NO. 12-86

# In the Supreme Court of the United States

WILLIS OF COLORADO INC.; WILLIS GROUP HOLDINGS LIMITED; WILLIS LIMITED; BOWEN, MICLETTE & BRITT, INC.; and SEI INVESTMENTS COMPANY

*Petitioners*,

v.

SAMUEL TROICE, ET AL.,

*Respondents*.

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

**REPLY BRIEF OF PETITIONERS**


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## REPLY BRIEF FOR PETITIONERS

The *Troice* Respondents concede that the courts of appeals employ different tests in applying SLUSA's "in connection with" requirement, but contend that any difference is merely semantic and has no effect on the ultimate outcome of this or other cases. That contention is squarely refuted by the decisions below. The district court applied the Eleventh Circuit's test and found Respondents' claims to be precluded because Respondents were "induced" to purchase SIB CDs based on misrepresentations about SLUSA-covered securities. The Fifth Circuit rejected the Eleventh Circuit's "induced or depended" test (and the Second Circuit's similar test), applied its own variant of the Ninth Circuit's standard, and concluded that Respondents' claims were not barred because the alleged fraud was too far removed from a covered securities transaction. The choice of legal standard is indisputably outcome determinative.

The *Troice* Respondents claim that the misrepresentations regarding covered securities were so "tangential" to the fraudulent scheme that they would not be precluded in any circuit. That claim is directly refuted by their own complaints. The misrepresentations at the heart of the Stanford Ponzi scheme—which Respondents themselves describe as "material" misrepresentations—were the false statements that the CDs issued by Stanford International Bank ("SIB") were backed by safe, liquid, publicly traded securities. As the district court found, the CDs were the mechanism for delivering investors above-market returns from those publicly traded securities. Without the misrepresentations regarding SLUSA-covered securities, the entire scheme of getting investors to purchase SIB CDs never could have succeeded.

Moreover, Respondents have no response to Petitioners' argument that the Fifth Circuit's decision will directly undermine one of the core policy goals underlying SLUSA, the PSLRA, and this Court's securities law jurisprudence: preventing the plaintiffs bar from using state-law claims to evade restrictions on federal securities claims. Rather, Respondents affirmatively embrace the notion that aiders and abettors are further removed from covered securities and should thus fall outside the scope of SLUSA. That argument, if accepted, would allow wholesale evasion of this Court's decisions limiting private securities claims against third-party actors.

The *Roland* and *Farr* Respondents do not address the merits of the Petition, and instead rely entirely on a deeply flawed jurisdictional objection. They contend that there is no jurisdiction because the Fifth Circuit remanded their cases to the Louisiana state courts. But while it is true that the courts of appeals lack jurisdiction in most circumstances to review a *district court* order remanding a case to state court, it is equally well-established that this Court has jurisdiction to review a court of appeals decision reversing a district court order that declined to remand. *See Gay v. Ruff*, 292 U.S. 25, 30 (1934) (this Court may, pursuant to its certiorari jurisdiction, "review the action of the circuit court of appeals in directing the remand of a cause to the state court"). The latter situation is involved here, and there is absolutely no jurisdictional obstacle to this Court's review.

## I. THE ACKNOWLEDGED CIRCUIT SPLIT OVER THE MEANING OF SLUSA'S "IN CONNECTION WITH" REQUIREMENT WARRANTS THIS COURT'S REVIEW

### A. There is a Bona Fide Split of Authority That is Demonstrably Outcome-Determinative Here

The *Troice* Respondents attempt to dismiss (at 13-21) the circuits' different formulations of the "in connection with" requirement as "minute semantic differentiations" that are not outcome-determinative. That argument is plainly wrong. Respondents ignore the fact that both the district court and the Fifth Circuit found the different formulations of the "in connection with" requirement to be dispositive. Indeed, what is so compelling about this case as a vehicle is that the difference among the circuits was demonstrably outcome-determinative: the district court applied the Eleventh Circuit's test to find Respondents' claims precluded, while the Fifth Circuit adopted a variant of the Ninth Circuit's test to reverse.

In the absence of "controlling Fifth Circuit authority," the district court surveyed the relevant case law and found a "mélange of opinions" about the meaning of SLUSA's "in connection with requirement." Pet.App.65. The court chose to follow the Eleventh Circuit's "more exacting" standard, which asks whether the plaintiffs' claims are premised on either: (1) fraud that "induced" the plaintiffs to invest with the defendants; or (2) a fraudulent scheme that "coincided and depended upon" the purchase or sale of SLUSA-covered securities. Pet.App.65 (citing *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1349 (11th Cir. 2008) ("*IPM*")). The district court found that standard to be satisfied here because Respondents' purchases of SIB CDs were "induced" by misrepresentations that SIB was investing the CD assets in a portfolio of SLUSA-covered securities. Pet.App.66-67.

The Fifth Circuit, in contrast, expressly rejected the Eleventh Circuit's standard (and the Second Circuit's similar test), and concluded that the Ninth Circuit's test was the "best articulation" of the standard. Pet.App.31-33. Purporting to apply the Ninth Circuit's "more than tangentially related" standard, but actually applying an even more plaintiff-friendly version of that test, the Fifth Circuit held that SLUSA does not apply because Petitioners' alleged misrepresentations were only "tangentially" related to covered securities transactions. Pet.App.36-38.

Because the district court found that Respondents' claims would be barred by SLUSA under the Second and Eleventh Circuits' tests, Respondents try to distinguish the cases from those circuits. The *Troice* Respondents contend (at 16-17) that the leading Eleventh Circuit case, *IPM*, 546 F.3d 1349, can be distinguished on the ground that SIB did not *promise* purchasers of the CDs that it would invest their deposits in covered securities. That contention is squarely refuted by Respondents' own complaint, which alleges that SIB made a "material misstatement" that the CD funds would be placed in "safe, liquid investments," including "first grade investment bonds (AAA, AA+, AA) and shares of stock (of great reputation, liquidity, and credibility)."[1] Even the Fifth Circuit acknowledged that these misrepresentations were intended to "lure" (*i.e.*, induce) Respondents into "buying the worthless CDs." Pet.App.36-37; *see also* Pet.App.66 (SIB represented that the CDs were "backed, at least in part, by SIB's investments in SLUSA-covered securities").

Respondents also fail to distinguish the relevant Second Circuit cases. The Second Circuit's test asks whether the complaint "necessarily" alleges, involves, or rests on misrepresentations regarding SLUSA-covered securities. *Romano v. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010). Respondents' claims would clearly be barred under this standard, as they are quite similar to claims against third parties arising out of the Bernard Madoff Ponzi scheme that district courts within the Second Circuit have repeatedly found to be precluded by SLUSA. *See* Pet. 27-28.

Respondents argue (at 18-20) that these cases are inapposite because the Madoff investment funds were merely "cursory pass-through vehicles" or "conduits" for the purchase of SLUSA-covered securities. But that is a distinction without a difference. The CDs were the "conduit" through which investors sought to obtain Stanford's above-

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[1] Third Amended Class Action Complaint at ¶ 180 & Ex.2, *Troice v. Willis of Colorado*, No. 3:09-cv-1274-L (N.D. Tex. Apr. 1, 2011) ("Willis/BMB Complaint").

market returns. As Respondents readily admit, SIB induced investors to purchase its CDs by making materially false representations that the CDs were backed by SLUSA-covered securities, such as "first grade investment bonds" and "shares of stock (of great reputation, liquidity, and credibility)." Willis/BMB Complaint ¶ 180 & Ex.2. The combination of above-market returns and safe, liquid securities was the key to the inducement. Bernard Madoff similarly represented to his investors that he would "purchase [covered] securities (i.e., stocks and options) for the benefit of Funds in which plaintiffs invested." *In re Herald, Primeo & Thelma Sec. Litig.*, 2011 WL 5928952, at *8 (S.D.N.Y. Nov. 29, 2011). Both Stanford and Madoff "purported to take investors' funds and purchase covered securities for their investors' benefit." Pet.App.67-68 n.12. There is thus little doubt that Respondents' claims would have been precluded under the reasoning of the Madoff-related cases applying the Second Circuit's test.

### B. It is Irrelevant That the CDs Were Not Covered Securities and That SIB Did Not Actually Purchase or Sell Securities

The *Troice* Respondents raise two related arguments about why Petitioners purportedly cannot prevail under any standard. They emphasize (at 15-16, 28) that the SIB CDs are not *themselves* SLUSA-covered securities, and that SIB did not actually purchase or sell covered securities despite its misrepresentations to the contrary.

Both arguments are wholly without merit. Indeed, that is the one point on which the district court and the Fifth Circuit agreed. As the district court explained, the fact that the SIB CDs are not themselves covered securities "is not the end of the story" because "SLUSA [does] not require actual dealing in ascertainable securities." Pet.App.62-63. The Fifth Circuit agreed, holding, "in accord with the district court," that the fact that "the CDs were uncovered securities [ ] does not end our inquiry." Pet.App.36. Many other courts have reached the same conclusion. *See Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 312 (S.D.N.Y. 2010) ("[M]isrepresentations related to non-covered limited partnership interests may be nonetheless 'in connection with' covered securities where the Funds were created for the purpose of investing in such securities, and the misrepresentations 'had the effect of facilitating [the] fraud'").

Respondents are equally wrong to suggest (at 15-16) that SLUSA is categorically inapplicable unless there has been an *actual* purchase or sale of covered securities. An investment scheme purportedly backed by real securities transactions does not somehow fall outside of SLUSA because, in fact, it was a complete fraud and no securities transactions occurred. The absence of the promised transactions ensures there were misrepresentations, but does not render the misrepresentations any less "in connection with" covered securities. It is no accident that Respondents cite no authority in support of this argument, as all relevant case law is to the contrary. *See Grippo v. Perazzo*, 357 F.3d 1218, 1223 (11th Cir. 2004) (alleged fraud was "in connection with" a securities transaction even though "no proof exist[ed] that a security was actually bought or sold"); *Scala* *v. Citicorp*, 2011 WL 900297, at *7 (N.D. Cal. Mar. 15, 2011) (finding it "inconsequential" that "some or even all of the securities transactions may never have occurred"); *Horattas v. Citigroup*, 532 F. Supp. 2d 891, 901-03 (W.D. Mich. 2007).

### C. The Fifth Circuit's Decision Was Wrong on the Merits

While there will be ample opportunity to debate the merits of the Fifth Circuit's test if certiorari is granted, the *Troice* Respondents' defense of the Fifth Circuit's reasoning is wholly unavailing. Respondents argue (at 23) that the "only allegation that could possibly implicate SLUSA"—the misrepresentations that the CDs were backed by SLUSA-covered securities—was "only tangentially related to the fraudulent scheme."

To the contrary, the false statements that the SIB CDs were backed by safe, liquid, publicly traded securities (*i.e.*, SLUSA-covered securities), were at the very core of the Stanford Ponzi scheme. *See* Willis/BMB Complaint ¶ 180 & Ex. 2; SEI Complaint ¶ 20. The SIB CDs were the vehicle to obtain the promised above-market returns, and the (mis)representations that those CDs not only delivered above-market returns but were backed with safe securities were critical to inducing investors into a seemingly ideal high-return, low-risk investment. Indeed, Respondents themselves described these as "material" misstatements. Willis/BMB Complaint ¶ 180. Absent such misrepresentations, Respondents and other investors would not have bought into the scheme. *See* Pet.App.67 ("[i]f Plaintiffs had been aware of the truth, Plaintiffs would not have purchased the SIB CDs").[2]

Finally, the *Troice* Respondents weakly attempt to bolster the Fifth Circuit's reasoning by contending (at 26-27) that applying SLUSA to their complaint would "not further" the statute's purpose of preventing "strike suits" against issuers of publicly traded securities. But preventing strike suits is only one of the many purposes underlying SLUSA, the PSLRA, and this Court's securities law jurisprudence. The *primary* purpose of SLUSA is to prevent the plaintiffs bar from using "State private securities class action lawsuits" to "frustrate the objectives" of the PSLRA. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 82, 86 (2006) (citations omitted).

That is exactly what has happened here, as Respondents' counsel has boasted. *See* Pet. 31-32. If brought under federal law, Respondents' claims would have been subject to the PSLRA's heightened pleading requirements, and their efforts to target secondary actors would have been barred by this Court's decisions in *Stoneridge* and *Central Bank*. Respondents thus intentionally chose to limit their

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[2] Respondents make the extravagant claim (at 24) that a ruling in Petitioners' favor would preclude common-law fraud claims involving ordinary business transactions against any defendant that "bolstered its claims of financial stability by pointing to its own portfolio of covered securities." Not so. In those circumstances, the *misrepresentations* would have nothing to do with SLUSA-covered securities, and thus would not satisfy the Second or Eleventh Circuits' tests.

complaint to state-law claims in order to "get around" those requirements. *Id.* Indeed, Respondents affirmatively embrace the notion that secondary actors are further removed from the securities transaction and thus should fall outside SLUSA. Pet. 29-31. An analogous argument was made of "holder" claims in *Dabit*, but this Court rejected that argument there and should do likewise here.

## II. THIS COURT HAS JURISDICTION OVER THE *ROLAND* AND *FARR* CASES

The *Roland* and *Farr* Respondents do not address the merits of the Petition at all. Instead, they rest on a profoundly mistaken jurisdictional argument. They contend that this Court lacks jurisdiction over the *Roland* and *Farr* cases—in which only Petitioner SEI Investments Company is a defendant—because the Fifth Circuit held that the claims against SEI must be remanded to Louisiana state court. That argument wholly ignores contrary precedent.

To be sure, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). And *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), held that courts of appeals lack jurisdiction under § 1447(d) to review district court orders remanding to state court cases that had been removed under SLUSA. *Kircher* was consistent with earlier decisions holding that "[a]n order *of a District Court* remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here." *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 466-67 (1947) (emphasis added).

But that is simply not the posture of this case. Here, the district court did not issue an order remanding the *Roland* and *Farr* cases to state court. To the contrary, it *exercised* subject matter jurisdiction and dismissed Respondents' claims pursuant to SLUSA. Pet.App.74-75. That order was clearly appealable; indeed, it was Respondents who filed the appeal.[3] The Fifth Circuit ultimately reversed that decision and remanded with instructions to remand to state court. Petitioners seek this Court's review of the Fifth Circuit's decision, not any action of the district court. It is well-established that this Court has jurisdiction over an appellate decision reviewing a district court ruling dismissing a case and declining to remand, whether the appellate court affirms or reverses. *See Aetna*, 330 U.S. at 467 (this Court has "authority to

[3] Because the district court order dismissing the case was appealable, this Court had jurisdiction once Respondents filed their appeal and the case was "in the court of appeals." *Hertz v. Friend*, 130 S. Ct. 1181, 1187 (2010) (28 U.S.C. § 1254 "gives this Court jurisdiction to 'review . . . [b]y writ of certiorari' cases that . . . are 'in the courts of appeals' when we grant the writ"). That distinguishes this case from *Kircher* and analogous cases where the remand order is not appealable and the case was never properly in the court of appeals. Once this case was "in the court of appeals" subsequent events did not deprive this Court of jurisdiction and it would make no sense to suggest that this Court would have had jurisdiction over a petition for certiorari before judgment, but somehow does not have jurisdiction to review the decision and judgment of the Fifth Circuit.

review an action of the Circuit Court of Appeals, directing a remand to a state court").

The Court has reaffirmed this rule several times. In *Gay*, the Court held that, by reason of its "extensive power to issue writs of certiorari," the Court may "review the action [of] the circuit court of appeals in directing the remand of a cause to the state court." 292 U.S. at 30.[4] That is, under "the general statute controlling review on certiorari," this Court may "review a decision of a Circuit Court of Appeals directing a District Court to remand a cause to state court." *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 379 n.9 (1937). The rule limiting appellate review of remand orders "is limited to remanding orders made by the District [] Courts," *id.*—orders that were *never* appealable or "in the courts of appeals"—and does not affect in any way this Court's authority to review a decision of the court of appeals pursuant to its certiorari jurisdiction.[5]

The *Roland* and *Farr* Respondents assert (at 2, 6, 9) that the case is immune from review because the Fifth Circuit's mandate has issued and the district court subsequently acted on that mandate. To the contrary, the "fact that the mandate of the Circuit Court of Appeals has issued" does not "defeat this

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[4] The statute at issue in *Gay*, 28 U.S.C. § 71, contained language similar to 28 U.S.C. § 1447(d).

[5] The lower court cases cited by Respondents (at 8) involved appellate review of district court remand orders and are thus inapposite.

Court's jurisdiction" to review a court of appeals decision ordering that a case be remanded. *Aetna*, 330 U.S. at 467. This Court recently granted certiorari and reversed a Fourth Circuit decision that had "instructed the District Court to remand the case to state court." *Lincoln Property v. Roche*, 546 U.S. 81, 87-88 (2005).

Because the *Roland* and *Farr* Respondents' jurisdictional arguments lack merit, the Court should deny their request for attorneys' fees and costs pursuant to Rule 42.2.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,


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