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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precludes state law class actions that allege a misrepresentation or omission "in connection with" the purchase or sale of a covered security. 15 U.S.C. § 78bb(f)(1). The complaints at issue in this case plainly include such alleged misrepresentations. The district court, applying Eleventh Circuit precedent, recognized as much and dismissed the complaints. However, the Fifth Circuit disagreed and, purporting to apply the Ninth Circuit's test, found the fact that the complaints included alleged misrepresentations in connection with a covered security insufficient to invoke SLUSA because the complaints also included *other* misrepresentations that were not made "in connection with" a covered securities transaction. In doing so, the Fifth Circuit acknowledged that it was departing from the holding of the Eleventh Circuit and several other circuits.

The question presented is whether a covered state law class action complaint that unquestionably alleges "a" misrepresentation "in connection with" the purchase or sale of a SLUSA-covered security nonetheless can escape the application of SLUSA by including other allegations that are farther removed from a covered securities transaction.

PARTIES TO THE PROCEEDINGS

Petitioners Willis Limited, Willis of Colorado, Bowen, Miclette & Britt, Inc., and SEI Investments Company are defendants in two separate actions in the district court and appellees in a consolidated action in the court of appeals.

The Willis Respondents are the following individuals who are plaintiffs in the district court action in which Willis Limited, Willis of Colorado, and Bowen, Miclette & Britt, Inc. are defendants and appellants in the consolidated action in the court of appeals: Samuel Troice; Martha Diaz; Paula Gilly-Flores; Punga Punga Financial, Ltd., individually and on behalf of a class of all others similarly situated; Promotora Villa Marino, CA; Daniel Gomez Ferreiro; and Manuel Canabal.

The SEI Respondents are the following individuals who are plaintiffs in the district court action in which SEI Investments Company is a defendant and appellants in the consolidated action in the court of appeals: James Roland; Susan Roland; Michael J. Giambrone; Thomas E. Bowden, individually and on behalf of the Thomas E. Bowden SEP IRA; T.E. Bowden Sr. Ret. Trust; G. Kendall Forbes, individually and on behalf of G. Kendall Forbes IRA; Deborah S. Forbes, individually and on behalf of the Deborah S. Forbes IRA; William Bruce Johnson on behalf of the Benton Bruce Johnson Trust #1; William Bruce Johnson on behalf of the Mark Calvin Johnson Trust #1; William Bruce Johnson on behalf of the Martha J.C. Johnson GEN SKPG TR-SAS; William Bruce Johnson on behalf of the Aimee Lynn Johnson Trust #1-SAS; William

Bruce Johnson on behalf of the Benton B. Johnson TEST TR II-SAS; Terence Beven, individually and on behalf of Terrence Beven IRA; Thomas J. Moran; Ralph D. D'Amore, individually and on behalf of FBO Ralph Daniel D'Amore MD, A Professional Corporation; Ralph D. D'Amore IRA; Daniel P. Landry, individually and on behalf of Daniel P. Landry IRA; Ronald R. Marston, individually and on behalf of Ronald R. Marston IRA; Rodney P. Starkey, individually and on behalf of Rodney P. Starkey IRA; Stephen Wilson, individually and on behalf of Bone and Joint Clinic FBO Stephen Wilson; Jeanne Anne Mayhall, individually and on behalf of Microchip ID Services Inc. Retirement Plan; John Wade, individually and on behalf of Microchip ID Services Inc. Retirement Plan; Lynn J. Philippe, individually and on behalf of Lynn J. Philippe IRA; Leah Farr; Troy Lillie; Kenneth Dougherty; Charles White; Martha Jean Witmer; Sharon Witmer; Olivia Sue Warnock; Clyde J. Chisholm; Ronald McMorris; Arthur Ordoyne; William Dawson; Terry Tullis; James Stegall; Anthony Ventrella; Robert Smith; Thomas Slaughter; Larry Perkins; William Phillips; Charles Hart; Richard Feucht; Lonnie Ordoyne; Arthur Waxley; Darrell Courville; Merrill Laplante; James Brown; Ira Causey; Jerry Burris; Jacqueline Millet; Louis Mier; Mamie Baumann; Charles Sanchez; Joseph Chustz; Robert Bush; Bobby Nix; Claude Marquette; Gwen Fabre; Robert Schwendimann; Wanda Bevis; Terry Tarver; Marcel Dumestre; Ronald Valentine; Bennie O'Rear; Julie Savoy; Laura Lee; Dennis Kirby; Billie Ruth McMorris; Larry Smith; Kenneth Wilkewitz; Murphy Buell; Kerry Kling; Lynn Gildersleeve Michelli; Willa

Mae Gildersleeve; Anita Ellen Carter; Fred Demarest; Nancy Gill; Linda Boyd; Virginia Buscheme; Robert Gildersleeve; Walter Stone; Virginia McMorris; Carol Stegall; Monty Perkins; Joan Feucht; Kathleen Mier; Mamie Sanchez; Margaret S. Nix; Margaret Dumestre; Claudia O'Rear; Gordon C. Gill; John Buscheme; Charles Massey; and Gary Magee.

CORPORATE DISCLOSURE STATEMENT

Petitioners Willis Limited and Willis of Colorado, Inc., are indirect, wholly owned subsidiaries of Willis Group Holdings Public Limited Company, a publicly held corporation listed on the New York Stock Exchange. No other publicly held corporation owns 10% or more of Willis Group Holdings' stock.

Petitioner Bowen, Miclette & Britt does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner SEI Investments Company does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 675 F.3d 503 and reproduced at Pet.App.1-43. The district court's opinion and order dismissing the action against Petitioner SEI is reproduced at Pet.App.48-75. The district court's order dismissing the action against Petitioners Willis and BMB is reproduced at Pet.App.76-77.

JURISDICTION

The Fifth Circuit issued its decision on March 19, 2012, Pet.App.3, and denied rehearing en banc on April 19, 2012, with three judges recused, Pet.App.46-47. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 101(b) of the Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb, is reproduced in full in the addendum to this brief at 1a-11a, and provides in relevant part:

> **(f) Limitations on remedies**
>
> **(1) Class action limitations**
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security….

STATEMENT OF THE CASE

To prevent abusive practices and deter vexatious litigation, Congress and this Court have carefully limited the circumstances in which private plaintiffs may bring claims for damages under the federal securities laws. In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress imposed heightened pleading standards in federal securities fraud cases and placed restrictions on recoverable damages and attorneys' fees. *See* 15 U.S.C. §§ 77z-1, 78u-4. This Court has also held, in a series of cases, that claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder may be brought only by certain plaintiffs—those who bought and sold securities (not mere holders), *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)—and against only certain defendants—primary wrongdoers (not alleged aiders and abettors or other third parties), *see Stoneridge Inv. Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

Many plaintiffs' attorneys sought to evade these restrictions by abandoning federal claims altogether and instead redirecting cases to state courts via class-action complaints limited to state-law claims. Congress responded in 1998 by enacting the Securities Litigation Uniform Standards Act ("SLUSA"), which precludes any state law class or mass action 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). This Court has emphasized that a "broad construction" of SLUSA is critical in light of "the particular concerns that culminated in SLUSA's enactment"—namely, preventing circumvention of the PSLRA. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71, 86 (2006). In construing the meaning of SLUSA's "in connection with" requirement, the Court has held that "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Id.* at 85.

This case arises out of the massive Ponzi scheme perpetrated by Robert Allen Stanford and his affiliated corporate entities. Respondents purchased certificates of deposit ("CDs") from the Antigua-based Stanford International Bank ("SIB") based on, among other things, misrepresentations by Stanford and SIB that the CDs were safe and secure because SIB invested its assets in highly liquid, publicly traded securities. The SIB CDs became worthless when the Stanford Ponzi scheme imploded.

Because Allen Stanford and his affiliated companies were insolvent and in receivership, Respondents sought out deep-pocketed third parties with any remote connection to Stanford or SIB. For example, Petitioners Willis Limited and Willis of Colorado (collectively, "Willis"), and Bowen, Miclette & Britt ("BMB") are insurance brokers that helped SIB purchase ordinary commercial insurance policies needed for its day-to-day operations. That insurance was completely unrelated to the CDs. Petitioner SEI Investments Company ("SEI") merely provided a Stanford affiliate with back-office services such as computer services and automated investment processing through SEI's proprietary computer system. Despite the remote connection between Petitioners and Stanford, Respondents have filed class- and mass-action complaints under state law seeking to hold Petitioners liable for billions of dollars of losses caused by Stanford's misconduct.

Respondents' counsel has boasted that he intentionally pled only state-law claims in order to "get around" the PSLRA and federal-law limitations on suing defendants only remotely connected to the primary wrongdoer.[1] In short, Respondents did *precisely* what SLUSA sought to prevent: they filed class- and mass-action complaints under state law, alleging claims in connection with securities transactions that, if brought under federal law, would have been subject to the PSLRA's requirements (such as heightened pleading standards), not to mention the limits on private claims against third parties set forth by this Court in *Stoneridge* and *Central Bank*.

The district court held that Respondents' class-action claims were barred by SLUSA because Respondents alleged that they were induced to purchase SIB CDs based, at least in part, on misrepresentations that their funds would be used to purchase SLUSA-covered securities. The Fifth Circuit reversed even though the court readily acknowledged that the Stanford entities used misrepresentations about SLUSA-covered securities to advance their Ponzi scheme. Rather than stopping

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[1] Julie Triedman, *Fifth Circuit Green-Lights $7 Billion Claims Against Proskauer, Other Stanford Advisers*, AmLaw Daily (Mar. 20, 2012).

there and dismissing the suit because SLUSA's plain terms were satisfied, the court found SLUSA inapplicable based on *other* alleged misrepresentations that did not relate to SLUSA-covered securities. Even though Respondents' complaints highlighted the significance of the alleged misrepresentations regarding covered securities, the court of appeals reasoned that those other allegations rendered the allegations of misrepresentations about covered securities too "tangential" to satisfy SLUSA.

A. Congress' Efforts To Prevent Abusive Practices in Securities Litigation

Congress enacted the Private Securities Litigation Reform Act of 1995, P.L. No. 104-67, 109 Stat. 737, to combat numerous abusive practices involving securities class-action suits. According to the House Conference Report, "nuisance filings, targeting of deep-pocket[ed] defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant." *Dabit*, 547 U.S. at 81 (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)). The PSLRA sought to prevent these practices by, *inter alia*, imposing heightened pleading standards in federal securities fraud cases, authorizing a stay of discovery pending a motion to dismiss, imposing restrictions on the selection and compensation of lead plaintiffs, creating a "safe harbor" for forward-looking statements, and placing limits on recoverable damages and attorneys' fees. *See* 15 U.S.C. §§ 77z-1, 78u-4; *see also Tellabs v. Makor Issues & Rights*, 551 U.S. 308, 324 (2007) (construing PSLRA to effectuate its purpose of "screen[ing] out frivolous suits").

Before Congress enacted the PSLRA, "there was essentially no significant securities class action litigation brought in State court." H.R. Rep. No. 105-803, at 14 (1998) (Conf. Rep.). In response to the PSLRA, however, many plaintiffs' lawyers sought to "exploit[] differences between Federal and State laws by filing frivolous and speculative lawsuits in State court, where essentially none of the [PSLRA's] procedural or substantive protections against abusive suits [is] available." *Id.* at 14-15; *see id.* at 14 (plaintiffs "'resort[ed] to state court to avoid the new, more stringent requirements of federal cases'"). Indeed, the decrease in securities litigation in federal court in the wake of the PSLRA was offset by an "'almost equal increase'" in state-court litigation, which no one thought was a mere coincidence. *Id.* at 14.

Congress responded by enacting SLUSA in 1998 to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the PSLRA. *See* SLUSA, P.L. No. 105-353 §§ 2(2), (5), 112 Stat. 3227.[2] The central provision of SLUSA provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may

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[2] SLUSA amended both Section 16 of the Securities Act of 1933, *see* 15 U.S.C. § 77p, and Section 28(f) of the Securities Exchange Act of 1934, *see* 15 U.S.C. § 78bb(f). Those amendments are "substantially identical." *Dabit*, 547 U.S. at 82 n.6 For ease of reference Petitioners will cite only the amendments to the Exchange Act.

be maintained in any State or Federal court by any private party alleging— (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). A "covered security" is a publicly traded security listed on a regulated national exchange. *Id.* § 78bb(f)(5)(E). And a "covered class action" is a lawsuit, or group of lawsuits filed in the same court involving common questions of law or fact, in which damages are sought on behalf of more than 50 people. *Id.* § 78bb(f)(5)(B).

SLUSA does not preempt substantive state securities law or force individual plaintiffs to assert federal-law claims. Instead, SLUSA precludes certain *class actions* brought under state law that involve covered securities. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006). Covered class actions brought in federal court under state law may be dismissed outright, while claims brought in state court may be removed to federal court and then dismissed. *See* 15 U.S.C. § 78bb(f)(1)-(2). But the possibility of individual state-law claims or federal-court class actions that comply with the PSLRA and other federal-law requirements remains.[3]

[3] SLUSA thus does not "deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist." *Dabit*, 547 U.S. at 87. The statute further provides that "nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf." 15 U.S.C. § 78bb(f)(3)(B)(i); *see id.* § 78bb(f)(4) (preserving state jurisdiction to "investigate and bring enforcement actions").

This Court has emphasized that a "broad construction" of SLUSA is warranted in light of "ordinary principles of statutory construction" as well as "the particular concerns that culminated in SLUSA's enactment." *Dabit*, 547 U.S. at 86. Given Congress' concerns with lawyers' use of artful pleading to escape federal court and evade Congress' intent in the PSLRA, SLUSA's "in connection with" requirement must be construed broadly. *Id.* at 85-86. Moreover, SLUSA deliberately employed the capacious phrase "in connection with," which had already been given a broad interpretation in the context of Section 10(b) of the Securities Exchange Act and Rule 10b-5. *Id.* at 84-86.

SLUSA also serves to prevent plaintiffs from using the state-law class-action vehicle to sidestep the limitations this Court has imposed on third-party liability under federal securities laws. In *Central Bank*, 511 U.S. at 191, the Court held that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)" of the Exchange Act. And in *Stoneridge*, 552 U.S. at 158, the Court reaffirmed *Central Bank* and held that "[t]he conduct of a secondary actor must satisfy each of the elements or preconditions for liability" under Section 10(b). SLUSA ensures that plaintiffs cannot evade these precedents in cases involving nationally traded, "covered" securities through the simple expedient of asserting only state-law claims.

B. The Stanford Ponzi Scheme

In February 2009, the Securities and Exchange Commission ("SEC") brought suit under the federal securities laws against Allen Stanford and numerous

Stanford-affiliated corporate entities, alleging that Stanford had perpetrated a massive Ponzi scheme. *See* First Amended Complaint, *SEC v. Stanford Int'l Bank*, No. 3:09-cv-298 (N.D. Tex. Feb. 27, 2009) ("SEC Complaint").

Stanford's fraudulent scheme involved sales of CDs issued by the Antigua-based Stanford International Bank. SIB enjoyed a high volume of CD sales by promising above-market returns and assuring investors that the bank's assets were invested in a "well-balanced global portfolio of marketable financial instruments," including "U.S. and international securities." SEC Complaint ¶ 44. For example, SIB's marketing brochures for the CDs emphasized that SIB's investment in "marketable securities" allowed it to "maintain[] the highest degree of liquidity," which was a "protective factor for our depositors." *Id.* ¶ 45. And Stanford financial advisors conveyed to clients that the "liquidity/marketability of SIB's invested assets" was the "most important factor to provide security to SIB clients." *Id.* ¶ 46.

In reality, however, Allen Stanford used the proceeds from SIB's CD sales to finance his lavish lifestyle and to invest in highly speculative real estate projects in various Caribbean countries, and to keep the Ponzi scheme going by making "interest" and redemption payments to earlier investors. The SEC alleged multiple violations of, *inter alia*, Section 10(b) of the Securities Exchange Act and Rule 10b-5. *See* U.S. Amicus Br. 5 n.3. The district court recently entered summary judgment against Stanford, SIB, and Stanford Group Company, ordered disgorgement of \$6.7 billion, and imposed a \$5.9 billion civil penalty. *See* Order, *SEC v. Stanford Int'l Bank*, No. 3:09-cv-298 (N.D. Tex. Apr. 25, 2013). Allen Stanford also faced criminal charges arising from his Ponzi scheme. He was convicted in March 2012 on 13 counts of fraud, conspiracy, and obstruction of justice, and was sentenced to 110 years in prison.

C. Respondents' Complaints

Respondents are individuals and companies that purchased SIB CDs through Stanford subsidiaries in the United States, Mexico, and Venezuela, and lost their investments when the Stanford Ponzi scheme collapsed. Allen Stanford and SIB are now insolvent and in receivership. Respondents and other plaintiffs thus cast a wide net in pursuing deep-pocketed defendants with any connection whatsoever to Stanford-affiliated entities. In this regard, they have sued a number of financial services firms, law firms, insurance companies, insurance brokers, and other companies that are alleged to have some connection to Stanford or SIB. These defendants unquestionably would be too remote to sue under Section 10(b) and Rule 10b-5 under this Court's holdings in *Stoneridge* and *Central Bank*.

In July 2009, the Willis Respondents—a group of Mexican and Venezuelan citizens—filed a class-action complaint in U.S. District Court for the Northern District of Texas against Willis and BMB. *See* JA 612-770 ("Willis/BMB Complaint"). Willis and BMB are insurance brokers that assisted SIB in its purchase of ordinary commercial insurance policies for SIB's operations. There is no allegation in the complaint that Willis or BMB knew about

Stanford's Ponzi scheme, sold the fraudulent CDs, or profited in any manner from the sale of the CDs or from the Ponzi scheme. Rather, Willis and BMB merely placed ordinary commercial insurance policies for SIB from Lloyd's of London, in exchange for standard brokerage fees.

The Willis Respondents' complaint is limited to Texas state-law claims, including alleged violations of the Texas Securities Act and Texas Insurance Code, as well as various common-law claims. The complaint clearly and repeatedly alleges that Stanford and his affiliated companies made misrepresentations about SLUSA-covered securities and that these misrepresentations were a material part of Stanford's scheme. Respondents allege that "Stanford Financial led Plaintiffs, verbally and through written marketing materials . . . to believe that their money was being invested in safe, liquid investments that were insured, *which was a material misstatement*." Willis/BMB Complaint ¶ 180 (JA 715) (emphasis added); *see id.* ¶ 34 (JA 628) (Respondents were led to believe that "SIB, through Stanford Financial, invested the money [from CD sales] in safe, secure and liquid assets"). Respondents also reference SIB's marketing materials, which state that SIB invested "the greater part of its assets" in "first grade investment bonds (AAA, AA+, AA) and shares of stock (of great reputation, liquidity and credibility)." *Id.* Ex.2 (JA 744).

The complaint further alleges that Willis and BMB aided and abetted Stanford's fraudulent scheme by drafting one-page letters confirming that SIB had purchased directors-and-officers liability insurance and a bankers' blanket bond from Lloyd's of London. *See* Willis/BMB Complaint ¶¶ 75-90 & Ex.4 (JA 649-57, 751-66). Other than writing those letters, Respondents do not allege that Willis or BMB had any role in developing, marketing, or selling the SIB CDs. There is likewise no allegation that Willis or BMB profited from the SIB CDs or from the Ponzi scheme.

Instead, Respondents suggest that Willis and BMB are liable for all of their losses because they *failed to detect* Stanford's fraud—something even the SEC was unable to do for more than a decade. Nevertheless, under secondary liability principles, Respondents seek to recover from Willis and BMB "well in excess of $7 billion" in damages—*i.e.*, the entire amount investors lost in the Stanford Ponzi scheme. *Id.* ¶¶ 185-86, 208 (JA 718-19, 733).

The SEI Respondents filed two nearly identical actions against Petitioner SEI in Louisiana state court in August 2009. Those complaints (styled as *Roland v. Green* and *Farr v. Green*) were brought by more than 80 individual purchasers of SIB CDs who asserted a single claim against SEI under the Louisiana Securities Law. The complaints allege that Stanford employees induced Respondents to purchase SIB CDs through misrepresentations that SIB's assets were "invested in a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies, and major international banks." Roland Complaint ¶ 36 (JA 253-54); Farr Complaint ¶ 38 (JA 345). According to the complaints, the "liquidity/marketability of SIB's invested assets" was the "most important factor to provide security to SIB clients." *Id.*

Respondents seek to hold SEI liable for Stanford employees' misrepresentations even though no Respondent identified SEI as playing any role in their decision to purchase SIB CDs. *See* Roland Complaint ¶ 112 (JA 279-80) (alleging that SEI is "directly liable for fraud" because it participated in a "fraudulent scheme"); *id.* ¶ 200 (JA 300); Farr Complaint ¶ 203 (JA 393-94) (alleging that "SEI has liability under the Louisiana Securities Law based upon § 714(B)," the secondary liability section of the statute). Respondents allege that SEI had a contract with a Stanford affiliate to provide back-office services such as "investment processing," "fund processing," and "business outsourcing solutions" through SEI's proprietary computer software system. Roland Complaint ¶ 101 (JA 275).

After the two actions against SEI were removed to the Middle District of Louisiana, they were transferred by the Judicial Panel on Multi-district Litigation to the Northern District of Texas. The actions were consolidated by the district court under the caption of *Roland v. Green*, No. 10-cv-224 (N.D. Tex.), and—as a mass action of more than 50 plaintiffs—together satisfy the statutory definition of a "covered class action" under SLUSA. 15 U.S.C. § 78bb(f)(5)(B)(ii).

D. The District Court's Decision

The district court dismissed the complaints against Willis, BMB, and SEI, holding that SLUSA applies to Respondents' state-law class- and mass-action claims. The court held in *Roland v. Green* that the claims against SEI were precluded, Pet.App.54-75, and it subsequently applied the same reasoning to dismiss Respondents' claims against Willis and BMB, Pet.App.76-77. In so ruling, the court found the "in connection with" requirement easily met because Respondents were "induced" to invest in SIB CDs by SIB's misrepresentations and because perpetration of the alleged fraud "coincided with and depended on" SIB's misrepresentations about investments in covered securities. Pet.App.66-68.

Respondents argued that SLUSA was categorically inapplicable because the SIB CDs were not themselves covered securities. The district court acknowledged that "the SIB CDs are not SLUSA-covered securities," but emphasized that this fact "does not end the SLUSA inquiry." Pet.App.62. As the district court explained, this Court has expressly rejected the argument that "'an alleged fraud is "in connection with" a purchase or sale of securities only when the plaintiff himself was defrauded into purchasing or selling particular securities.'" Pet.App.62-63 (quoting *Dabit*, 547 U.S. at 85). The court thus concluded that "SLUSA do[es] not require actual dealing in ascertainable securities." Pet.App.63 (citing *Grippo v. Perazzo*, 357 F.3d 1218, 1223 (11th Cir. 2004)).

Turning to the question presented here, the district court noted that "[c]ourts have come to varying conclusions on what 'in connection with' requires." Pet.App.61. In light of "this mélange of opinions and in the apparent absence of controlling Fifth Circuit authority," the district court chose to apply the Eleventh Circuit's test, which asks whether the plaintiffs' claims are premised on either "'fraud that induced [the plaintiffs] to invest with [the defendants] … or a fraudulent scheme that coincided and depended upon the purchase or sale of securities.'" Pet.App.65 (quoting *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) ("*IPM*")).

In applying the Eleventh Circuit's test, the district court noted that the complaint alleges that "SIB led the Plaintiffs to believe that the SIB CDs were backed, at least in part, by SIB's investments in SLUSA-covered securities." Pet.App.66-67. In particular, SIB "claimed to have invested its portfolio at least in part in SLUSA-covered securities," which "helped explain the CDs' purported low-risk/high-yield nature." Pet.App.67. Those misrepresentations, in turn, "induced the Plaintiffs to purchase SIB CDs." Pet.App.66. The district court thus had little difficulty concluding that the alleged misrepresentations were made "in connection with" the purchase or sale of a covered security.

The district court also relied upon numerous other district court decisions holding that SLUSA applied to suits arising out of the Bernard Madoff Ponzi scheme. As the court explained, "[b]oth Stanford and Madoff purported to take investors' funds and purchase covered securities for their investors' benefit." Pet.App.67-68 n.12.[4] And, like

[4] Two Madoff-related cases declined to apply SLUSA but the district court concluded that these decisions were "distinguishable and represent a minority approach." Pet.App.68 n.12.

Madoff, Stanford promised above-market returns that "ostensibly were produced by and directly attributable to [] investing in a portfolio that a reasonable investor would conclude contained SLUSA-covered securities." *Id.* Any suit against third parties arising out of those schemes necessarily involved misrepresentations "in connection with" SLUSA-covered securities transactions.

The district court accordingly held that SLUSA "precludes this action" against SEI. Pet.App.75. Citing its decision in *Roland*, the district court also dismissed Respondents' state law covered class actions against Willis and BMB, without prejudice to re-filing individual claims. Pet.App.76-77.

E. The Fifth Circuit's Decision

Both the Willis Respondents and the SEI Respondents appealed the district court's decision. The Fifth Circuit consolidated the appeals and reversed. In articulating its view of the meaning of "in connection with" under SLUSA, the court described the test set forth in *Dabit*—that the alleged fraud must "coincide" with a covered securities transaction—as "not particularly descriptive." Pet.App.17. The Fifth Circuit thus canvassed the disparate decisions of other courts in an effort to formulate a standard. Pet.App.16-30.

The Fifth Circuit described the Eleventh Circuit's test—which asks "whether the plaintiffs thought they were investing in covered securities or investing because of (representations about) transactions in covered securities"—as a "good starting point." Pet.App.30-31. The court, however, concluded that this standard "asks the wrong question" because it "unnecessarily imports causation into a test whose language ('coincide') specifically disclaims it." Pet.App.31-32. The court also described the Eleventh Circuit's test—and the Second Circuit's similar standard, *see Romano v. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010)—as "too stringent" and "too high a bar." Pet.App.32-33.

The Fifth Circuit instead found the "best articulation" of the "in connection with" requirement to be the Ninth Circuit's test, under which "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*." Pet.App.33 (quoting *Madden v. Cowen & Co.*, 576 F.3d 957, 965-66 (9th Cir. 2009)). The Fifth Circuit believed that this formulation would ensure that the "in connection with" requirement was not "'construed so broadly as to [encompass] every common-law fraud that happens to involve [covered] securities.'" Pet.App.33 (quoting *SEC v. Zandford*, 535 U.S. 813, 820 (2002)).

Although the court purported to apply the Ninth Circuit's test, its application of that test yielded a result not even the Ninth Circuit would have sanctioned. That is, the Fifth Circuit readily acknowledged that "the CDs' promotional material touted that SIB's portfolio of assets was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks.'" Pet.App.36.[5] However,

[5] The Fifth Circuit twice stated that the "Willis Defendants" and SEI had made representations to Respondents about SIB's purported investments in a "well-diversified portfolio of highly

instead of stopping its SLUSA analysis at that point, the court found it significant that this was "but one of a host of (mis)representations made to the Appellants in an attempt to lure them into buying the worthless CDs." Pet.App.36-37 (footnote omitted).

Thus, even though Respondents' complaints alleged misrepresentations about the purchase or sale of covered securities, the Fifth Circuit held that those allegations were not dispositive because they were only "tangentially related" to the "heart," "crux," or "gravamen" of the alleged fraud. Pet.App.37-38. The court reached this conclusion even though the complaints acknowledged that the misrepresentations about the liquidity and marketability of SIB's invested assets were so important that, had plaintiffs "'been aware of the truth' that SIB's 'portfolio consisted primarily of illiquid investments or no investments at all,' they 'would not have purchased the SIB CDs.'" Pet.App.12; *see also* Roland Complaint ¶¶ 34-39 (JA 253-55); Farr Complaint ¶¶ 36-41 (JA 345-47). In sum, the Fifth Circuit held that SLUSA did not apply because the fact that "the CDs were marketed with some vague references to SIB's portfolio containing instruments that might be SLUSA-covered securities

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marketable securities." Pet.App.8-10, 36-37 n.3. That is demonstrably false, as those misrepresentations were made solely by Allen Stanford and his affiliated companies, not by Willis, BMB, or SEI. *See* Willis/BMB Complaint ¶ 180 (JA 715); Roland Complaint ¶ 34 (JA 253); Farr Complaint ¶ 38 (JA 345). But this mistake is ultimately irrelevant, as Respondents' claims are precluded regardless of who made this alleged misrepresentation about covered securities. *See infra* Section I.

seems tangential to the schemes advanced by the SEI and Willis Defendants." Pet.App.38.

Willis, BMB, and SEI subsequently filed petitions for rehearing en banc, which the court of appeals denied on April 19, 2012, with three judges (then-Chief Judge Jones, Judge Smith, and Judge Haynes) recused. Pet.App.46-47. This Petition followed. The Court called for the views of the Solicitor General on October 1, 2012, and granted certiorari on January 18, 2013.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision cannot be squared with either the plain text of SLUSA or this Court's consistently broad interpretation of the phrase "in connection with." Allowing Respondents' state-law class-action claims to proceed would also be contrary to Congress' policy goals in SLUSA and the PSLRA, as well as this Court's jurisprudence carefully limiting private securities liability for third-party actors such as purported aiders and abettors. SLUSA was designed as an anti-circumvention provision, and giving "in connection with" the broad meaning its plain language suggests is critical to achieving Congress' goal.

I.A. SLUSA bars private litigants from bringing state-law class-action claims 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). This Court has repeatedly held that the phrase "in connection with" must be given a "broad interpretation," *Dabit*, 547 U.S. at 85, and must be construed "'flexibly, not technically and restrictively,'" *Zandford*, 535 U.S. at

821. A broad construction is particularly critical in the SLUSA context for Congress to achieve its anti-circumvention objective.

In their complaints, Respondents plainly allege misrepresentations in connection with SLUSA-covered securities transactions. Indeed, this is a straightforward case in which the plaintiffs allege misrepresentations *about* covered securities. Such allegations plainly trigger SLUSA preclusion. The core of the Stanford Ponzi scheme involved sales of CDs that promised stable, above-market returns with little risk because the CDs were purportedly backed by investments in highly liquid, publicly traded securities—*i.e.*, SLUSA-covered securities. High returns are alluring to investors, but what is well-nigh irresistible is the promise of high returns *and* low risk, and the misrepresentations about SLUSA-covered securities were critical to the low-risk part of the pitch. There is no question about how critical these misrepresentations were to the scheme, as Respondents themselves characterize these misrepresentations as "material" in their complaints. Without those material misrepresentations about SLUSA-covered securities, the whole scheme never could have succeeded.

It is irrelevant for purposes of SLUSA that the misrepresentations about covered securities were made by the primary fraudsters (Allen Stanford and SIB) rather than by Petitioners. SLUSA broadly precludes state-law class actions alleging *any* "misrepresentation or omission" in connection with a covered securities transaction; it does not limit preclusion to cases in which the *defendant* made the alleged misstatement. Because Respondents have unquestionably alleged "a" misrepresentation in connection with a covered securities transaction, it simply does not matter whether that alleged misrepresentation was made by "the [defendant] *or by someone else*." *Dabit*, 547 U.S. at 85 (emphasis added).

B. The Fifth Circuit readily acknowledged that Respondents' complaints alleged misrepresentations *about* SLUSA-covered securities. That should have been the end of the matter. The court nonetheless refused to find SLUSA preclusion, holding instead that the misrepresentations about SLUSA-covered securities were too "tangential" to the "gravamen" or "crux" of the fraudulent scheme to give rise to preclusion.

That holding is wrong on both the facts and the law. On the facts, the misrepresentation that SIB would invest proceeds from the CD sales in safe, liquid securities was hardly "tangential," as it was critical to Stanford's ability to lure new investors into the Ponzi scheme. Indeed, Respondents themselves describe this as a "material" misrepresentation.

On the law, the Fifth Circuit's approach to SLUSA cannot be squared with the plain text of the statute, which precludes any state-law class action alleging "a" misrepresentation or omission in connection with the purchase or sale of a covered security. 15 U.S.C. § 78bb(f)(1)(A). A single covered misrepresentation is sufficient to trigger preclusion, and nothing in the statute allows a plaintiff to escape preclusion by larding up the complaint with *additional* misrepresentations that are farther removed from a covered securities transaction. The Fifth Circuit effectively rewrote the statute by limiting SLUSA preclusion to complaints that *predominantly* allege misrepresentations in connection with SLUSA-covered securities. That narrow interpretation of SLUSA is directly contrary to the language of the statute, and is especially unwarranted in light of SLUSA's evident purpose to prevent the circumvention of the PSLRA. There is simply no reason to construe straightforward and purposely broad language to create an opportunity and incentive for creative lawyers to plead around SLUSA by padding a complaint with additional allegations in hopes of rendering allegations about covered securities "tangential." SLUSA unquestionably makes one material misrepresentation "in connection with" covered securities enough.

The Fifth Circuit further held that its decision was "bolstered" by the fact that the SIB CDs were not themselves SLUSA-covered securities and were not directly linked to the returns on covered securities. But that simply misreads the statute. Under the plain text of SLUSA, it is the misrepresentation—not the plaintiff's form of investment—that must be "in connection with" a covered securities transaction. As this Court held in *Dabit*, and as numerous lower courts have recognized, SLUSA does not require actual *dealing* in covered securities as long as the alleged scheme involved a *misrepresentation* about the purchase or sale of such securities. There is no reason to complicate that straightforward statutory requirement.

II. Allowing Respondents' state-law class-action claims to proceed would undermine Congress' policy judgments in SLUSA and the PSLRA, as well as this Court's decisions in *Stoneridge* and *Central Bank*.

This Court has repeatedly refused to extend private liability under the federal securities laws to third-party actors far removed from any actual fraud, such as alleged aiders and abettors. Yet, here, Respondents are seeking to make a virtue out of the fact that they have sued defendants further removed from the core of the fraud—defendants with only a tangential relationship to the misrepresentations about covered securities that are central to Respondents' theory of recovery. That gets matters backwards. SLUSA was designed to prevent the circumvention of the PSLRA and other rules limiting private federal securities actions. Although Congress did not intend to reach state-law claims wholly unconnected to misrepresentations about covered securities, Congress certainly did not try to preserve plaintiffs' ability to bring claims that are the *least* meritorious in the eyes of federal law. In *Dabit*, this Court rejected a similar effort to carve out "holder" claims—long disfavored under federal law—from SLUSA's scope. There is no reason why claims *against* tangential defendants should fare better than claims *by* tangential plaintiffs.

Respondents' lawyers have explicitly acknowledged that they engaged in the exact type of gamesmanship that SLUSA was intended to prevent—namely, the use of state-law securities suits to evade restrictions on federal securities claims. If Respondents had sued Petitioners pursuant to the implied right of action under Rule 10b-5, they would have been subject to the heightened pleading standards and other requirements of the PSLRA, as well as this Court's decisions in *Stoneridge* and *Central Bank*. Knowing they would not be able to proceed in that manner, Respondents limited their complaints to state-law securities claims that are not bound by these strictures. This is not conjecture. After the Fifth Circuit validated this stratagem, Respondents' counsel boasted that his goal had been to use artful pleading to "get around" *Central Bank* and *Stoneridge*. This is *precisely* what Congress intended to prevent when it enacted SLUSA, and the capacious "in connection with" language it employed should have precluded such gamesmanship. The decision below should be reversed.

ARGUMENT

I. SLUSA Precludes Respondents' State-Law Class-Action Claims.

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). There is no dispute that Respondents are seeking to bring "covered class action[s]" under Texas and Louisiana state law alleging "a misrepresentation or omission of a material fact." The sole issue in this case is whether Respondents' complaints allege misrepresentations or omissions "in connection with" the purchase or sale of a covered security. They plainly do, and the Fifth Circuit's reasons for finding those allegations insufficient to trigger SLUSA preclusion do not withstand scrutiny.

A. Respondents' Claims Are Precluded Under the Plain Text of SLUSA and a Straightforward Application of *Dabit.*

1. When Congress enacted SLUSA in 1998, it did not write on a blank slate. The phrase "in connection with the purchase or sale of any security" has been a prominent feature of the federal securities laws for decades, appearing in both Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. As this Court recognized in *Dabit*, Congress clearly intended SLUSA to incorporate settled law adopting a broad reading of "in connection with." Indeed, "not only did Congress [in SLUSA] use the same words as are used in § 10(b) and Rule 10b-5, but it used them in a provision that appears in the same statute as § 10(b)." *Dabit*, 547 U.S. at 86; *see also Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well").

Each time this Court has "sought to give meaning" to the phrase "in connection with" in the context of the federal securities laws, it has "espoused a broad interpretation." *Dabit*, 547 U.S. at 85. And the Court has repeatedly emphasized that this capacious language must be construed "'flexibly, not technically and restrictively.'" *Zandford*, 535

U.S. at 821 (quoting *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971)). After all, any limits on the scope of "in connection with" would not only artificially constrict SLUSA, but also limit the SEC's authority to pursue novel types of wrongdoing in the securities markets.

A broad construction is thus "'practically essential'" because "practices 'constantly vary and . . . practices legitimate for some purposes may be turned to illegitimate and fraudulent means.'" *Bankers Life*, 404 U.S. at 12. The temptation to dupe investors is ever-present and would-be manipulators and scam artists are nothing if not creative. Thus, to ensure that the next generation of Madoffs and Stanfords do not outfox both investors and the SEC, it is essential that "in connection with" be given its full, broad scope.

In *Dabit*—this Court's sole decision addressing the substantive scope of SLUSA—the Court rejected an attempt to read artificial limitations into the broad text of the statute. The plaintiffs in that case brought state-law "holder" claims alleging that the defendants' misrepresentations caused them to refrain from selling overvalued securities. 547 U.S. at 76. The plaintiffs argued that these misrepresentations were not "in connection with" a SLUSA-covered securities transaction because, as mere "holders," they did not actually buy or sell securities in response to the alleged misrepresentations.

This Court unanimously rejected that cramped interpretation of SLUSA, reiterating that a "broad construction" of the preclusion provision was warranted in light of "the particular concerns that culminated in SLUSA's enactment." *Id.* at 86. The Court thus held that it is "enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff *or by someone else*." *Id.* at 85 (emphasis added). The "requisite showing" is "'deception in connection with the purchase or sale of any security, not deception of an identifiable purchaser or seller.'" *Id.* at 85; *see also id.* at 89 (SLUSA preclusion does not turn on "the identity of the plaintiffs").

In reaching its holding, the Court emphasized that the express purpose of SLUSA was to prevent plaintiffs from using state-law claims to evade Congress' restrictions on private liability under federal law, and "[a] narrow reading of the statute would undercut the effectiveness of the [PSLRA]." *Id.* at 86; *see also id.* at 78 ("the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated"). In short, this Court has always construed "in connection with" broadly, and the anti-circumvention objective of SLUSA only underscores the need for a broad construction. *See*, *e.g.*, *Morse v. Republican Party of Virginia*, 517 U.S. 186, 215 (1996) (rejecting interpretation that "permits precisely the kind of circumvention of congressional policy that [the statute] was designed to prevent").

Dabit's holding is consistent with this Court's earlier decisions interpreting Section 10(b) and Rule 10b-5. *See* Pet.App.62-63 & n.8. In *Bankers Life*, the Court found the "in connection with" requirement satisfied because the plaintiff had suffered an injury as a result of deceptive practices "touching" securities transactions. 404 U.S. at 12-13. The Court concluded that the fraud and the securities transaction did not need to occur simultaneously, as long as the scheme as a whole involved both a material misrepresentation and the purchase or sale of a security. *Id.*

Similarly, in *Zandford*, the defendant was a stockbroker who misappropriated his clients' funds by selling securities from their accounts and diverting the proceeds to his own use. 535 U.S. at 815-16. Even though the defendant's conduct did not affect the plaintiff's trading decisions or the price of any publicly traded security, the Court concluded that the "in connection with" requirement was satisfied because the fraudulent scheme and the securities transactions were "not independent events." *Id.* at 820-21. As the Court subsequently reiterated in *Dabit*, it was "enough" that the scheme to defraud "coincide[d]" with securities transactions. *Id.* at 822.

2. In their complaints, Respondents have unquestionably alleged misrepresentations that "coincide" with or "touch" SLUSA-covered securities transactions. Indeed, Respondents have alleged misrepresentations *about* covered securities, which makes this a straightforward case for SLUSA preclusion. *See* U.S. Amicus Br. 12 ("False statements about one's own transactions in covered securities are naturally characterized as misrepresentations in connection with the purchase or sale of such securities.").

Specifically, Respondents' complaint against Willis and BMB alleges that "Stanford Financial led Plaintiffs, verbally and through written marketing materials . . . to believe that their money was being invested in *safe, liquid investments* that were insured, which was a *material misstatement* because the money was not invested in safe, liquid and fully insured investments." Willis/BMB Complaint ¶ 180 (JA 715) (emphasis added); *see also id.* ¶ 34 (JA 628) (Respondents were led to believe that "SIB, through Stanford Financial, invested the money [from CD sales] in safe, secure and liquid assets"). And SIB's marketing materials—which Respondents attached as an exhibit to the Complaint—falsely stated that SIB had invested "the greater part of its assets" in "first grade investment bonds (AAA, AA+, AA) and shares of stock (of great reputation, liquidity, and credibility)." *Id.* Ex.2 (JA 744).[6]

The SEI Respondents similarly allege that Stanford investment advisors induced them to purchase SIB CDs through misrepresentations that proceeds from CD sales would be "'invested in a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks.'" Roland Complaint ¶ 36 (JA253-54); Farr Complaint ¶ 38 (JA 345). Respondents were led to believe that SIB

[6] SIB did not identify the specific "bonds" and "shares of stock" that were purportedly included in its portfolio, but the district court determined that any such portfolio would have necessarily included "SLUSA-covered securities." Pet.App.66 & n.11. Respondents did not challenge that finding on appeal, and the Fifth Circuit did not disturb the district court's holding on this issue.

invested its assets in "financial instruments" that could be "readily liquidated to provide redemption payments . . . on the SIB CDs." Roland Complaint ¶ 12 (JA 244); Farr Complaint ¶ 14 (JA 336).

These misrepresentations about SLUSA-covered securities were critical to the Stanford Ponzi scheme because they were what induced Respondents to purchase SIB CDs in the first place. The complaints identify these allegations as "material" to the scheme, *see* Willis/BMB Complaint ¶ 180 (JA 715), and they undoubtedly were. For any investor evaluating an income-producing financial instrument, whether it be a "plain vanilla" corporate bond or a complex mortgage-backed security, the source of the funds used to pay distributions is, of course, a critical consideration. This is particularly true when the quality of the issuer's investments (*i.e.*, its use of the invested capital) is the purported explanation for (as here) an above-market yield.

The promise of above-market returns is alluring, but investors typically consider both prospective returns and relative risks. *See*, *e.g.*, *SEC v. Infinity Grp.*, 212 F.3d 180, 191 (3d Cir. 2000) ("[T]he investors' beads were strung upon the gossamer guarantee of seemingly impossibly high returns at no risk."). Investors asked to send their money to an Antiguan bank, rather than an FDIC-insured U.S. bank, will naturally have concerns about the liquidity and security of the institution. The promised combination of security, liquidity, and above-market returns—which would be achieved through SIB's purported investment in SLUSA-covered securities—was thus essential to recruiting new investors in the SIB CDs.

As the United States recognized, "only the assertions about covered securities would have answered investors' questions about *how* SIB would be able to deliver the promised high returns on the CDs—questions that any reasonable investor would have asked before buying a financial instrument from a foreign bank." U.S. Amicus Br. 11. Without those misrepresentations regarding SLUSA-covered securities, the entire Ponzi scheme could not have succeeded. *See id.* at 12 (Stanford and SIB's "misrepresentations about their own holdings were critical to the Stanford fraud.").[7]

It is perfectly sensible that SLUSA should apply here, as Stanford and SIB's misrepresentations about their investments in covered securities implicate "the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities." *Dabit*, 547 U.S. at 78. The publicly traded securities that are covered by SLUSA, Section 10(b), and Rule 10b-5 have a well-earned reputation for safety, liquidity, and strong returns. CDs issued by banks in exotic offshore locales do not. Through their false representations about SLUSA-covered

[7] Respondents' allegations about investments in covered securities were also important as a matter of state substantive law. For example, a plaintiff can state a claim under the Louisiana Securities Law only if she was sold a "security," and that term does not include CDs. *See* La. R.S. § 51:702(15)(b)(ii). Any argument that the SEI Respondents have not alleged misrepresentations in connection with covered securities is thus tantamount to an admission that they cannot state a claim for relief under Louisiana state law.

securities, Stanford and SIB effectively misappropriated the reputation and goodwill of the U.S. securities markets in order to advance their fraudulent scheme. This is precisely the sort of conduct that Congress intended to come within the SEC's reach and to be governed by uniform "national standards for securities class action lawsuits." SLUSA § 2(5), 112 Stat. at 3227.

3. It is irrelevant for purposes of SLUSA that the alleged misrepresentations about covered securities were made by the primary fraudsters (Stanford and SIB) rather than by Petitioners (third parties far removed from any actual fraud). Allegations about misrepresentations by Stanford and SIB are not stray or tangential references, but are integral to Respondents' efforts to sue Petitioners. After all, Respondents specifically allege that Petitioners are "*responsible for all wrongdoing* done by . . . other members of the conspiracy, including Allen Stanford, SIB, [and] Stanford Financial." Willis/BMB Complaint ¶ 186 (JA 719) (emphasis added). Respondents further allege that Petitioners are "directly liable for fraud" because they "aided and abetted and participated with Stanford Financial and SIB in a fraudulent scheme." *Id.* ¶ 185 (JA 718); *see also* Roland Complaint ¶¶ 101, 200 (JA 275, 300); Farr Complaint ¶¶ 105, 203 (JA 368, 393-94) (alleging that "SEI has liability under the Louisiana Securities Law based upon § 714(B)," the secondary liability provision).

Because Respondents seek to hold Willis and BMB vicariously liable for "all" of Stanford and SIB's wrongdoing (to the tune of $7 billion)—and to hold

SEI secondarily liable for the losses of each SEI Respondent—it is simply not possible to articulate a theory of why Petitioners should pay for the damage wreaked by Stanford's malfeasance without making allegations about Stanford's misrepresentations. And those misrepresentations by Stanford about covered securities are sufficient to trigger SLUSA preclusion.

Given that Respondents have unquestionably alleged "a" misrepresentation in connection with a covered securities transaction—namely, SIB's false statement that proceeds from CD sales would be invested in highly liquid, publicly traded securities—it simply does not matter whether that alleged misrepresentation was made by "the [defendant] *or by someone else*." *Dabit*, 547 U.S. at 85 (emphasis added). The "requisite showing" is "'deception in connection with the purchase or sale of any security, not deception [by] an identifiable [defendant].'" *Id.* at 85; *see id.* at 89 (SLUSA preclusion does not turn on "the identity of the [parties]").

B. The Fifth Circuit's Reasons for Denying Preclusion Lack Merit.

1. SLUSA applies even if the complaint alleges other misrepresentations that do not concern covered securities.

The Fifth Circuit readily acknowledged that Respondents' complaints involved misrepresentations about the purchase or sale of covered securities. Pet.App.36-37. Respondents allege that SIB falsely represented that its "portfolio of assets was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks,'" Pet.App.36, and that Petitioners should be held liable for SIB's misconduct, Willis/BMB Complaint ¶¶ 185-86 (JA 718-19). The Fifth Circuit recognized that these misrepresentations about SLUSA-covered securities were critical to the Stanford fraud because they were used "to lure [Respondents] into buying the worthless CDs." Pet.App.36-37. Those findings should have been the end of the matter because misrepresentations *about* covered securities are clearly sufficient to satisfy the "in connection with" requirement and trigger SLUSA.

But the Fifth Circuit did not stop there. It instead concluded that the presence of *additional* alleged misrepresentations in Respondents' complaints somehow diluted the SLUSA-covered misrepresentations or rendered them "tangential." *See* Pet.App.37-39. In particular, the court found that the actual "heart" or "crux" of the Stanford scheme was "representing to [Respondents] 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 . . . regulators were keeping a watchful eye on SIB." Pet.App.38. The Fifth Circuit thus concluded that the misrepresentations about SLUSA-covered securities were "but one of a host of (mis)representations made to Appellants" and "seem[] tangential to the schemes advanced by the SEI and Willis Defendants." Pet.App.36-38.

The Fifth Circuit's approach was fundamentally flawed on both the facts and the law. On the facts, as the complaints make clear, the misrepresentations about the liquidity provided by the purported underlying investments in covered securities were critical to making Stanford's false claims about high returns and low risk credible. *See* Willis/BMB Complaint Ex.2 (JA 744); Roland Complaint ¶¶ 35-36 (JA 253-54); Farr Complaint ¶¶ 37-38 (JA 345). Respondents, the victims of the fraud, state that these misrepresentations were "material" to their being defrauded. Willis/BMB Complaint ¶ 180 (JA 715).

On the law, and even more to the point, the whole inquiry into whether representations about covered securities were central or peripheral is beside the point. SLUSA preclusion is triggered by *a* material misrepresentation about covered securities *vel non*. The centrality of such representations to the overall fraudulent scheme is irrelevant. And given that SLUSA's *raison d'etre* was the need to counteract clever attorneys who had effectively pled around the PSLRA, it would have been astonishing had Congress created an incentive for lawyers to lard up their complaints with additional allegations in hopes of rendering allegations about covered securities "tangential" by comparison.

In short, the question here is not whether the alleged misrepresentations were *material*—they plainly were—but whether they were made "in connection with" a SLUSA-covered securities transaction. They clearly were, and that suffices for SLUSA preclusion. Indeed, Respondents have never disputed the materiality of SIB's representations about SLUSA-covered securities. *See* Willis/BMB

Complaint ¶ 180 (JA 715) (misrepresentation that Respondents' money "was being invested in safe, liquid investments" was a "material misstatement"); Roland Complaint ¶¶ 34-39 (JA 253-55); Farr Complaint ¶¶ 36-41 (JA 345-47) (Respondents "would not have purchased the SIB CDs" if they had been "aware of the truth" that SIB's assets were not invested in "liquid financial instruments").

The correct approach is well-illustrated by Judge Sutton's opinion for the Sixth Circuit in *Segal v. Fifth Third Bank*, 581 F.3d 305 (6th Cir. 2009), *cert denied* 130 S. Ct. 3326 (2010). Like Respondents in this case, the plaintiff in *Segal* argued that the "gravamen" of his complaint involved garden-variety state-law fraud claims, and that any misrepresentations about covered securities were merely tangential to the defendant's "scheme." *Id.* at 311. But, as the Sixth Circuit explained, this is "not how SLUSA works." *Id.* The statute simply asks "whether the complaint *includes* these types of allegations [about covered securities], pure and simple." *Id.* (emphasis added).

The Sixth Circuit further noted that any inquiry into whether SLUSA-covered misrepresentations were too far removed from the "gravamen" of the fraud would be both "difficult . . . to implement" and contrary to this Court's instruction that SLUSA must be interpreted broadly. *Id.* at 312. Such an amorphous inquiry would be particularly misplaced in the kind of threshold inquiry demanded by SLUSA. *Cf. Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (criticizing "[c]omplex jurisdictional tests" that "produce appeals and reversals, encourage gamesmanship, and . . . diminish the likelihood that results and settlements will reflect a claim's legal and factual merits").

Put simply, courts "have no license to draw a line between SLUSA-covered claims that must be dismissed and SLUSA-covered claims that must not be." *Segal*, 581 F.3d at 311.[8] The fact that Respondents' complaints allege at least one material misrepresentation about SLUSA-covered securities was sufficient to trigger preclusion, regardless of whether the complaints also included *other* allegations that did not concern covered securities transactions.

2. SLUSA does not require actual dealing in covered securities.

The Fifth Circuit also mistakenly concluded that its holding was "bolstered" by the fact that the SIB CDs were not themselves covered securities under SLUSA and were not directly "tied to the success" of other covered securities. Pet.App.39.

Once again, that is far too narrow a reading of the "in connection with" requirement. SLUSA's text does not require that the plaintiff actually *invest* in covered securities. And, as this Court recognized in rejecting the argument that "holder" claims should escape SLUSA preclusion, the statute requires only that the misrepresentation coincide with the

[8] The Fifth Circuit actually cited the Sixth Circuit's decision in *Segal* with approval, *see* Pet.App.32-33, but nonetheless proceeded to do what the Sixth Circuit expressly *refused* to do—namely, parse the complaint to determine whether otherwise-covered misrepresentations were too "tangential" to the "gravamen" of the fraud to give rise to preclusion.

purchase or sale of covered securities by "someone." *Dabit*, 547 U.S. at 85-86. Here, that "someone" was SIB, which induced Respondents to purchase CDs through misrepresentations about SIB's purported purchases of covered securities. *See supra* 28-31. The fact that Respondents purchased the CDs, rather than covered securities, is of no moment, especially because the alleged misrepresentations attempted to imbue the CDs with some of the qualities of covered securities, like liquidity and security. Nor does it matter that SIB did not actually purchase the covered securities—that is what makes their statements *mis*representations, but it does not render them any less "in connection with" covered securities.

Applying this Court's holding in *Dabit*, a number of lower courts have correctly recognized that SLUSA does not require actual *dealing* in covered securities as long as the *misrepresentation* is about such securities. As one district court explained, "[i]f a covered class action brought under state law concerns a transaction involving covered securities at all, it is subject to dismissal under SLUSA—even if it also involved non-covered securities or non-securities." *Scala v. Citicorp*, No. 10-3859, 2011 WL 900297, at *4 (N.D. Cal. Mar. 15, 2011). SLUSA turns on "what representations were made in soliciting the [investors'] funds," and it is "inconsequential that some or even all of the securities transactions may never have occurred." *Id.* at *5-*7.[9]

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[9] *See also Grippo v. Perazzo*, 357 F.3d 1218, 1223 (11th Cir. 2004) (finding "in connection with" requirement satisfied even

Courts have reached this same conclusion in cases arising out of the Bernard Madoff Ponzi scheme. The Madoff and Stanford schemes are analytically identical for purposes of SLUSA: in both sets of cases, investors were induced to purchase uncovered securities based on false representations about SLUSA-covered securities. *See* Pet.App.67-68 n.12 ("[b]oth Stanford and Madoff purported to take investors' funds and purchase covered securities for their investors' benefit"). In the Madoff context, the majority of courts have recognized that neither the fact that plaintiffs purchased uncovered securities nor the reality that Madoff never actually purchased the covered securities makes any difference for SLUSA purposes. The misrepresentation about covered securities suffices.

For example, in *In re Beacon Associates Litigation*, the plaintiffs argued that SLUSA did not apply to their claims against a Madoff "feeder fund" because they had merely purchased "LLC interests" that were not covered by SLUSA. 745 F. Supp. 2d 386, 430 (2010). But, as Judge Sand explained, the proper inquiry involves consideration of the *entire fraudulent scheme*, not just the specific allegations

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though "no proof exists that a [covered] security was actually bought or sold"); *U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 844 (9th Cir. 2007) ("Plaintiffs in this case seek to avoid SLUSA dismissal by arguing that they did not purchase or sell any listed security in response to the misrepresentations, and that, therefore, they do not allege fraud in connection with the purchase or sale of a security. This is the very argument that *Dabit* rejected."); *Horattas v. Citigroup Fin. Mkts. Inc.*, 532 F. Supp. 2d 891, 901-03 (W.D. Mich. 2007) (SLUSA applies even if plaintiffs "did not buy or sell any securities").

against the third-party defendant. There was no question that Bernard Madoff had made misrepresentations that he would "purchase and sell [covered] securities," which was sufficient to trigger preclusion under SLUSA even though "the trades never took place." *Id.*[10]

The Fifth Circuit sought to distinguish the Madoff cases on the ground that the Madoff feeder funds were "pass-through vehicles" to invest in covered securities, while the fixed returns on SIB CDs were not *directly* tied to the success of any covered securities. Pet.App.39. But that distinction has no place in a broad statute that must be construed "flexibly, not technically and restrictively." *Zandford*, 535 U.S. at 821. If representations about covered securities were made in an effort to get potential investors to part with their money, then the

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[10] *Accord In re Herald, Primeo & Thelma*, No. 09-289, 2011 WL 5928952, at *5-*8 (S.D.N.Y. Nov. 29, 2011), *on appeal* No.12-156 (2d Cir.); *In re Merkin*, 817 F. Supp. 2d 346, 360-61 (S.D.N.Y. 2011); *In re Kingate Mgmt.*, No. 09-5386, 2011 WL 1362106, at *9 (S.D.N.Y. Mar. 30, 2011), *on appeal* No. 11-1397 (2d Cir.); *Backus v. Conn. Cmty. Bank*, 789 F. Supp. 2d 292, 302-06 (D. Conn. 2011); *Newman v. Family Mgmt.*, 748 F. Supp. 2d 299, 313 (S.D.N.Y. 2010), *on appeal* No. 11-622 (2d Cir.); *Wolf Living Trust v. FM Multi-Strategy Inv. Fund*, No. 09-1540, 2010 WL 4457322, at *3 (S.D.N.Y. Nov. 2, 2010). Two district court decisions held that SLUSA does not apply to claims against third parties arising out of the Madoff fraud. *See Levinson v. PSCC*, No. 09-269, 2010 WL 5477250 (D. Conn. Dec. 29, 2010); *Anwar v. Fairfield Greenwich*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010). The district court in this case found those decisions to be distinguishable on their facts, *see* Pet.App.67-68 n.12, but in all events they appear to suffer from many of the same analytical flaws as the Fifth Circuit's decision.

concerns of SLUSA and the federal securities laws more broadly are fully implicated. Whether the returns are fixed or tied directly to underlying covered securities is an irrelevant detail. It would make no sense to lay down a rule that incentivizes the next generation of Ponzi artists to emulate Stanford rather than Madoff, when the clear message should be that neither "mentor" has provided a model to evade the reach of the federal securities laws.[11]

II. Allowing Respondents' Claims To Proceed Would Undermine Congress' Policy Judgments and This Court's Decisions in *Central Bank* and *Stoneridge*.

Any interpretation of SLUSA and its broad "in connection with" language necessarily must account for SLUSA's overriding purpose of preventing the circumvention of the PLSRA and sensible judicial constructions of the federal securities laws via artificial resort to state law. Congress was plainly aware that its efforts to reform private securities litigation in the federal courts had produced an unprecedented migration of securities claims to state court. Rather than applaud this development as an appropriate allocation of cases between the federal and state court systems, Congress plainly viewed this

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[11] In all events, Respondents allege that they expected *their own money* to be invested in SLUSA-covered securities, which makes this case materially indistinguishable from the Madoff feeder fund cases that have been found precluded. *See* Willis/BMB Complaint ¶ 34 (JA 628) (Respondents were told that "investments in the CDs were liquid and the CDs could be redeemed at any time because SIB, through Stanford Financial, *invested the money* in safe, secure and liquid assets") (emphasis added).

migration as an effort to circumvent the PSLRA and sensible judicial constructions of the federal securities laws. Congress was thus acutely aware of the capacity for enterprising lawyers to plead around its intended reforms and consciously chose the capacious "in connection with" language to limit efforts to plead around SLUSA.

The Court recognized this reality in *Dabit* by giving "in connection with" a broad construction to reflect "the particular concerns that culminated in SLUSA's enactment." 547 U.S. at 86. As the Court explained, "[a] narrow reading of the statute would undercut the effectiveness" of the Act. *Id.* In particular, this Court in *Dabit* avoided the counterintuitive conclusion that a particularly disfavored class of federal securities claims—"holder" claims involving plaintiffs who had neither bought nor sold securities during the relevant period—would escape SLUSA preclusion. Rather than make a SLUSA virtue out of what would otherwise be a vice, this Court recognized that SLUSA was designed to avoid pushing marginal federal securities claims into state courts and that its "in connection with" language was broad enough to capture claims brought by relatively tangential plaintiffs. The same logic is fully applicable to Respondents' avowed effort to avoid federal jurisdiction over claims seeking recovery for a massive Ponzi scheme against tangential defendants.

A. SLUSA Protection Is Especially Important for Third-Party Actors Far Removed from Any Actual Fraud.

This Court has long recognized that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. Securities fraud claims often have "a settlement value to the plaintiff out of any proportion to [their] prospect of success at trial" because "[t]he very pendency of the lawsuit may frustrate or delay normal business activity of the defendant." *Id.* at 740. Such claims impose "a social cost rather than a benefit" to the extent they permit "a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence." *Id.* at 741.

Concerns about vexatious litigation are even more pronounced when the defendants are third-party actors far removed from the actual fraud, such as alleged aiders and abettors. The claims here clearly illustrate the burdens that vexatious securities litigation can impose on third-party defendants. Because the actual perpetrators of the alleged fraud—Allen Stanford and his affiliated corporate entities—are all insolvent or in receivership, Respondents and other plaintiffs targeted deep-pocketed third-party actors with any tangential connection to Stanford or SIB.[12] The complaints here are cases-in-point. Willis and BMB are insurance brokers that dealt with Stanford at arm's-length to help SIB procure ordinary commercial insurance policies unrelated to the CDs and SEI provided a Stanford affiliate with computer technology services. Petitioners did not buy, sell, broker, profit from, or otherwise trade in the SIB CDs. Nor have they been accused of wrongdoing by the SEC, DOJ, or the Stanford Receiver. Even Respondents do not contend that Petitioners had any knowledge at all that Stanford was running a Ponzi scheme.

This Court has consistently refused to extend private liability under the federal securities laws to third-party actors such as Petitioners. As the Court explained, "[s]econdary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." *Central Bank*, 511 U.S. at 188. Securities fraud litigation "requires secondary actors to expend large sums even for pretrial defense and the negotiation of

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[12] An empirical study of securities class actions found that "[p]roviding for a wide range of potential defendants . . . will increase the expected return from litigation and induce more class action lawsuits," and that "[d]eep-pocket defendants such as underwriters and auditors hold the greatest promise of increasing the return for plaintiffs' attorneys." Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 Vand. L. Rev. 1465, 1512 (2004); *see also* Cornerstone Research, *Accounting Class Action Filings and Settlements* 14 (2012) (finding that median case settlement amounts increased by more than 300% when an auditor was named as a defendant), *available at* http://tinyurl.com/boxja7o.

settlements." *Id.* at 189. This "uncertainty and excessive litigation" causes "ripple effects" that fall the hardest on "newer and smaller companies" and professional services firms that may be the targets of third-party securities fraud claims. *Id.*[13]

In *Stoneridge*, for example, the plaintiffs brought a federal securities fraud claim against Motorola and Scientific-Atlanta under the implied private right of action this Court has recognized under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The premise of that claim was that Motorola and Scientific-Atlanta engaged in transactions that allowed *another* company (Charter Communications) to issue misleading financial statements and commit securities fraud. 552 U.S. at 153-54. This Court squarely rejected that attempt to reach third parties, emphasizing that it was unwilling to expose a "new class of defendants" to the "uncertainty and disruption" that inevitably results from lawsuits alleging "weak claims to extort settlements from innocent companies." *Stoneridge*, 552 U.S. at 163-66.

Similarly, in *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296, 2301-05 (2011), the Court held that the phrase "make any untrue statement" in Rule 10b-5 does not extend to a company that provides information that is

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[13] *See also Regents of Univ. of Cal. v. Credit Suisse First Boston*, 482 F.3d 372, 386 (5th Cir. 2007) ("In *Central Bank*, the Court emphasized that securities fraud liability is an area of the law that demands certainty and predictability. Secondary liability brings neither; instead, it gives rise to confusion about the extent of secondary actors' obligations and invites vague and conflicting standards of proof in diverse courts.").

subsequently published by *another* company in a mutual fund prospectus. In reaching that conclusion, the Court emphasized that the contrary rule "would create the broad liability that we rejected in *Stoneridge*." *Id.* at 2304.

Those concerns about the importance of protecting third parties from expansive private securities liability are squarely implicated here. Any federal securities action against Petitioners would clearly run afoul of *Central Bank* and *Stoneridge*. These decisions stand as insuperable obstacles to a federal securities action, and the actions here were avowed, calculated efforts to avoid those decisions. As in *Dabit*, it would make no sense whatsoever for these especially disfavored federal claims to somehow escape SLUSA preclusion. A Rule 10b-5 defect should not be construed as a SLUSA virtue, yet that is precisely what the Fifth Circuit's decision—and its inquiry into whether misrepresentations about covered securities are "tangential"—allows.

When a named defendant is far removed from the actual fraud that caused the plaintiff's loss, the plaintiff must often allege additional facts in order to implicate that third-party actor. Because the Fifth Circuit envisions an ill-defined inquiry into whether the misrepresentation "in connection with" covered securities is central or tangential to the overall allegations in the complaint, there is a real risk, if not a likelihood, that the additional allegations necessary to bring the third party into the case will render the misrepresentation tangential, especially for purposes of the third party's liability. The Fifth Circuit's decision is thus likely to reward plaintiffs who bring claims that are the *least* meritorious in the eyes of federal law—namely, claims targeting deep-pocketed third-party defendants with only some attenuated connection to the underlying fraud.

That result makes no sense. The prohibition on private claims against aiders and abettors is part of the scheme of sensible federal securities regulation that Congress wanted to protect from circumvention by enacting SLUSA. A rule of construction that treats those claims as more likely to escape SLUSA preclusion contravenes that purpose and cannot be squared with this Court's holding in *Dabit*. In that case, the Court rejected the plaintiffs' argument that they were too far removed from a covered securities transaction for SLUSA to apply because they were merely "holders" of securities, rather than purchasers or sellers. There is no reason why claims *against* tangential defendants should fare better than claims *by* tangential plaintiffs.[14]

[14] In addition to the tension with *Stoneridge* and *Central Bank*, Respondents' claims against Willis and BMB also run afoul of *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), because they seek extraterritorial application of U.S. securities laws. The Willis Respondents are Mexican and Venezuelan citizens who purchased CDs from an Antiguan bank. These are precisely the type of "foreign-cubed" claims that do not belong in U.S. court absent express statutory language authorizing such claims. *Cf. Kiobel v. Royal Dutch Petroleum*, -- S. Ct. --, 2013 WL 1628935 (Apr. 17, 2013).

B. Respondents Should Not Be Allowed To Evade SLUSA and the PSLRA Through Artful Pleading.

The express purpose of SLUSA was to prevent plaintiffs from using artful pleading to evade the heightened barriers on private securities fraud litigation that Congress enacted in the PSLRA. Yet Respondents' counsel has boasted of using such pleading tactics here: Respondents brought only "claims under state law" in order to "get around the U.S. Supreme Court's rulings in" *Central Bank* and *Stoneridge*. *See* Triedman, *supra* n.1.

As this Court explained in *Dabit*, a "narrow reading" of SLUSA would "run contrary to SLUSA's stated purpose, viz., 'to prevent certain State private securities class action lawsuits . . . from being used to frustrate the objectives' of the [PSLRA]." 547 U.S. at 86 (quoting § 2(5), 112 Stat. at 3227). In particular, the PSLRA "prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether," and SLUSA was intended to "stem this 'shif[t] from Federal to State courts.'" *Id.* at 82; *see also* S. Rep. No. 105-182, at 8 (1998) ("[I]t remains the Committee's intent that the bill be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition."). The Willis Respondents' counsel has accordingly conceded that "[o]bviously the application of SLUSA will be case dispositive for basically all the class actions, all the investor actions. If SLUSA applies, they'll basically be dismissed." Transcript at 7, *In re Stanford Securities Litig.*, No. 3:09-cv-1274 (N.D. Tex. Apr. 20, 2011).

In light of Congress' intent to combat efforts to evade federal reforms through artful pleading, it would frustrate Congress' purposes to give "in connection with" anything but its full, broad sweep. Congress had witnessed firsthand the ability of enterprising lawyers to evade its efforts to rein in private securities class actions by diverting claims to state court. And Congress likewise understood that plaintiffs would remain "masters of their complaints" and so could plead around SLUSA if its preclusion provision was not written broadly. Given Congress' evident intent to avoid the circumvention of the PSLRA, it would make no sense to artificially narrow the broad language of SLUSA to reward artful pleading. *Cf. Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (refusing to allow plaintiff to use a non-binding stipulation to evade the federal Class Action Fairness Act).

This case is a prime example of the gamesmanship Congress sought to prevent when it enacted SLUSA. If brought under federal law, Respondents' claims against Willis, BMB, and SEI would have been subject to the PSLRA's requirements (such as heightened pleading standards), as well as the limits on private claims against third parties set forth by this Court in *Stoneridge* and *Central Bank.* Respondents thus limited their complaints to Texas and Louisiana state-law claims. There is no need to speculate about their motivation for doing so. The Willis Respondents' counsel boasted to the press that he limited the complaint to "claims under state law" in order to "get around the U.S. Supreme Court's rulings in [*Central Bank*] and [*Stoneridge*], which have been the death knell to federal securities law claims against third party advisors to accused fraudsters." Triedman, *supra* n.1.

There is no reason to think that Congress wanted to reward such artful pleading. Even without the benefit of the legislative context, the specific words Congress chose in SLUSA are broad and encompassing. But once SLUSA is recognized as an anti-circumvention provision, the case for interpreting its broad language to avoid easy circumvention through the artful wording of state-law complaints becomes overwhelming. It is easy enough to pad a complaint with allegations that make a single misrepresentation about covered securities seem "tangential." But it is not easy to attempt to hold relatively tangential defendants like Petitioners liable for the consequences of a massive Ponzi scheme without mentioning a representation about covered securities.

Congress, fresh from the experience of seeing the PSLRA circumnavigated, wisely wrote a broad preclusion provision in which a single misrepresentation "in connection with" a covered security sufficed. The Fifth Circuit's decision refusing to give those terms their plain, broad meaning should not be allowed to stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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May 3, 2013

STATUTORY APPENDIX

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15 U.S.C. § 78bb

Effect on Existing Law

(a) Limitation on judgments

(1) In general

No person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in 1 or more actions, a total amount in excess of the actual damages to that person on account of the act complained of. Except as otherwise specifically provided in this chapter, nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations under this chapter.

(2) Rule of construction

Except as provided in subsection (f), the rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(3) State bucket shop laws

No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate—

(A) any put, call, straddle, option, privilege, or other security subject to this chapter (except any security that has a pari-mutuel payout or otherwise is determined by the Commission, acting by rule, regulation, or order, to be appropriately subject to such laws), or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such security;

(B) any security-based swap between eligible contract participants; or

(C) any security-based swap effected on a national securities exchange registered pursuant to section 78f(b) of this title.

(4) Other State provisions

No provision of State law regarding the offer, sale, or distribution of securities shall apply to any transaction in a security-based swap or a security futures product, except that this paragraph may not be construed as limiting any State antifraud law of general applicability. A security-based swap may not be regulated as an insurance contract under any provision of State law.

(b) Modification of disciplinary procedures

Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

(c) Continuing validity of disciplinary sanctions

The stay, setting aside, or modification pursuant to section 78s(e) of this title of any disciplinary sanction imposed by a self-regulatory organization on a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided*, That such action is not inconsistent with the provisions of this chapter or the rules or regulations thereunder. The rights of any person acting in good faith which arise out of any such action shall not be affected in any way by such stay, setting aside, or modification.

(d) Physical location of facilities of registered clearing agencies or registered transfer agents not to subject changes in beneficial or record ownership of securities to State or local taxes

No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision. No State or political subdivision thereof shall impose any tax on securities which are deposited in or retained by a registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor, unless such securities would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision.

(e) Exchange, broker, and dealer commissions; brokerage and research services

(1) No person using the mails, or any means or instrumentality of interstate commerce, in the exercise of investment discretion with respect to an account shall be deemed to have acted unlawfully or to have breached a fiduciary duty under State or Federal law unless expressly provided to the contrary by a law enacted by the Congress or any State subsequent to June 4, 1975, solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities

with respect to the accounts as to which he exercises investment discretion. This subsection is exclusive and plenary insofar as conduct is covered by the foregoing, unless otherwise expressly provided by contract: *Provided*, *however*, That nothing in this subsection shall be construed to impair or limit the power of the Commission under any other provision of this chapter or otherwise.

(2) A person exercising investment discretion with respect to an account shall make such disclosure of his policies and practices with respect to commissions that will be paid for effecting securities transactions, at such times and in such manner, as the appropriate regulatory agency, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) For purposes of this subsection a person provides brokerage and research services insofar as he—

(A) furnishes advice, either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities;

(B) furnishes analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and the performance of accounts; or

(C) effects securities transactions and performs functions incidental thereto (such as clearance, settlement, and custody) or required in connection therewith by rules of the

Commission or a self-regulatory organization of which such person is a member or person associated with a member or in which such person is a participant.

(4) The provisions of this subsection shall not apply with regard to securities that are security futures products.

(f) Limitations on remedies

(1) Class action limitations

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

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

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

(2) Removal of covered class actions

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

(3) Preservation of certain actions

(A) Actions under State law of State of incorporation

(i) Actions preserved

Notwithstanding paragraph (1) or (2), a

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

(ii) Permissible actions

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

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

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

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

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

(B) State actions

(i) In general

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

(ii) State pension plan defined

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

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

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

(D) Remand of removed actions

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

(4) Preservation of State jurisdiction

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

(5) Definitions

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

(A) Affiliate of the issuer

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

(B) Covered class action

The term “covered class action” means—

(i) any single lawsuit in which—

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

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

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

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

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

(C) Exception for derivative actions

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

(D) Counting of certain class members

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

(E) Covered security

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

(F) Rule of construction

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