintiff's allegations "depend" upon transactions in covered securities. *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009). The Seventh Circuit has determined that the "coincide" requirement requires a plaintiff to allege fraud "involving" covered securities, noting that a simple "but for" relationship between an alleged fraud and the purchase or sale of such securities is insufficient. *Gavin v. AT&T Corp.*, 464 F.3d 634, 639 (7th Cir. 2006). The Eighth Circuit has concluded that "coincide" is less stringent than a standard requiring that defendant's non-disclosure "relate" to plaintiff's decision to purchase a covered security. *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122, 1127 (8th Cir. 2008). The Ninth Circuit has required defendant's alleged misrepresentations and omissions to be "more than tangentially related" to plaintiff's purchase of covered securities. *Madden*, 576 F.3d at 966. And the Eleventh Circuit has found the "in connection with" requirement is satisfied when either defendant's fraud "induced" plaintiff to transact in covered securities or a fraudulent scheme "coincided and depended upon a purchase or sale of [covered] securities." *IPM*, 546 F.3d at 1349.

Although these tests use slightly different verbal formulations, each purports to describe the same "coincide" requirement set forth in *Dabit*. And each is conceptually very similar to the others: a fraud that "necessarily involves" or "necessarily rests" on a transaction in covered securities (the Second Circuit test) is very likely to "depend" on the transaction (the Sixth and second-prong Eleventh Circuit test), to have induced the plaintiff to transact in the securities (the first-prong Eleventh Circuit test), to "involve" the securities in more than a but-for relationship (the Seventh Circuit test), and to be "more than tangentially related" to the transaction (the Fifth and Ninth Circuit test), and vice versa.[3] Even if it were possible to conceive of a case that would meet one but not another of the tests, to do so would merely highlight the imprecision of the formulations rather than identifying a genuine outcome-determinative difference among them.

If this Court is inclined to wade into the thicket of these minute semantic differentiations, it should do so only after it becomes clear that the circuits really mean different things by

[3]This close similarity of the applicable tests puts to rest the petitioners' concern about forum-shopping. A lawyer or litigant attempting to choose a particular circuit in which to file a potentially SLUSA-precluded case would be hard-pressed to predict with any confidence which circuit would be most likely to allow the case to proceed.

their respective articulations of the applicable standard. And it should do so only after the other circuits have had a chance to react to the Fifth Circuit opinion in this case, which explored the various formulations in more detail than prior opinions have done. As it stands, the supposed circuit conflict to which the petitioners point may be nothing more than an ephemeral variation in language, unworthy of a scarce slot on this Court's submission docket.

B. If There Were More Than a Semantic Split, This Would Not Be the Case in Which to Resolve It: Regardless of Which Test Is Applied, the Connection Requirement Is Not Satisfied Here.

If the Court were to conclude that the difference among the circuits on the "in connection with" issue is more than semantic and therefore certworthy in the abstract, this would not be an appropriate case in which to resolve that difference. That is because SIB's sale of CDs was not "in connection with" the purchase or sale of covered securities under *any* of the tests. The nuances of the various formulations simply do not matter on the facts of the case, and resolution of any differences among them should await a case in which they do.

As an initial matter, this case fails to meet a universally-applied threshold requirement for SLUSA preemption. All of the tests employed by the courts of appeals require, at a minimum, a direct or indirect purchase or sale of covered securities, or a contract to do so.[4] But there was no direct or indirect purchase or sale of, or contract to purchase or sell, a covered security in these actions. Thus, none of the tests

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[4]Because the 1933 and 1934 Acts define purchases and sales to include contracts to purchase or sell, *see* 15 U.S.C. §§ 77b(a)(3), 78c(a)(13)-(14), misrepresentations in connection with unconsummated contracts to purchase or sell covered securities fall within SLUSA. *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002).

would lead to preclusion here.

Moreover, as discussed in the sections that follow, application of the detailed circuit formulations to the facts of the case likewise demonstrates the lack of an outcome-determinative conflict on the facts of these cases.

1. The Standards Adopted by the Second, Sixth, and Eleventh Circuits Would Not Result in Preclusion Here.

a. The Eleventh Circuit has held the "in connection with" requirement satisfied when either (1) fraud induced the plaintiff to invest with the defendant or (2) the misrepresentation "coincided and depended upon the purchase or sale of [covered] securities." *IPM*, 546 F.3d at 1349. In *IPM*, plaintiff sued Merrill Lynch for vouching for a pension fund that promised to invest the claimants' money in covered securities, but instead embezzled them. Here, unlike in *IPM*, the plaintiffs do not allege that they were induced by fraud to invest with SIB on the promise that their money would be invested in covered securities. In particular, they do not allege: that SIB promised any investor that it was going to buy covered securities; that any investor bought SIB CDs as a means of investing in any covered security; that any fraud occurred in connection with SIB's purchase of covered securities for its own account; that the investors expected to own any interest in SIB's investment portfolio; or that covered securities were collateral for the loans that the investors made to SIB with their deposits.

In short, the plaintiffs were not directly or indirectly buying an interest in the bank's covered securities. Instead, they were loaning money to a financial institution and relying on the strength of that financial institution to pay them back when the CDs matured (or on the bank's purported insurance if the bank were unable to pay). The plaintiffs parted with money intending that it be invested in private placement bank certificates of deposit, and it was. Facts bearing on the financial soundness of the issuing bank – that it did not make loans, that it invested in safe, secure, and liquid assets, and that it had unique insurance policies in place – do not convert the CDs into interests in the bank's investment portfolio.

Nor did the misrepresentations "coincide" with or "depend" on the purchase or sale of covered securities. The fraud was complete on the sale of the certificates of deposit by an insolvent bank engaged in a Ponzi scheme, and did not depend on the subsequent purchase or non-purchase of any covered securities. The fraudulent practices and the securities purchases were independent events. *Cf. Zandford*, 535 U.S. at 820-22 ("in connection with" requirement was satisfied where "[t]he securities sales and respondent's fraudulent practices were not independent events"). Thus, under the Eleventh Circuit's rule, SLUSA preclusion would not apply in these cases.

b. The Second Circuit has adopted a formulation, similar to the Eleventh Circuit "depends upon" test, under which SLUSA's "in connection with" standard is met where "plaintiff's claims 'necessarily allege,' 'necessarily involve,' or 'rest on' the purchase or sale of securities . . .." *Romano*, 609 F.3d at 522. Like the Eleventh Circuit rule, the Second Circuit's test would not call for preclusion here, because the alleged fraud did not "depend on," "necessarily involve," or "rest on" the purchase or sale of covered securities. The plaintiffs do not allege that they expected to own any interest in covered securities or that they expected to have any of the indicia of such ownership, including participating in appreciation or depreciation of covered securities, sharing in dividends, or having a preferential right to distribution of covered securities against other creditors of the bank. Here, in contrast to *Romano*, there is no allegation that plaintiffs expected investment returns from a portfolio investment that was never acquired; instead, plaintiffs' damages were caused by SIB's failure to honor its contractual obligations to redeem its (worthless) certificates of deposit. Thus, the Second Circuit's rule would not lead to SLUSA preclusion in these cases.

c. The petitioners point to a series of Madoff feeder-fund cases from district courts in the Second Circuit. But in those cases, unlike the present cases, investors alleged that they intended to invest, directly or through one or more investment funds, in a purported portfolio of covered securities that Madoff never actually purchased on the investors' behalf. The initial funds were merely cursory pass-through vehicles. The courts concluded that the investors' complaints alleged misrepresentations "in connection with the purchase or sale of covered securities" because "the plaintiffs part[ed] with the money intending that it be invested in [covered] securities." *E.g., In re J.P. Jeanneret Assoc. Inc.*, 769 F. Supp. 2d 340, 364 (S.D.N.Y. 2011).[5] Thus the Madoff feeder-fund

[5]*See also In re Merkin*, 817 F. Supp. 2d 346, 360-61 (S.D.N.Y. 2011) ("Plaintiffs are alleged to have invested with the Funds. In turn, the Funds invested in Madoff, who then purported to make further securities transactions. This **pass-through investment** to Madoff "coincided" with a securities transaction"; emphasis supplied); *In re Herald, Primeo & Thema Sec. Litig.*, No. 09 CIV 289 (RMB), 2011 U.S. Dist. LEXIS 137773, at *25 (S.D.N.Y. Nov. 29, 2011) ("Madoff's announced intention to purchase [covered] securities (i.e., stocks and options) for the benefit of Funds in which plaintiffs invested satisfies the requirement that Plaintiffs' claims against JPM and BNY, Madoff's bankers, were made 'in connection with the purchase or sale of a covered security'"); *In re Kingate Mgmt. Ltd. Litig.*, No. 09 CIV 5386 (DAB), 2011 U.S. Dist. LEXIS 41598, at *323 (S.D.N.Y. Mar. 30, 2011) (plaintiffs "allege that the Funds they purchased were essentially **transparent conduits** to [Madoff's investment firm] such that 'Plaintiffs' sole purpose in investing in the Funds was to invest in the United States and in United States equities that are part of the S&P 500;'" emphasis supplied); *In re J.P. Jeanneret Assocs., Inc.*, 769 F. Supp. 2d 340, 378 (S.D.N.Y. 2011) (interest in "feeder funds – funds that invested client assets with Bernard J. Madoff"

cases provide no support for SLUSA preclusion here, nor does the decision below carry any implications that the Madoff feeder-fund cases are not precluded.

d. Nor would this claim be precluded under the Sixth Circuit test, which is merely a slight permutation of the tests applied in the Second and Eleventh Circuits. The Sixth Circuit has held that SLUSA's "in connection with" requirement is satisfied by fraud allegations that "depend on" transactions in covered securities. *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009). In that case, a bank breached its fiduciary duty to trust beneficiaries by investing trust assets in its own proprietary, registered mutual fund rather than in superior funds operated by its competitor. In *Segal*, the defendants were acting in a fiduciary capacity, buying covered securities for the benefit of plaintiff beneficiaries, not trading

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– were covered securities under SLUSA); *Wolf Living Trust v. FM Multi-Strategy Inv. Fund, LP*, No. 09 CIV 1540 (LBF), 2010 U.S. Dist. LEXIS 118169, at *10 (S.D.N.Y. Nov. 2, 2010) (misrepresentations related to non-covered limited partnership interest "in connection with" covered securities where the funds were created for purpose of investing in Madoff funds); *Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 312 (S.D.N.Y. 2010) (although shares of fund were not covered securities, objective of fund was to purchase and sell covered securities including those in Madoff funds); *In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 429 (S.D.N.Y. 2010) ("Although the shares of Beacon Fund are not covered securities, the objective of the fund was to manage Plaintiffs' investment using a strategy that inevitably included the purchase and sale of covered securities"); *Barron v. Igolnikov*, No. 09 CIV 4471 (TPG), 2010 U.S. Dist. LEXIS 2267, at *8-13 (S.D.N.Y. Mar. 10, 2010) (members of putative class purchased limited partnership interests in funds which in turn invested in Madoff covered securities), *appeal docketed*, No. 10-1387 (2d Cir. Apr. 14, 2010); *Backus v. Conn. Cmty. Bank, N.A.*, 789 F. Supp. 2d 292 (D. Conn. 2011) (plaintiffs pooled retirement funds in an investment account that "was essentially a **pass-through entity** for investment with [Madoff fund]"; emphasis supplied); *Levinson v. PSCC Serv., Inc.*, No. 3:09-CV-00269 (PCD), 2009 U.S. Dist. LEXIS 119957, at *23-40 (D. Conn. Dec. 23, 2009) (defendants placed plaintiffs' retirement proceeds into a collective fund that invested with Madoff).

for themselves. In contrast, in this case, SIB was buying securities for its own account, not for the benefit of the plaintiffs. The fraud was complete when plaintiffs purchased their certificates of deposit and did not depend upon SIB's subsequent purchase, or non-purchase, of covered securities. Like the Second and Eleventh Circuit standards, the Sixth Circuit standard would not result in preclusion here.

2. The Standards Adopted by the Fifth and Ninth Circuits – SLUSA Precludes Fraud Claims When the Fraud is "More Than Tangentially Related" to a Securities Transaction – Would Not Result in Preclusion Here.

The Ninth Circuit has articulated a slightly different formulation of the requisite connection between the fraud alleged and the purchase or sale of securities, holding that 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." *Madden*, 576 F.3d at 966. Only if the alleged fraud is more than "tangentially related" to a covered securities transaction will SLUSA preclusion apply. *Id.*

The Fifth Circuit believed the Ninth Circuit's test to be the best articulation of the "coincide" requirement. In the court's view, the tangentially-related standard "nicely deals" with the "tension" between construing the requirement "so broadly as to [encompass] every common law fraud that happens to involve [covered] securities" while at the same time taking the "connection" requirement seriously. App. 32a. "Accordingly, if [the plaintiff's] 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." App. 33a.

The Fifth Circuit correctly applied this standard in the cases at hand, holding that the plaintiffs' claims were not precluded because the fraud allegations were not "more than tangentially related" to a covered-security transaction. The court correctly concluded that references to SIB's portfolio's being backed by "covered securities" were merely tangentially related to the "heart," "crux," or "gravamen" of the defendants' fraud. Comparing the allegations here to those in the Madoff feeder-fund cases, the court concluded that the CDs, like the uncovered hedge funds in *Montreal Pension*, were not mere "ghost entities" or "cursory pass-through vehicles" to invest in covered securities. App. 37a. Instead, they 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." *Id.* There was thus no SLUSA preclusion under the Fifth/Ninth Circuit test.

II. THE DECISION BELOW WAS CORRECT.

A. The Fifth Circuit's Decision Is Innocent of the Flaws the Petitioners Allege.

The Willis petitioners mischaracterize the Fifth Circuit's opinion as "limiting SLUSA preclusion to complaints that *predominantly* allege misrepresentations in connection with transactions in covered securities," claiming that under such a rule, adding extraneous allegations "allows a plaintiff to escape SLUSA." Willis Petition at 21 (emphasis in original). But it was not solely the presence of allegations of fraud not involving covered securities that led the Fifth Circuit to conclude that the fraud was only tangentially related to transactions in covered securities. Instead, the court also relied on the fact that the only allegation that could possibly implicate SLUSA – that SIB represented that it had an investment portfolio that included highly liquid, marketable securities (not that SIB would invest the proceeds of the plaintiffs' CDs in such securities or that the plaintiffs themselves would have any interest whatsoever in that portfolio) – was itself only tangentially related to the fraudulent scheme.

Nor was the Fifth Circuit fooled by "artful pleading." The court regarded the nature of the securities sold to the plaintiffs, not the state of the plaintiffs' pleadings, as determinative. Those securities were debt instruments, not equity investments in covered securities or in a pass-through vehicle that in turn invested in covered securities. Stanford's misrepresentations that SIB's portfolio was invested in highly liquid, marketable, and secure assets do not transform fraud in the purchase and sale of the CDs into fraud in connection with the purchase or sale of a covered security. Indeed, to construe SLUSA that broadly would preclude *any* common-law fraud claim (whether relating to securities, or real estate, or a business transaction, or otherwise) against any entity that bolstered its claims of financial stability by pointing to its own portfolio of covered securities. The Fifth Circuit was correct in concluding that Congress did not intend SLUSA (and, concomitantly, § 10(b) and Rule 10b-5)[6] to stretch so far.

The petitioners' arguments are premised on the false assumption that "Stanford Financial . . . made a false promise to purchase covered securities, for the specific purpose of

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[6]The Court will recall that the phrase "in connection with the purchase or sale" in SLUSA is construed *in pari materia* with the same phrase in § 10(b) of the 1934 Act [15 U.S.C. § 78(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5]. *Dabit*, 547 U.S. at 85-86. An overexpansive reading of the phrase as used in SLUSA would lead inexorably to an overexpansive reading of the phrase as used in § 10(b) and Rule 10b-5. In particular, adopting the petitioners' construction of the phrase would construe it "so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)," as warned against in *Zandford*, 535 U.S. at 820.

inducing plaintiffs' continued investment and thereby facilitating the entire fraudulent scheme." Chadbourne Petition at 26. The plaintiffs alleged no such promise, but instead alleged misrepresentations by SIB that its existing portfolio already consisted of highly liquid marketable securities.

But even if SIB had made a promise of future purchases as the petitioners claim, a false promise that SIB would invest in covered securities for its own account would not suffice to satisfy the "in connection with" requirement. SLUSA would not apply in that situation because the purported buyer (SIB) would not be deceived in connection with the purported transactions in covered securities. There was, in short, no deception in any covered securities transaction, and the deception of the plaintiffs in their non-covered securities transaction bore, as the Fifth Circuit recognized, only a highly attenuated connection to the covered transactions.

The Proskauer petitioners contend that the Fifth Circuit decision is incorrect because the decision below found that "covered securities were in fact traded as a part of the fraud." Proskauer Petition at 19, *quoting* App. 38a. But they take that statement out of context: it appeared in the circuit court's discussion of the district court's second rationale for SLUSA preclusion, namely, that at least one of the plaintiffs must have sold SLUSA-covered securities to buy CDs. No court of appeals has applied its SLUSA preclusion standard to embrace the district court's "upstream" rationale, and indeed none of the petitioners advocates it in this Court.[7] The Fifth

[7]As the Fifth Circuit correctly concluded, "the fact that some of the plaintiffs sold some 'covered securities' to buy CDs" was not more than tangentially related to the fraudulent scheme and, accordingly, provides no basis for SLUSA preclusion. App. 40a. The court distinguished *Superintendent of Insurance v. Bankers Life and Casualty Co.*, 404 U.S. 6 (1971), and *Zandford* because in those cases "the entirety of the fraud depended upon the tortfeasor convincing victims of those fraudulent

Circuit's statement in the "upstream" context thus serves as no basis for a claim that the court misapplied *Dabit* by failing to apply SLUSA to a (non-existent) deceptive "downstream" sale of covered securities.

B. The Fifth Circuit's Decision Comports with the Intent and Purpose of SLUSA and the PSLRA.

The Fifth Circuit's approach is consistent with Congressional intent. SLUSA was passed to establish national standards for securities class action lawsuits involving nationally-traded securities. At the same time, Congress recognized the importance of "preserving the appropriate enforcement powers of state regulators, and the rights of individuals to bring suit." S. Rep. No. 105-182, at 8 (1992). Thus, while SLUSA precludes securities class actions based on state law alleging misrepresentations in connection with the purchase or sale of securities listed on a national exchange, it leaves the states free to police fraud not involving nationally-traded securities.

Had Congress intended to preclude all state-law securities fraud actions or fiduciary fraud actions involving securities, there would have been no need to explicitly require a connection to the purchase or sale of a nationally-traded security. Given Congress's express decision to exclude from "covered securities" those not traded on a national exchange, federal courts should be wary of foreclosing common law breach-of-fiduciary-duty actions or state law aiding-and-abetting actions that supplement existing federal statutes. *E.g., Gochauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987).

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schemes to sell their covered securities in order for the fraud to be accomplished." App. 39a. Here, the focus of the fraud was the fraudulent sale of SIB's certificates of deposit, not the sale of whatever assets were sold to buy the certificates of deposit; the source of the funds was immaterial both to Stanford's scheme and to the harm suffered by the plaintiffs.

Moreover, expanding the scope of SLUSA to reach secondary transactions by issuers, downstream of purported purchasers of uncovered securities, does not further the purposes of SLUSA or the PSLRA to prevent frivolous strike suits against issuers of nationally-traded securities and to avoid discouraging forward-looking statements of such issuers. Issuers of *covered* securities are not exposed to meritless strike suits, or chilled from making forward-looking statements, when defrauded investors pursue claims against those who commit fraud in the sale of *uncovered* securities, regardless of whether some secondary transaction happens to involve covered securities.

SLUSA's reach simply does not extend to cases where the fraudulently-induced investments are not themselves covered securities, nor investment vehicles that actually or purportedly invested in covered securities. Here, the alleged fraud – the false representations that SIB certificates of deposit were as safe as FDIC-insured bank certificates of deposit because SIB had unique insurance policies in place, and because SIB invested in safe, secure, and liquid assets – has nothing to do with the integrity of a United States stock exchange, with forward-looking statements made by issuers of covered securities, or with any other concern of the PSLRA. Accordingly, the circuit court was correct in honoring Congress's express and intentional exemption of non-national securities from SLUSA preclusion.

III. THE COURT BELOW CORRECTLY CONCLUDED THAT THE AIDERS' AND ABETTORS' MISREPRESENTATIONS WERE EVEN FURTHER REMOVED FROM A COVERED TRANSACTION THAN THE PRIMARY MISREPRESENTATIONS.

A. There Is No Circuit Conflict Regarding SLUSA Preclusion of Aiding-and-Abetting Claims.

The Proskauer Defendants argued below that their alleged misrepresentations to regulators were "in connection with" the sale of covered securities because those representations "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." App. 41a. The Fifth Circuit held that this was an insufficient connection to trigger SLUSA preclusion. In its view, "[t]hese alleged misrepresentations were one level removed from the misrepresentations made by SIB or the SEI and Willis Defendants." *Id.* The court therefore concluded that, "[l]ike 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." *Id.*

There is nothing in that holding that conflicts with the law in any other circuit. In the Eleventh Circuit, if, as here, the court had concluded that the fraudulent misrepresentations by PFA were not SLUSA-precluded, then the claims against Merrill Lynch for aiding and abetting those misrepresentations likewise would not have been precluded. So, too, in *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208 (9th Cir. 2009), because the underlying fraud was in connection with the purchase or sale of the covered securities and, hence, precluded by SLUSA, the aiding-and-abetting claim was precluded as well. The result would be the same in the Fifth Circuit as in every other circuit.

B. The Fifth Circuit Correctly Held That Where a Primary Misrepresentation Is Not SLUSA-Precluded, Claims for Aiding and Abetting That Misrepresentation Are Not Precluded.

The Fifth Circuit's aiding-and-abetting holding was straightforward – that the misrepresentations allegedly made by the Proskauer Defendants were even more removed from a covered securities transaction than those of SIB and the SEI and Willis Defendants, and were therefore not SLUSA-precluded. App. 41a.

The court did *not* hold, as petitioner Chadbourne alleges, that "SLUSA preclusion does not apply *even if* the underlying fraud is SLUSA-covered, because the defendant's own statements are not 'in connection with' a [covered] securities transaction." *Cf.* Chadbourne Petition at 29-30 (emphasis in original). It instead analyzed the content and circumstances of the Proskauer Defendants' misrepresentations to assure itself that those defendants' acts of aiding and abetting did not themselves trigger SLUSA preclusion, by constituting misrepresentations in connection with a covered transaction.

The Fifth Circuit's actual aiding-and-abetting holding in this case – that non-precluded misrepresentations that aid and abet other non-precluded misrepresentations are not SLUSA-precluded – is unremarkable and indeed almost tautological. The question of whether SLUSA precludes aiding-and-abetting claims where the primary actor's misrepresentations, or the aider-and-abettor's misrepresentations, or both, are in connection with a covered transaction will have to await a case in which it is presented.

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CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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