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 Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF FOR TROICE RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES

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INTRODUCTION

The Troice respondents agree with the United States that the decision below presents no question worthy of this Court's review. They also concur in the government's belief that the analytical test employed by the Fifth Circuit in this case is faithful to this Court's SLUSA jurisprudence, is consistent with the approach of other circuits, and correctly construes the "in connection with" requirement under SLUSA. They respectfully disagree, however, with the United States' assertion that the Fifth Circuit's application of the law to the facts produced an erroneous outcome in this case, and offer this supplemental brief to articulate the grounds for that disagreement.

REASONS FOR DENYING THE PETITION

I. THERE WAS NO PURCHASE OR SALE OF A COVERED SECURITY.

The government's merits argument proceeds directly to the "in connection with" requirement. U.S. Brief at 10. It thus overlooks a fundamental threshold question: whether there was a purchase or sale of a covered security. For SLUSA does not apply to alleged misrepresentations "in connection with a covered security," but only to alleged misrepresentations "in connection with *the purchase or sale of* a covered security." 15 U.S.C. § 78bb(f)(1)(A) (emphasis supplied).

This case is unique in SLUSA jurisprudence in that no one involved in it – neither the petitioners nor the respondents nor SIB nor anyone else – purchased or sold a covered security, or contracted to do so. The certificates of deposit purchased by the respondents are universally acknowledged *not* to have been covered securities. And SIB did not purchase or sell covered securities: the complaints allege that it instead invested in speculative Antiguan real estate and squandered its money on the lavish lifestyle of Allen Stanford.

There are, to be sure, several SLUSA and § 10(b) cases applying those statutes in the absence of an actual purchase or sale. *See, e.g., SEC v. Zandford*, 535 U.S. 813, 819 (2002) (dictum: § 10(b) violated where broker accepts payment for securities that he never intends to deliver); *Grippo v. Perazzo*, 357 F.3d 1218 (11th Cir. 2004) (same under state statute *in pari materia* with § 10(b)).[1] The petitioners take these cases to mean that the statutes apply indiscriminately to non-purchases and non-sales as well as to purchases and sales.

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[1] *See also Scala v. Citicorp Inc.*, No. C 10-03859 CRB, 2011 U.S. Dist. LEXIS 30871 (N.D. Cal. Mar. 15, 2011); *Newman v. Family Management Corp.*, 748 F. Supp. 2d 299, 312 (S.D.N.Y. 2010); *Barron v. Igolnikov*, No. 09 Civ. 4471 (TPG), 2010 U.S. Dist. LEXIS 22267, *11 (S.D.N.Y. Mar. 10, 2010); *Schnorr v. Schubert*, No. CIV-05-303-M, 2005 U.S. Dist. LEXIS 45757, *18-23 (W.D. Okla. Aug. 18, 2005).

But they do not. As explained in *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002), the rationale behind the cases is not that the "purchase or sale" requirement may be casually disregarded, but rather that it is satisfied by an unconsummated contract for purchase or sale. That is 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). Thus the correct rule is not that SLUSA applies to all non-purchases and non-sales of covered securities, but that it applies to misrepresentations in connection with contracts to purchase or sell covered securities, whether such contracts remain unconsummated or are consummated through an actual purchase or sale.

Here, SIB did not contract with the respondents (or anyone else) to purchase or sell covered securities. It instead fraudulently misrepresented an existing fact, namely the contents of its investment portfolio, to induce a transaction in uncovered securities through which the respondents placed time deposits with SIB. The respondents did not acquire or contract to acquire any ownership or security interest in SIB's portfolio. As the government noted, "the fraud had no prospect of affecting the market in [covered] securities." U.S. Brief at 12. These facts amply distinguish this case from SLUSA-precluded cases involving contracts to purchase or sell covered securities.

Thus the Fifth Circuit correctly rejected the application of SLUSA in this case, because there was no purchase or sale of a covered security with which

any misrepresentation could be connected or not connected.

II. THE MISREPRESENTATIONS WERE NOT "IN CONNECTION WITH" THE PURCHASE OR SALE OF A COVERED SECURITY.

The government reasons that, among SIB's many misrepresentations, the one regarding the contents of its investment portfolio was the most salient, because it addressed the means by which SIB could pay high returns on the CDs while maintaining the safety of the respondents' investment. U.S. Brief at 10-11.

That conclusion is questionable. SIB's putative investment in low-risk blue-chip securities would logically tend to negate rather than to bolster the availability of higher-than-average returns. And while that misrepresentation would tend to establish that SIB was financially solid and the CD purchasers' investment was safe, many of SIB's other misrepresentations would do so even more directly. These include its misrepresentations about regulation of SIB by the United States and Antiguan governments, verification of value by independent auditors, regular outside stringent risk management evaluations, and insurance through Lloyds, all of which are directly related to the safety of an investment in SIB.

In any event, there is a more fundamental reason why SIB's misrepresentation about its portfolio was not "in connection with" the purchase or sale of a covered security: no actual or putative buyer or seller

of a covered security was ever deceived. Although this Court held in *Dabit*[2] that SLUSA applies even when the plaintiff is not the deceived party in a covered securities transaction, it did not hold that a deceptive transaction in covered securities is unnecessary.

In *Dabit*, the defendant's manipulation of stock prices necessarily deceived buyers and sellers in actual market transactions. It mattered not that the plaintiff was a holder rather than one of those buyers or sellers, but instead sufficed that his harm resulted from deceptive transactions in covered securities.[3] But it would stretch "in connection with" beyond the breaking point to hold that a misrepresentation is connected with a covered securities transaction in which *no one* was deceived.

An overexpansive application of the phrase "in connection with" in SLUSA would lead to an overexpansive application of the same phrase in § 10(b), because the two statutes are *in pari materia* on this point. *See Dabit*, 547 U.S. at 85-86. In particular, application of SLUSA in this case, where the only fraud was in an uncovered transaction, would imply that § 10(b) should be applied even in cases where the only fraud is in a non-securities transaction. This

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[2] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

[3] *See also U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 844-45 (9th Cir. 2007); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2004).

would set at naught this Court's holding 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)." *Zandford*, 535 U.S. at 820, *quoted in* U.S. Brief at 9. The Fifth Circuit correctly concluded that Congress did not intend SLUSA (and, concomitantly, § 10(b)) to stretch that far.

III. WHETHER SIB'S NONEXISTENT PORTFOLIO CONTAINED COVERED SECURITIES IS A MATTER OF SPECULATION.

The government acknowledges that SIB's misrepresentations about its portfolio did not refer specifically to securities listed on a regulated national exchange. U.S. Brief at 21. It is nevertheless willing to *assume* that the non-existent "well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies and major international banks" touted by SIB contained covered securities. *Id.*

This approach is at best speculative and at worst counter-factual. A covered security is a security traded on certain national stock exchanges[4] or a

[4] These are: the New York Stock Exchange; the American Stock Exchange; the three tiers of the NASDAQ market; the NYSE Arca; the Philadelphia Stock Exchange; the Chicago Board Options Exchange; and the International Securities Exchange options listings. 15 U.S.C. § 77r(b)(1)(A); 17 C.F.R. § 230.146(b)(1).

security senior to a security traded on those exchanges. 15 U.S.C. §§ 77p(f)(3), 77r(b)(1). This generally does not include securities issued by stable national governments. While it does include securities issued by some strong multinational companies and major international banks, it is a matter of speculation whether securities acquired by an Antiguan bank would typically be traded on an American national stock exchange or on an exchange in Europe, the Far East, or elsewhere.

This is an inherent problem in attempting to apply SLUSA to an imaginary portfolio of nonexistent securities. Where a SLUSA case involves a purchase of, a sale of, or a contract to purchase or sell a security, the actual transaction or contract identifies the security, and the "covered security" question is simple and non-speculative. In contrast, where there is no purchase, sale, or contract, the question of what was *not* purchased, sold, or contracted for is almost always speculative.[5]

In any event, the Fifth Circuit did not reach this issue, holding only that "vague references to SIB's portfolio containing instruments that *might be* SLUSA-covered securities" were tangential to the petitioners' misrepresentations. App. 37a (emphasis

[5] The speculation is enhanced by the so-called "Delaware carve-out," under which SLUSA does not apply to certain actions based upon the law of the state of organization of the issuer. *See* 15 U.S.C. § 78bb(f)(3)(A). If the identity of the issuer is unknown, so is the applicability of the carve-out.

supplied). Had it reached the issue, the respondents submit that the court would have been obliged to hold that "might be" is not enough to trigger SLUSA preclusion.

CONCLUSION

For all the reasons set forth in the original briefs in opposition and in the United States' brief, a writ of certiorari should be denied. In considering that question, the Court should, for the reasons set forth in the original briefs in opposition and this supplemental brief, treat the decision below as correct in its application of the legal standards governing SLUSA preclusion to the unique facts of this case.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Patricia Billotte, of lawful age, being duly sworn, upon my oath state that I did, on the 24th day of December, 2012, send out from Omaha, NE 17 package(s) containing 3 copies of the SUPPLEMENTAL BRIEF FOR TROICE RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the SUPPLEMENTAL BRIEF FOR TROICE RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 1767 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 24th day of December, 2012.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

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My Commission Expires Apr 9, 2014

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