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Nos. 12-79, 12-86 and 12-88

IN THE

Supreme Court of the United States

CHADBOURNE & PARKE LLP,

Petitioner,

and

WILLIS OF COLORADO INCORPORATED,
BOWEN, MICLETTE & BRITT, INC. AND
SEI INVESTMENTS COMPANY,

Petitioners,

and

PROSKAUER ROSE LLP,

Petitioner,

v.

SAMUEL TROICE, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE NABT[1]

The National Association of Bankruptcy Trustees (NABT) is a nonprofit professional association formed in 1982 to address the needs of chapter 7 bankruptcy trustees and promote the effectiveness of the bankruptcy system as a whole. The NABT is committed to improving the administration of bankruptcy by promoting professionalism, education, and the open exchange of ideas among its members and other members in the bankruptcy community. Chapter 7 trustees are fiduciaries charged with administering chapter 7 bankruptcy cases and upholding the integrity of those proceedings. A chapter 7 trustee is appointed as a disinterested person to review the bankruptcy petition in a chapter 7 liquidation proceeding and to schedule and determine whether the debtor has any non-exempt assets available for distribution to creditors. The trustee must be independent and works primarily for the benefit of the debtor's unsecured creditors. The trustee's primary goal is to liquidate assets for the benefit of creditors. In a majority of chapter 7 cases, there are no assets available for liquidation; however, the trustee is responsible for investigating the debtor's affairs, examining the debtor under oath, and submitting reports to the bankruptcy court and the Office of the United States Trustee, a division of the United States Department of Justice. Trustees have a duty to close a bankruptcy estate

1. Undersigned counsel authored this brief pro bono, and no party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the NABT, its members, or its counsel has made any such monetary contribution. All parties have consented to the filing of this brief.

as expeditiously as is compatible with the best interests of the parties. 11 U.S.C. § 704(a)(1).

Trustees are private citizens appointed and supervised by the Office of the United States Trustee to administer bankruptcy cases under chapter 7 of the United States Bankruptcy Code. There are approximately 1,200 chapter 7 trustees who are currently receiving new cases, a majority of which are NABT members. Chapter 7 trustees collectively administer over one million cases annually. Chapter 7 trustees are uniquely qualified to administer assets of the bankruptcy estate. Trustees are independent, dedicated professionals who place their personal assets at risk with each bankruptcy case they administer. They are familiar with the bankruptcy process and have a depth of experience relating to the disposition of estate assets and in recovering those assets for the estate.

Chapter 7 trustees frequently serve as trustees over liquidating or litigation trusts that are formed as part of confirmed chapter 11 plans. Liquidating or litigation trusts are used routinely in chapter 11 cases to facilitate the administration of the bankruptcy estate in the best interest of all parties. The trustee's duties include prosecuting claims that are held by the trust for which the creditors are beneficiaries. The ability of bankruptcy trustees to exercise their duties is an issue of federal importance because litigation trusts are essential to the administration of bankruptcy proceedings and in moving the bankruptcy forward without waiting for resolution of those claims. Claims transferred to bankruptcy litigation trusts can be significant and complex, frequently involving allegations of fraud. This Court's interpretation of SLUSA, therefore, bears directly on a litigation trustee's ability to prosecute such fraud claims.

Respondents are victims of an international Ponzi scheme directed by Allen Stanford and various affiliated entities. Among those entities was Stanford International Bank, Ltd. (SIB). In connection with the scheme, Respondents allege that brokers induced them to invest in certain SIB certificates of deposit based on false promises of above-market returns and misrepresentations that SIB, the bank issuing the CDs, was a secure company invested in safe, liquid investments. Respondents also assert claims against certain lawyers who assisted Stanford in evading regulatory oversight. Contrary to SIB's false representations, SIB had been using new CD sales proceeds to make interest and redemption payments on pre-existing CDs because it did not have sufficient assets, reserves and investments to cover its liabilities. Thus, the CDs were not good investments and did not yield the promised returns. The CDs were also non-covered investments, because they were not nationally traded, nor were they issued by a registered investment company.

These consolidated cases involve questions regarding the scope and application of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, which bars certain state law class actions alleging a misrepresentation in connection with the purchase or sale of a covered security, as defined by the statute. On review is the Fifth Circuit's ruling that SLUSA does not bar these claims because the complaints do not allege misrepresentations in connection with a transaction in covered securities. Consistent with SLUSA's plain language, its purpose, and its unambiguous distinction between covered and non-covered investments, the Fifth Circuit correctly held SLUSA inapplicable because the fraudulently induced transactions did not involve the purchase or sale of covered securities.

The NABT has an interest in the outcome of this case because an overly restrictive application of SLUSA would limit the ability of bankruptcy trustees to exercise their fiduciary duties, particularly in cases where NABT members are serving as liquidating trustees. An expansion of SLUSA would hamper the ability of bankruptcy trustees to prosecute claims.[2] An overly expansive application of securities laws in the context of a Ponzi scheme would also detrimentally affect litigation trusts through section 546(e) defenses under the United States Bankruptcy Code or potentially in the direct assertion of a SLUSA defense. Congress enacted SLUSA to close a loophole in federal law that had invited the filing of meritless strike suits in state court. Its purpose is to make federal court the exclusive venue for most securities fraud class actions concerning the purchase or sale of securities traded on the national exchange or that are from a registered company. SLUSA was not meant to apply to cases concerning fraud in connection with other types of investments. Moreover, it certainly was not intended to apply to cases involving Ponzi schemes where the underlying transactions were not in covered securities. Accordingly, the NABT urges the Court to affirm the Fifth Circuit's decision, which correctly holds these claims do not implicate SLUSA's preclusion provision.

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2. Although NABT believes that actions brought by a bankruptcy trustee, as a fiduciary, are not class actions and therefore not subject to SLUSA's preclusion provisions, *see LaSala v. Bordier et Cie*, 519 F.3d 121, 134 (3d Cir. 2008) (SLUSA not intended to reach liquidating trustee), some courts have applied SLUSA to a trustee's claims, *see LaSala v. UBS*, AG, 510 F.Supp.2d 213, 236 (S.D.N.Y. 2007) (SLUSA applied to liquidating trust with more than 50 beneficiaries). Thus, this Court's ruling is important to bankruptcy trustees because courts in certain jurisdictions have held SLUSA applicable to a trustee's claims.

SUMMARY OF ARGUMENT[3]

Contrary to Petitioners' framing of the question presented, the complaints in these consolidated cases do not allege that a covered security was purchased, sold or held in connection with the fraud. They allege misrepresentations that the non-covered certificates of deposit purchased by the fraud victims were issued by a bank – SIB – that had a well-balanced global portfolio of safe, liquid investments. The victims were also induced by the promise of above-market returns on the CDs. The alleged conduct does not involve the victims' purchase of any covered securities; it involves their purchase of non-covered CDs, which were simple debt instruments redeemable by purchasers. The CDs guaranteed a fixed interest rate that was not tied to the performance of SIB's portfolio. The alleged conduct also does not include any misrepresentation that the CDs themselves were covered securities, or that the victims would otherwise be purchasing covered securities. Thus, the fraud victims did not purchase covered securities, *nor were they told* they were purchasing covered securities.

Instead, victims were falsely assured that the CDs they purchased were issued by a company with a well-balanced portfolio of "highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." J.A. 444 (Proskauer Compl. ¶ 41). Petitioners ask the Court to infer that these statements refer to "covered securities" within SLUSA's definition. First, to arrive at this conclusion

3. NABT adopts and incorporates herein Respondents' Statement of the Case.

requires the Court to impute facts that are not expressly alleged. Second, even assuming the complaints allege misrepresentations as to SIB's own investment in covered securities, the allegations still fail to implicate SLUSA because there is no allegation that any covered securities were actually purchased or sold in connection with SIB's portfolio, and the victims themselves were not induced to purchase any covered securities. *See* Chadbourne Br. 30 (covered securities purportedly referenced by SIB were "non-existent"). Petitioners' proposed application of SLUSA stretches the statute's language beyond its reasonable limits, imputes allegations in the complaints that are simply not there, and undermines the statute's plain distinction between covered and non-covered investments.

Moreover, Petitioners' argument that SLUSA applies because at least one victim probably sold covered securities in order to purchase the bad investments also fails because it is not based on the allegations in the complaints. The alleged misrepresentations were not aimed at defrauding investors of covered securities in their own portfolios. Petitioners' theory is based on the presumption that someone probably sold a covered security in order to fund *his* or *her* investment in the CDs. *See* Proskauer Br. 37-38. Even assuming that were true, the Fifth Circuit correctly held that the connection is too tangential to support applying SLUSA to this action in which the alleged misconduct does not actually target the purchase or sale of covered securities. As noted by the Fifth Circuit, construing SLUSA to depend on the source of funds where the defendant does not target those funds leads to absurd results. Pet. App. 39a n.7. SLUSA does not apply simply because someone may have sold a covered security in order to purchase one of the CDs.

Contrary to SLUSA's plain language and a fair reading of the complaints, Petitioners advance an interpretation of SLUSA that would bar this action based on a potential connection with covered securities that is at best tangential, when the fraudulently induced transaction clearly involved the purchase of non-covered CDs. In so doing, Petitioners' application of SLUSA conflicts with the statute's express language, which limits SLUSA's scope to fraud in connection with covered securities. Such preclusive effect could have far-reaching and unintended consequences, including a disparate impact on claims brought by bankruptcy trustees, which often involve fraud, when trustees already face countless obstacles in exercising their fiduciary duties in connection with the efficient and effective administration of bankruptcy estates. Accordingly, this Court should reject Petitioner's interpretation of SLUSA and affirm the Fifth Circuit's ruling that the complaints do not allege a misrepresentation in connection with the purchase or sale of a covered security.

ARGUMENT

I. PETITIONERS' INTERPRETATION CANNOT BE RECONCILED WITH SLUSA'S PLAIN DISTINCTION BETWEEN COVERED AND NON-COVERED INVESTMENTS

A. The Fifth Circuit Correctly Declined To Extend SLUSA Based On The Absence Of A Sufficient Connection Between The Misrepresentations And A Transaction In Covered Securities

SLUSA's plain language does not support preclusion in this case because the allegations describe a fraudulent

scheme in connection with transactions in non-covered investments. When construing a statute, the Court starts with the statutory text and proceeds from the understanding that unless otherwise defined, statutory terms are interpreted according to their ordinary meaning. *Sebelius v. Cloer*, 133 S.Ct. 1886, 1893 (2013). If the text of a statute is clear and the statutory scheme is coherent and consistent, the Court's inquiry ceases. *Id.* at 1895. The Court generally assumes that the statute's plain language "accurately expresses the legislative purpose." *Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1172 (2013) (citations omitted). However, statutory language must be read in context with a view to its place in the overall statutory scheme. *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 1357 (2012) (citation omitted). Moreover, the Court should give effect to every clause and word of a statute. *Setser v. United States*, 132 S.Ct. 1463, 1471 (2012); *TRW Inc. v. Andrews*, 543 U.S. 19, 31 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant"). Finally, the Court should construe SLUSA in a way that avoids absurd results. *McNeill v. United States*, 131 S.Ct. 2218, 2223 (2011) (citing *United States v. Wilson*, 503 U.S. 329, 334 (1992)).

SLUSA was enacted to prevent securities fraud class actions based on state laws with less stringent pleading requirements than federal law. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006). SLUSA provides that certain state class actions alleging

fraud in connection with the purchase or sale of covered securities are removable to federal court, where they shall be dismissed. 15 U.S.C. § 78bb(f)(1)-(2). SLUSA's 'preclusion provision', which bars such state class actions, provides:

> 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.

15 U.S.C. § 78bb(f)(1). Thus, SLUSA plainly requires that the misrepresentations be made "in connection with" an alleged transaction in *covered securities*. *Id*. SLUSA defines a "covered security" as one that is traded nationally or one that is issued by a registered investment company. 15 U.S.C. § 78bb(f)(5)(E) (citing 15 U.S.C. § 77r(b)); *Dabit*, 547 U.S. 71 at 83.

Plaintiff is master of the complaint. *See Standard Fire Ins. Co. v. Knowles*, 133 S.Ct. 1345, 1350 (2013). A defendant cannot simply recast the complaint as a fraud class action concerning covered securities in order to have it preempted by SLUSA. *Levinson v. PSCC Services, Inc.*, No. 3:09-CV-00269 (PCD), 2010 WL 5477250, at *9 (D. Conn. Dec. 29, 2010) ("Although Plaintiffs cannot escape

SLUSA preemption through artful pleading, it is equally true that a 'defendant may not recast plaintiff's Complaint as a securities fraud class action so as to have it preempted by SLUSA.'") (quoting *Paru v. Mut. Of Am. Life Ins. Co.*, No. 04-civ-6907, 2006 WL 1292828, at *4 (S.D.N.Y. May 11, 2006)). To satisfy the "in connection with" requirement, the fraud must relate to the nature of the securities or the risks associated with their purchase or sale, or have some other similar connection to the securities themselves. *Ambassador Hotel Co. v. Wei-Chuan Investment*, 189 F.3d 1017, 1025-26 (9th Cir. 1999); *Mack University LLC v. Halstead*, 2007 WL 4458615, at *7 (C.D. Cal. 2007).

Here, Petitioners recast plaintiffs' claims to allege fraud involving covered securities in order to have them preempted by SLUSA. However, there is no allegation that defendants made any misrepresentation or used any deceptive device in connection with the purchase or sale of a covered security. The covered securities were in fact "non-existent." Chadbourne Br. 30. Yet Petitioners maintain that alleged misstatements about SIB's own investment portfolio (as opposed to the subject CDs) – misstatements which Petitioners *construe to have implied* to the victims that SIB invested its *own money* in covered securities – support applying SLUSA to this action in which the fraudulently induced transactions were not investments in the bank's portfolio, but rather, the victims' purchases of CDs from the bank. Petitioners' construction is contrary to SLUSA's plain language, which requires the alleged misrepresentation to be in connection with the purchase or sale[4] of a covered security. The

4. A "purchase or sale" includes a decision not to purchase or sell (or, a decision to "hold") a covered security. *Dabit*, 547 U.S. 71.

victims in this case were not induced to purchase covered securities. Thus, the Fifth Circuit correctly ruled SLUSA inapplicable.

Several cases arising out of the Bernie Madoff Ponzi scheme similarly reject Petitioners' strained interpretation of SLUSA. For instance, in *Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372, 397-98 (S.D.N.Y. 2010), the court held that SLUSA did not apply where plaintiffs' investments were in non-covered investment funds that reinvested within Madoff, who then purchased and sold covered securities. The court reasoned:

> Defendants do not argue that the Plaintiffs' investments. . . amount to "covered securities" under SLUSA; they instead contend that the relevant covered securities are those Madoff lied about purchasing. But this argument overlooks the basic facts of this case, which concern misrepresentations and breaches of duties concerning shares purchased in the Funds. . . ***Investments in the Funds simply were not purchases of covered securities***.

Id. at 398 (emphasis added) (citing *Romano v. Kazacos*, 609 F.3d 512, 523 (2d Cir. 2010) ("SLUSA requires attention to both the pleadings and the realities underlying the claims.")). Similarly, here, investments in the CDs "simply were not purchases of covered securities." *Id*. Accordingly, SLUSA does not bar the instant claims.

In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 750 F. Supp. 2d 450, 452-53 (S.D.N.Y. 2010), plaintiffs

alleged that they invested in certain funds based on misrepresentations about the funds' performance and value. *Id.* at 453. The defendants argued for SLUSA preclusion on grounds that a portion of the funds' portfolios purportedly included covered securities. *Id.* at 452-53. The court held that SLUSA did not apply because the allegations concerned the purchase by plaintiffs of uncovered hedge funds, despite that a portion of the assets in those funds included covered securities. *Id.* at 455. The court explained that "determination of whether SLUSA preemption applies turns on a single – and straight forward – question: whether the statements were made in connection with plaintiffs' purchase or sale of covered securities." *Id.* at 452-53. The court found this outcome was "required" because the alleged fraud related to the hedge funds rather than to the covered securities in the portfolios. *Id.* at 455. The court reasoned that a contrary result would stretch the statute beyond its plain meaning because the alleged misrepresentations did not coincide with a securities transaction. *Id.* at 454-55. Similarly, here, the alleged misrepresentations do not coincide with the purchase or sale of covered securities; rather, they coincide with fraudulently induced transactions in non-covered CDs, rendering SLUSA inapplicable.[5]

5. Although other Madoff decisions have applied SLUSA, those cases are distinguishable because in those cases, the plaintiffs intended to invest directly or through one or more investment funds, in covered securities. *See* Pet. App. 37a (feeder funds in the Madoff cases were "nothing but ghost entities – easily pierced" and "those funds essentially 'did not exist and had no assets'"). In other words, plaintiffs deposited money in the funds for the purpose of purchasing covered securities. *Id.*

B. This Court Has Never Extended SLUSA In Analogous Circumstances

Petitioners cite a number of this Court's cases calling for a broad reading of the statute and of section 10(b). However, none of those cases implicate the statute's distinction between covered and non-covered investments because none extend SLUSA based on the remote connection to "covered securities" advanced by Petitioners. *See* U.S. Br. 19 ("the scheme here differs from the paradigmatic SLUSA-precluded case"); *see also* Resp. Br. 32. For instance, in *S.E.C. v. Zandford*, 535 U.S. 813 (2002), the alleged fraud involved a broker selling his customers' covered securities and using them for his own benefit without the customers' knowledge or consent. *Id*. at 815, 820. The defendant "engaged in a scheme to defraud" the plaintiffs by selling what were indisputably covered securities and misappropriating the proceeds. *Id*. at 820-21. The Court ruled that these allegations were "in connection with" the sale of covered securities because each sale of covered securities was made by the defendants to further their fraudulent scheme. *Id*. at 820. Thus, *Zandford* clearly involved the direct sale of covered securities by the defendant broker in furtherance of the fraud. In contrast, the instant case involves the fraudulently induced purchase of non-covered CDs. The defendants did not purchase or sell covered securities in furtherance of the fraud.

Similarly, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), this Court applied SLUSA to a class action brought by holders of covered securities claiming they were fraudulently induced *not* to sell or purchase covered securities. Again, the claims

clearly centered on covered investments. *See Dabit*, 547 U.S. at 83-84 ("Respondent does not dispute that both the class and the *securities at issue in this case* are 'covered' within the meaning of the statute") (emphasis added). The only question was whether the case involved a sale or purchase of covered securities when the fraudulently induced conduct was actually a *lack of* sale or purchase. *Id*. at 87-89. The Court ruled that it did. *Id*. at 88-89 ("The misconduct of which respondent complains here – fraudulent manipulation of stock process – unquestionably qualifies as fraud 'in connection with the purchase or sale' of securities."). By contrast, the fraudulently induced actions in this case involve the purchase of non-covered CDs; the investments 'at issue' are those same CDs.

In *Superintendent of Insurance of State of New York v. Bankers Life & Casualty Company*, 404 U.S. 6 (1971), a seller of treasury bonds was defrauded into believing that it would receive proceeds of the sale, when it in fact did not. The Court held that Rule 10b-5, 17 CFR § 240 applied because the fraud was in connection with the purchase or sale of covered securities. There was no dispute in *Bankers Life* regarding whether covered securities were involved in the fraudulently induced transaction. The question was whether the seller was injured despite the fact that full market value was paid for the bonds. *Bankers Life*, 404 U.S. at 9. The Court ruled there was an injury to the seller because, although the value of the bonds was not affected, the seller itself did not receive the proceeds. *Id*. ("it would be unrealistic to say that a corporation having the capacity to acquire $700,000 worth of assets for its 700,000 shares of stock has suffered no loss if what it gave up was $700,000 but got zero"). Thus, *Bankers Life* also does not assist in resolving the question presented here

because there was no dispute in *Bankers Life* as to the connection between the fraud and the covered securities.

Warf (Holdings) Ltd. v. United International Holdings, Inc., 532 U.S. 588 (2001) held that a company's sale of a stock option with the secret intent from the outset not to honor the option fell under § 10(b) of the Securities Exchange Act and Rule 10b-5. There was no dispute that the option was a covered security, and no dispute that the alleged fraud involved the sale of that option. *See id*. at 592-93. The relevant question was whether the company's secret intent not to honor the option amounted to a misrepresentation or other prohibited conduct. *Id*. at 593-94. The Court held that it did. *Id*. at 594-97. Thus, *Warf* does not inform the question presented because *Warf* did not resolve a dispute as to whether the fraud was in connection with the purchase or sale of a covered security.

Finally, *United States v. O'Hagan*, 521 U.S. 642 (1997) also involved the actual trading of covered securities. The indictment in *O'Hagan* alleged that an attorney defrauded his law firm and its client by misappropriating for his own purposes, material non-public information regarding the client's planned tender offer. *Id*. at 642. The Court held that the fraud was in connection with the sale of covered securities because the fraud was consummated when, without disclosure to his principal, the defendant used the information to purchase or sell securities. *Id*. at 656. Significantly, the Court made clear that the connection would be too tangential to implicate the statute if the person misappropriating funds had put them to other use. *Id*. at 656-57. The Court further elaborated on the limitation on the forms of fraud that § 10(b) reaches, quoting the Government for the proposition that:

> "The misappropriation theory would not. . . apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities.". . . In such a case, the Government states, "the proceeds would have value to the malefactor apart from their use in a securities transaction, and the fraud would be complete as soon as the money was obtained". . . In other words, money can buy, if not anything, then at least may things; its misappropriation may thus be sufficiently detached from a subsequent securities transaction that § 10(b)'s "in connection with" requirement would not be met.

Id. (citing *O'Hagan*, U.S. Br. 24 n.13).

Similarly, here, the theoretical securities transactions that Petitioners ask this Court to accept as grounds for applying SLUSA, to the extent they existed at all, are too detached from the alleged fraud to satisfy the "connection" requirement. Adopting the Ninth and Eleventh Circuits' "in connection with" standard,[6] the Fifth Circuit ruled that a misrepresentation is "in connection with" the purchase or sale of a covered security "if there is a relationship in which the fraud and the stock sale coincide or are more than tangentially related." Pet. App. 32a. The Fifth Circuit reasoned that the standard is consistent with a broad interpretation of SLUSA, and at the same time addresses concerns expressed by this Court that

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6. *See* U.S. Br. 15 n.7 (Fifth Circuit applied the correct standard).

SLUSA's requirements must not be construed so broadly as to encompass every common-law fraud that happens to involve covered securities. *Id.* at 520 (quoting *Zandford*, 535 U.S. at 820). Applying this standard, the Fifth Circuit concluded that the complaints did not principally, if at all, allege fraud in connection with the purchase or sale of a covered security. Any connection with covered securities was at best tangential and thus did not support applying SLUSA in this case. Pet. App. 33a.

II. PETITIONERS' OVERBROAD INTERPRETATION DOES NOT ADVANCE THE STATUTE'S PURPOSE

Petitioners' interpretation of SLUSA would not advance the statute's purpose because it would apply SLUSA to actions concerning non-covered investments simply because of a possible tangential connection to a covered securities transaction. Congress enacted SLUSA "to stem the 'shift from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objections of the PSLRA." *Dabit*, 547 U.S. at 82. Its purpose is to prevent plaintiffs from evading the protections that federal law provides against abusive litigation by filing securities fraud class actions in state, rather than federal, court. H.R. Rep. No. 195-803 at 13 (Oct. 9, 1998) (Conf. Rep.). SLUSA was intended "to protect the interests of shareholders and employees of public companies that are the target of meritless 'strike' suits." H.R. Rep. No. 195-803 at 13. A loophole in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 stat. 737, originally enacted to deter such strike suits, resulted in an increasing number of securities related class actions

that alleged only state law claims. Congress sought to resolve this issue by enacting SLUSA, and making federal court "the exclusive venue for most securities fraud class action litigation involving nationally traded securities." H.R. Rep. No. 195-803 at 13.

Significantly, Congress included in SLUSA express language limiting its application to cases alleging fraud in connection with covered securities. *See* 15 U.S.C. § 78bb(f)(1). This Court has cautioned against overbroad constructions of the "connection" requirement. *Zandford* cautions with respect to section 10(b) that the "in connection with" provision "must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)." *Zandford*, 535 U.S. at 820; *see also Warf*, 532 U.S. at 596 (§ 10(b) should not be read to allow numerous plaintiffs to bring what are in reality ordinary state breach of contract claims as federal securities claims); Resp. Br. 3 (Congress imported the phrase "covered security" to preserve state regulatory authority over fraud involving other securities that were not traded on national markets); *id.* at 12-14 (Congress limited statute to "covered securities" to preserve state-law remedies relating to non-covered assets like the SIB CDs). Extending SLUSA to cases alleging fraud in connection with the purchase or sale of a non-covered investment would improperly marginalize, if not render superfluous, the limitation to covered securities expressed in the statute. However, that is precisely what Petitioners seek to do.

Petitioners' overexpansive interpretation would result in the unintended consequence of barring cases involving fraud as to non-covered investments based on a remote,

potential connection to the purchase or sale of a covered security. Consequently, SLUSA would bar an unwarranted number of suits brought by bankruptcy trustees where they involve fraud in connection with the purchase or sale of covered securities. Essential to bankruptcy proceedings is the ability of bankruptcy trustees to exercise their duties in connection with liquidating or litigation trusts in order to move the bankruptcy forward without having to wait for resolution of those claims – claims which often involve significant and complex allegations of fraud. Petitioners' overbroad interpretation would extend SLUSA to cases, even where the alleged fraud involved a transaction in non-covered investments based, solely upon a possible tangential relation to covered securities. Applying SLUSA based on such a remote connection is contrary to the statute's plain language, which expressly limits its application to fraud in connection with transactions in covered securities.

CONCLUSION

In light of these considerations, the Fifth Circuit correctly ruled SLUSA inapplicable because the connection of the alleged fraud to a transaction in covered securities was too tangential to support application of the statute in this case. Accordingly, this Court should affirm the Fifth Circuit's ruling.

Respectfully submitted,

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