

No. 12-86

IN THE
Supreme Court of the United States

WILLIS OF COLORADO INCORPORATED, *et al.*,

Petitioners,

v.

SAMUEL TROICE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*
CAUSEWAY CAPITAL MANAGEMENT LLC
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Causeway Capital Management LLC (“Causeway”) is an investment adviser registered with the SEC under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.* Causeway is independently owned, manages \$17.3 billion in assets (at March 31, 2013), and specializes in managing global, international, emerging market and absolute return equities. Causeway’s clients include corporate, public, and Taft-Hartley pension plans, endowments, foundations, corporations, and mutual funds. The mutual funds managed by *amicus curiae* are investment companies registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* Shares of registered investment companies are “covered securities” within the meaning of the Securities Litigation Uniform Standards Act of 1998, Pub. L. 105-353, 112 Stat. 3227 (“SLUSA”). *See* 15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E).

Amicus curiae has a substantial interest in the issue discussed in this brief because it is relevant to a pending case in which it is a defendant. *Wodka v. Causeway Capital Management LLC, et al.*, BC463623, Superior Court of the State of California, County of Los Angeles.

1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its counsel, or its insurer made a monetary contribution to its preparation or submission. Letters of consent from both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF THE ARGUMENT

SLUSA provides that “[n]o [state law] covered class action . . . 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).

The case comes to this Court on the premise that the complaint at issue pleads a covered state law class action and alleges “a” misrepresentation “in connection with” the purchase or sale of a SLUSA-covered security. Thus, the question is simply how to interpret SLUSA’s command that no such “covered class action . . . may be maintained.” 15 U.S.C. § 78bb(f)(1). The answer seems clear: The term “action” typically refers to an entire case. SLUSA’s prohibition on the maintenance of “covered class actions” thus means that “SLUSA precludes an entire action, as opposed to specific claims, if the complaint contains any covered allegations.” *Atkinson v. Morgan Asset Mgmt., Inc.*, 658 F.3d 549, 555 (6th Cir. 2011).

This straightforward interpretation of the statutory text is fully consistent with *Jones v. Bock*, 549 U.S. 199 (2007). *Jones* held that “action” could be treated as synonymous with “claim” when the term “action” was mere statutory boilerplate. *Id.* at 220-24. That is plainly not the case here: SLUSA contains a detailed and critically important definition of “covered class action.” Further, SLUSA is in part a removal statute, a type of statute where the term “action” ordinarily refers to the entire case. The statutory text also trumps relevant policy considerations, which on balance support the more natural reading of the statute in any event.

ARGUMENT

Once a plaintiff pleads a covered state law class action alleging “a” misrepresentation “in connection with” the purchase or sale of a SLUSA-covered security, SLUSA’s plain language requires dismissal of the “covered class action” in its entirety.²

Throughout its text, SLUSA consistently refers to “actions” rather than to individual “claims.” *See* 15 U.S.C. §§ 78bb(f)(1); 78bb(f)(2); 78bb(f)(5)(C). And “action” is part of the defined term “covered class action” that was carefully crafted by Congress. *See* 15 U.S.C. §§ 78bb(f)(5)(B)(i)-(ii). Thus, when Congress stated emphatically that “[n]o covered class action ... may be maintained,” its intent was clear that the entire case be dismissed. 15 U.S.C. § 78bb(f)(1). *Cf. Tolbert v. Stevenson*, 635 F.3d 646, 650 (4th Cir. 2011) (the “typical meaning” of the term “action” is “an entire case or suit”).

This straightforward reading of SLUSA is dispositive. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (“We reach the uncontroversial conclusion, accepted even by those courts recognizing a § 10(b) aiding and abetting cause of action, that the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation. Unlike those courts, however, we think that conclusion resolves the case.”).

2. “[U]nlike the dismissal of a complaint, which can ordinarily be amended, the dismissal of the entire action ends the litigation ... whether the suit is dismissed with prejudice or without prejudice.” *Am. Nat. Bank and Trust Co. of Chi. v. Equitable Life Assur. Soc’y*, 406 F.3d 867, 874-75 (7th Cir. 2005) (citations and internal quotation marks omitted).

Causeway’s interpretation of the statutory text also comports with this Court’s most recent pronouncements concerning SLUSA. *See, e.g., Kircher v. Putnam Funds Trust*, 547 U.S. 633, 635-38, 644 n.12 (2006) (SLUSA’s purpose is “to preclude certain vexing state-law class **actions**”) (emphasis added); *id.* at 643-44 (describing SLUSA as “preclud[ing]” certain “cases”); *id.* at 644 n.12 (SLUSA “avails a defendant of a federal forum in contemplation . . . **of termination of the proceedings altogether**”) (emphasis added); Thus, “[i]f the **action is precluded**, neither the District Court nor the state court may entertain **it, and the proper course is to dismiss.**” *Id.*, at 644 (emphasis added).

Notwithstanding SLUSA’s plain language, lower court authority is inconsistent. At the appellate level, *Atkinson v. Morgan Asset Mgmt.*, 658 F.3d at 555-56 and *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 535 F.3d 325, 341-42 (5th Cir. 2008), are consistent with Causeway’s view.

But even courts that have rejected the view of SLUSA advocated by the *amicus* have effectively acknowledged that it is the natural reading of the statute. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 47 (2d Cir. 2005) (SLUSA’s language “might be read to suggest that where a single complaint contains claims that include allegations triggering preemption and other claims that do not, SLUSA prohibits maintenance of the entire action”), *rev’d*, 547 U.S. 71 (2006); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 305 (3d Cir. 2005) (SLUSA “does not preempt particular ‘claims’ or ‘counts’ but rather preempts [‘covered class actions’], 15 U.S.C. § 78bb(f)(1), suggesting that if any claims alleged in a

covered class action are preempted, the entire action must be dismissed”). *Accord In re Lord Abbett Mut. Funds Fee Litig.*, 463 F. Supp. 2d 505, 511-13 (D.N.J. 2006) (following *Rowinski* and adopting “entire action” interpretation of the statute), *rev’d*, 553 F.3d 248 (3d Cir. 2009).

Those courts have nonetheless offered three unpersuasive reasons for deviating from the statutory text: (1) a purported inconsistency with *Jones v. Bock*, 549 U.S. 199 (2007); (2) SLUSA’s use of “maintain” rather than “filed”; and (3) policy considerations. None overcomes the plain statutory text.

A. *Jones v. Bock* Is Inapposite

Causeway’s interpretation of the statute is fully consistent with *Jones*. *Jones* interpreted the Prison Litigation Reform Act (“PLRA”). However, *Jones* only

departed from the plain meaning of “action” interpreting a particular PLRA provision, 42 U.S.C. § 1997e(a). And the Court arrived at its conclusion that “action” meant “claim” in that provision only because it found that the specific phrasing of § 1997e(a) – “no action shall be brought” was “boilerplate language” borrowed from statutes of limitations and other similar contexts in which “action” always means “claim.”

Tolbert v. Stevenson, 635 F.3d at 652.

SLUSA differs fundamentally from the PLRA. It contains much more than (in the words of *Jones*) a mere

“statutory reference[] to an ‘action’” that may be regarded as “boilerplate language.” SLUSA’s *centerpiece* is a detailed statutory definition of a “covered class action,” 15 U.S.C. § 78bb(f)(5)(B)(i)-(ii), that encompasses “any *single lawsuit*” or “any *group of lawsuits*” that meets certain criteria. (emphasis added). See *In re Lord Abbett*, 463 F. Supp. 2d at 511-12 (discussing statutory definition). This statutory focus on a single lawsuit or group of lawsuits that meets carefully defined additional criteria belies any suggestion that Congress used the terms “action” and “covered class action” haphazardly. See also 15 U.S.C. § 78bb(f)(2) (providing for removal of covered “action”); 15 U.S.C. § 78bb(f)(5)(C) (excepting from definition of “covered class action” “an *exclusively* derivative action”) (emphasis added). It is patently unreasonable to treat these carefully defined terms as synonymous with “claim.”

Statutory context buttresses this conclusion. SLUSA is, in part, a special removal statute and (in contrast to the statute of limitations context mentioned in *Jones*), “[u]nder removal practice generally, the entire lawsuit is removable or not removable, not merely the claims against particular defendants.” *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007) (internal citations and quotation marks omitted). See also *City of Chi. v. Int’l College of Surgeons*, 522 U.S. 156, 166-67 (1997).

B. SLUSA’s Prohibition Against Maintenance of a Covered Class Action Prevents Efforts to Continue Part of the Litigation

As this Court has explained, “‘maintain’ in reference to a legal action is often read as ‘bring’ or ‘file.’” *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 695

(2003). Thus, “SLUSA prohibits a claimant from *filing* a class action” that meets the statutory criteria. *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 309 (6th Cir. 2009) (emphasis added). And in light of “Congressional intent that SLUSA be interpreted broadly,” *In re Enron Corp.*, 535 F.3d at 341, SLUSA preclusion is not limited to the time of commencement but may “be considered at any time.” *Id.*

Despite this Court’s guidance, the Ninth Circuit has suggested that

By using the word “maintained” rather than “filed,” the language focuses on the content of the action as it goes forward, not as it began, and so does not require that a federal court dismiss an entire action where only some claims are precluded by SLUSA.

Proctor v. Vishay Intertechnology Inc., 584 F.3d 1208, 1227 (9th Cir. 2009). But even if, in keeping with the Ninth Circuit’s view, “maintenance” means no more than “continuation,” in this context the prohibition against the “maint[enance]” of covered class actions, 15 U.S.C. § 78bb(f)(1), unquestionably requires dismissal of such actions. Declaring certain claims preempted but still permitting a plaintiff to continue the action by proceeding with other allegations in the complaint is precisely what the statute forbids. *See, e.g., Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1341 (11th Cir. 2002) (in SLUSA, “Congress . . . requir[ed] the immediate dismissal of ‘covered lawsuits’”); *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927) (“To maintain a suit is to uphold, continue on foot and keep from collapse a

suit already begun.” Maintaining a suit also includes commencing a new suit “at a later day.”).

Accordingly, *In re Enron* rejected the plaintiffs’ argument that it would be “absurd” to apply SLUSA in a way that terminated their claims (individual claims brought exclusively under state law that ordinarily would not trigger SLUSA preclusion) merely because of the particular (coordinated) manner in which the actions had proceeded. 535 F.3d at 341-42. The Fifth Circuit observed that the relevant inquiry was not whether the *Enron* plaintiffs *could* have avoided SLUSA by proceeding in a different manner but “whether they *did* in fact avoid SLUSA.” *Id.* at 342 n.15. Plaintiffs “cho[se] to proceed as a single action” and “must...face the consequences” of their “contribution to SLUSA preemption.” *Id.* at 342. Therefore, the district court was found to have properly dismissed all of plaintiffs’ claims with prejudice. *Id.*

C. Policy Considerations Favor Causeway’s Interpretation and Cannot Trump the Better Reading of the Statutory Text

Finally, the Third Circuit rested its holding in *Lord Abbett* on policy grounds. It believed that construing SLUSA to require dismissal of entire actions would have a “punitive effect” and that it would encourage plaintiffs to bring “two or more actions in order to avoid having all their claims dismissed.” *In re Lord Abbett*, 553 F.3d at 255. The Third Circuit “struggle[d]” to see how Causeway’s interpretation would advance the statutory purposes. *Id.* Based on these policy considerations, the Third Circuit declined to adhere to the plain reading of SLUSA articulated in *Rowinski* because it did not believe it was “compel[led],” *id.* at 255, 256, or “mandate[d],” *id.*

at 256, 257, to do so. The Second and Ninth Circuits have taken similar approaches.

These courts erred by requiring defendants to do more than demonstrate theirs is the more persuasive interpretation of the statutory text. *See, e.g., Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104 (1991) (seldom appropriate for court to impose clear statement requirement); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558 (2005) (“[I]t is just as important not to adopt an artificial construction that is narrower than what the text provides. No sound canon of interpretation requires Congress to speak with extraordinary clarity.”).³

Courts that have required more have seemingly forgotten that “[p]olicy considerations cannot override our interpretation of the text and structure of the Act.” *Central Bank*, 511 U.S. at 188.

The policy analysis exemplified by the *Lord Abbett* opinion also is erroneous on its own terms.

Other courts have answered the Third Circuit’s misplaced concern about SLUSA’s “punitive effect” on class action plaintiffs. Because the “plaintiff is the master of the complaint . . . he must take responsibility for the

3. The Second Circuit invoked a presumption against preemption in support of its artificial narrowing construction of SLUSA. *Dabit*, 395 F.3d at 46-47. But this Court’s opinion reversing the Second Circuit rejected “[a] narrow reading” of SLUSA, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006), and ruled the ordinary presumption against preemption inapplicable given that “SLUSA does not actually preempt any state cause of action.” *Dabit*, 547 U.S. at 87. *See also In re Lord Abbett*, 463 F. Supp. 2d at 14.

allegations included in it. SLUSA may be unforgiving when it applies, but it details in clear language when that is so.” *Segal*, 581 F.3d at 312 (internal quotation marks omitted).

The Third Circuit’s unexplained assertion that plaintiffs can easily circumvent SLUSA by filing multiple actions is immaterial and dubious given that SLUSA’s definition of a “covered class action” encompasses certain groups of lawsuits, *see* 15 U.S.C. §§ 78bb(f)(5)(B), and the fact that there are various procedural devices for consolidating related cases before a single judge. *See, e.g.*, Fed. R. Civ. P. 42(a); 28 U.S.C. § 1404. A plaintiff who splits his causes of action in this manner may also run the risk of claim preclusion. *See, e.g., Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978).

Finally, the Third Circuit erroneously discounted two important policy considerations.

First, the typical SLUSA case is filed in state court and then removed to federal court; allowing plaintiffs to argue that the complaint contains some valid claims or affording plaintiffs multiple opportunities to plead their claims will cause additional delay and therefore contravenes “[t]he policy of Congress” that “opposes interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction.” *Kircher*, 547 U.S. at 640 (citation and internal quotation marks omitted).

Second, securities class actions present “a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.” *Dabit*, 547 U.S. at 80 (citation and internal quotation marks

omitted). Plaintiffs therefore should be deterred from putting defendants to the effort and expense of defending claims triggering SLUSA preclusion. *Cf. Dabit*, 547 U.S. at 82 (Private Securities Litigation Reform Act of 1995 sought to “deter or at least quickly dispose of” disfavored lawsuits). There is no deterrence if plaintiffs are free to simply continue with their lawsuits after a court dismisses individual SLUSA precluded claims.

CONCLUSION

For the foregoing reasons, the *amicus curiae* respectfully submits that the statutory language of SLUSA mandates that, when a complaint contains one or more SLUSA-triggering allegations, the action must be dismissed in its entirety. Accordingly, the *amicus curiae* urges the Court to reverse the judgment below on this basis.

Respectfully submitted,

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