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

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

PHILLIP W. PREIS
Counsel of Record
PREIS GORDON, APLC
450 Laurel Street, Suite 2150
Baton Rouge, Louisiana 70801
(225) 387-0707
phil@preislaw.com

Counsel for Respondents, James Roland, et al. and Leah Farr, et al.

December 26, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 12-86

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

INTRODUCTION

The *Roland* and *Farr* Respondents present this Supplemental Brief to the Brief of the United States as Amicus Curiae filed on December 14, 2012. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated

rule of law. Sup. Ct. R. 10.[1] The United States has correctly stated the decision of the United States Court of Appeals for the Fifth Circuit does not conflict with a decision of any other United States court of appeals on the same important matter.[2] Further, the United States points out that no circuit court conflict exists via application of the Fifth Circuit's "tangentially related" rule to transactions in which "misrepresentations concerning supposed purchases and sales of covered securities induced investors to buy uncovered securities."[3] The United States disagreed with the factual determinations of the Fifth Circuit on the relative importance of the misrepresentations relating to alleged covered securities

---

[1] All references to "U.S. Br." are to the "Brief of the United States as Amicus Curiae" filed with the United States Supreme Court on December 14, 2012. All defined terms are the same terms used in that brief.

[2] *See* U.S. Br. 17: "Petitioners assert . . . that the Fifth Circuit diverged from other circuits in finding such misrepresentations relevant to the 'in connection with' inquiry. That assertion is mistaken."

[3] U.S. Br. 13. "[P]etitioners rely on no other court of appeals decision applying SLUSA to misrepresentations about covered securities that were designed to induce investments in uncovered securities." U.S. Br. 20. "This case therefore would be a poor vehicle for clarifying SLUSA's application to more usual fact patterns." U.S. Br. 20. "But none of the decisions on which petitioners rely analyzed a multi-layered transaction in which misrepresentations concerning supposed purchases and sales of covered securities induced investors to buy uncovered securities." U.S. Br. 13. "At the core of SLUSA preclusion are cases in which the defendant misrepresents facts about a covered security in order to induce purchases or sales *of that security,* or to affect the market in that security." U.S. Br. 11-12 (emphasis in original). "To be sure, the scheme alleged here is relatively far removed from the paradigmatic SLUSA-precluded case." U.S. Br. 11.

as compared to the other fraudulent elements of the overall Stanford Ponzi scheme. The resolution of this threshold issue involves a question of whether there was an "erroneous factual findings" by the Fifth Circuit. The "erroneous factual findings" should not be reviewed by the Court as recognized by Sup. Ct. R. 10.

REASONS FOR DENYING THE PETITION

I. THE UNITED STATES' ANALYSIS OF THE FIFTH CIRCUIT'S APPLICATION OF THE "IN CONNECTION WITH" TEST IS DRIVEN BY CONCERNS OF LIMITATIONS ON THE SEC'S ENFORCEMENT POWERS.

Notwithstanding the United States' recommendation that the writ not be granted, the United States, in its brief, states that the "Fifth Circuit erred . . . in applying that standard to the facts of this case." U.S. Br. 10. The "in connection with" language being interpreted under SLUSA is the same language that determines the scope of the enforcement powers of the SEC under 17 C.F.R. §240.10b-5 ("Rule 10b-5"). *See Merrill Lynch, Pierce, Fenner and Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). The SEC's underlying concern is that the factual application of the "in connection with" test via the "more than tangentially related" standard by the Fifth Circuit in this case has the potential to restrict the SEC's enforcement rights and the application of Rule 10b-5 in the future. Because of the statutory mandate of the SEC in pursuing enforcement actions under Rule 10b-5, the SEC has no choice but to argue that the factual allegations in the complaint would give rise to a cause of action under Rule 10b-5. It would be a most

unusual situation for the SEC to ever support the ruling of any court, regardless of the reasoning, that has the potential to limit its enforcement power under Rule 10b-5.

Despite its disagreement with the factual findings of the Fifth Circuit, the United States submits that "Review would be unwarranted in this case, moreover, even if the current body of appellate precedent suggested widespread confusion as to the proper construction of SLUSA's 'in connection with' requirement." U.S. Br. 20. Further, the United States concludes that "The unusual nature of the allegations here also suggests that petitioners' fears about forum-shopping and unreviewability of future SLUSA cases (*e.g.*, 12-79 Pet. 25, 31; 12-88 Pet. 31) are overstated. The Fifth Circuit's decision seems unlikely to motivate plaintiffs in typical SLUSA-related cases to flock to courts within that circuit." U.S. Br. 20, fn. 7.

The United States acknowledges that this case does not in actuality present a precedent that will likely be relied upon in the future for the limitation of enforcement power under Rule 10b-5. Further, in tiered investments like the facts at bar, the scope of the enforcement power is not an issue because enforcement actions can be brought against both covered and non-covered securities. U.S. Br. 5, fn. 3. Any perceived threat to the SEC's enforcement powers based upon the facts of this case does not exist and mandates a denial of the writ application.

II. THE UNITED STATES RECOGNIZES THAT THE WRIT APPLICANTS ARE SEEKING REVIEW OF DISPUTED FACTUAL ISSUES AND THE APPLICATION OF THOSE FACTS.

The United States asserts that "In assessing whether the alleged fraud was 'more than tangentially related' to a purchase or sale of covered securities, the [Fifth Circuit] underestimated the role that the statements about SIB's investment portfolio played in the Stanford scheme." U.S. Br. 10. In arguing that the Fifth Circuit "underestimated the role" of the covered securities, the United States is forced to concede that there is a difference between its view of the facts and the Fifth Circuit's view of the facts. As the United States readily notes, the statements contained in the allegations are treated "as *implicit* representations that SIB would invest the proceeds of the CD sales in securities listed on a regulated national exchange." U.S. Br. 21 (emphasis added). The United States concedes that "[t]he misrepresentations that petitioners are alleged to have made did not refer specifically to securities listed on a regulated national exchange." U.S. Br. 21. Further, the United States concedes that the U.S. Supreme Court will be "ultimately" required "to draw that inference" because of the lack of any specific reference to nationally registered securities. U.S. Br. 21. This analysis recognizes that the grant of the writ application by this Court would require the Court to review the factual determinations by the Fifth Circuit that "[t]he 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." *Roland v. Green*, 675 F.3d 503, 522 (5th Cir. 2012).

Another example of the factual determinations by the Fifth Circuit that the United States contests relates to how Stanford International Bank ("SIB") could pay high rates of return. Without support, the United States argues "that only assertions about covered securities would have answered investors' question about how SIB would be able to deliver the promised high returns on the CDs." U.S. Br. 11. At best, this is a highly speculative hypothesis made by the United States that is unsupported by the record. It is equally plausible that the Fifth Circuit's view is correct and that the other representations by SIB were the basis for the fraud and 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.

The United States ignores the factual analysis performed by the Fifth Circuit on the total fraud committed by Allen Stanford and the relative unimportance of the sale or purchase of covered securities to determine that such purchase or sale was not more than "tangentially related" to the fraud. The Fifth Circuit reviewed the facts of this case as shown by numerous prior appeals from the Stanford Ponzi scheme proceedings and was uniquely qualified to determine the overall scope of the Ponzi scheme and the unimportance of covered securities to the overall fraud committed.[4]

---

[4] The factual issues relating to the scope and elements of the Stanford Ponzi scheme have been the subject of multiple appeals to the Fifth Circuit. *See S.E.C. v. Stanford Intern. Bank Ltd.*, 424 F.App'x 338 (5th Cir. 2011); *Janvey v. Alguire*, 628

In *Roland,* the Fifth Circuit made a largely factual determination the fraud "in connection with the covered security" was not "more than tangentially related" to the multiple other elements of Allen Stanford's Ponzi scheme. Given the number of cases that have arisen out of the Stanford Ponzi scheme and have been reviewed by the Fifth Circuit, the court looked "beyond the face of the amended complaints to determine whether they allege securities fraud in connection with the purchase or sale of covered securities." *Roland*, 675 F.3d at 520. As the Fifth Circuit noted, "[c]ourts may look to—they must look to—the substance of a complaint's allegations in applying SLUSA. Otherwise, SLUSA enforcement would [be] reduce[d] to a formalistic search through the pages of the complaint for magic words . . . and nothing more." *Roland*, 675 F.3d at 520-521, *citing Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009). The Fifth Circuit based the scope of its inquiry on explicit instructions of the Supreme Court 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)." *S.E.C. v. Zandford,* 535 U.S. 813, 820 (2002) (emphasis added).

F.3d 164, 168 (5th Cir. 2010); *Janvey v. Adams,* 588 F.3d 831 (5th Cir. 2009); *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 567 (5th Cir. 2010); *Janvey v. Alguire*, 647 F.3d 585, 591 (5th Cir. 2011); *Janvey v. Democratic Senatorial Campaign Committee, Inc.*, 699 F.3d 848 (5th Cir. 2012); *Janvey v. Libyan Inv. Authority*, 478 F.App'x 233 (5th Cir. 2012); *S.E.C. v. Stanford Intern. Bank Ltd.*, 465 F.App'x 316 (5th Cir. 2012).

The Fifth Circuit determined that "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." *Roland*, 675 F.3d at 522. The Fifth Circuit looked at all of the allegations of the complaint and "beyond the facts of the amended complaint" to make a factual determination that the allegations of fraud were not more than tangentially related to a covered security. The United States even acknowledges that "[t]he Fifth Circuit's analysis of the 'host of (mis)representations' before it was undertaken in the course of ascertaining whether the 'in connection with' requirement was met at all—that is whether the alleged fraud was sufficiently connected to the purchase or sale of covered securities." U.S. Br. 17.

Thus, if the Court were to grant this writ application, then the Court would be required to perform a factual analysis to determine the effect of the "implicit representations" and to "draw that inference" that is different than the inference drawn by the Fifth Circuit, *i.e.*, a reversal of the factual determination of the Fifth Circuit as to what is more than "tangentially related" to the fraud. Thus, the United States implicitly recognizes this and recommends the denial of the writ application, despite its belief that the Fifth Circuit made an "erroneous factual analysis." The conclusion by the United States that the petition should be denied is correct.

III. THE JURISDICTIONAL ANALYSIS IS IN ERROR.

The *Roland* Plaintiffs in their initial opposition set forth in detail, based upon this Court's decision in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), why this Court has no jurisdiction on this appeal because the case has been remanded to the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. The United States, at footnote 6 of its brief, has disagreed with the *Roland* Plaintiffs and has argued that this Honorable Court does have jurisdiction to review the remand order based upon the case of *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466-467 (1947).

This is in error for two reasons. First, the writ applicants fail to acknowledge or analyze the effect of the enactment of 28 U.S.C. §1447(d) after *Flowers*, which limits appeals of remand orders to very specific circumstances, none of which are present here. Secondly, the writ applicants fail to acknowledge two decisions of this Court finding that the Court does not have the jurisdiction to review remand orders based on lack of jurisdiction, such as here. *Volvo of America Corporation v. Schwarzer*, 429 U.S. 1331, 1332-1333 (1976); *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 569 (1941).

Currently, under 28 U.S.C. §1447(d), a case remanded to state court cannot be reviewed "by appeal or otherwise." The specific language of the statute is the following:

> (d) An order remanding a case to the State court from which it was removed is not reviewable **on appeal or otherwise**, except that an order remanding a case to the State court from which

> it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(Emphasis added).

In SEI's reply to *Roland*'s writ opposition, as adopted by the United States, SEI argued the Supreme Court had jurisdiction to grant writs in *Roland*, relying on the cases of *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, and *Gay v. Ruff*, 292 U.S. 25 (1934). The United States fails to recognize that these cases rely on a prior version of the removal/remand statute, specifically 28 U.S.C. §71 (1940) (current version at 28 U.S.C. §1447 (2006)), which stated the following in pertinent part:

> . . . Whenever any cause shall be removed from any State court into any district court and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed. . .

Comparing this statute with the current removal/ remand statute, 28 U.S.C. §1447(d), which was adopted in 1964, shows two glaring differences, as follows:

1. The prior law, §71, only applied to district court rulings of remand. The current law, §1447(d), does not have this limit.
2. The prior law, §71, only prevented an "appeal" of a district court's order of remand, while the new law, §1447(d), prevents review by "appeal or otherwise."

What is plain to see is that Congress intended, by passage of 28 U.S.C. §1447(d), to expand the limits on review of remand orders by superior courts, by (1.) deleting the limitation of review to only district courts, and (2.) expanding the methods of review from "appeal" to "appeal or otherwise." As such, there is a clear statutory directive that remand orders are final and not to be disturbed by any superior court.

This very principle has been recognized by the Court in two cases. In *Metropolitan Casualty,* the Court was asked to review a state court default judgment which had issued after the case was remanded by a federal district court to state court. The issue was whether the remand order was improvidently granted. The Court disagreed with the claim that the Court had the right to review the remand order, plainly stating that "we are not at liberty to review the remand order." *Metropolitan Casualty*, 312 U.S. at 569.

Similarly, in *Volvo of America*, the Court was asked to issue a stay of a remand order granted by a federal district court, claiming the remand order could be reviewed via a writ of mandamus to the Court. The Court disagreed, holding that a remand order finding lack of jurisdiction, such as the case at bar, cannot be reviewed by the Court. *Volvo of America Corporation*, 429 U.S. at 1332-1333. The same result should apply here.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

PHILLIP W. PREIS
Counsel of Record
PREIS GORDON, APLC
450 Laurel Street, Suite 2150
Baton Rouge, Louisiana 70801
(225) 387-0707
phil@preislaw.com

Counsel for Respondents,
James Roland, et al.
and Leah Farr, et al.

December 26, 2012