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

IN THE

Supreme Court of the United States

CHADBOURNE & PARKE LLP, *PETITIONER*,
v.
SAMUEL TROICE, ET AL., *RESPONDENTS.*

WILLIS OF COLORADO INC., ET AL., *PETITIONERS*,
v.
SAMUEL TROICE, ET AL., *RESPONDENTS.*

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 OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Occupy the SEC ("OSEC") is an advocacy group within the New York-based Occupy Wall Street movement.[1] OSEC is comprised of financial professionals with decades of collective experience, concerned citizens, and activists. OSEC's mission is to advocate for specific improvements to existing and pending financial services industry legislation and regulation. OSEC has previously filed *amicus curiae* briefs in courts cases that raise significant issues of concern for financial activists, including a case decided by the Court earlier this year, *Gabelli v. SEC*, 133 S. Ct. 1216, 568 U.S. __ (2013).

This case centers on a key provision of the Securities Litigation Uniform Standards Act ("SLUSA"), which places limits on the ability of fraud victims to file class actions based on state law where the alleged fraud is "in connection with" a securities transaction. 15 U.S.C. § 78bb(f)(1). OSEC files this amicus brief to express its support for the Respondents' position and for the holding of the Fifth Circuit in the case below, *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012).

The Petitioners urge this Court to interpret SLUSA's "in connection with" requirement in an overbroad manner that would subsume a swathe of non-securities transactions into SLUSA's preclusive

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[1] The parties have consented to the filing of this brief. Blanket letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court by Petitioners and Respondents. No counsel for a party authored this brief in whole or in part, and no person, other than *amicus curiae* or its members made a monetary contribution to the preparation or submission of this brief.

ambit. This outcome would greatly hamper the ability of fraud victims to seek relief through the courts.

Financial fraud is no small problem. Such fraud, particularly in the area of non-security mortgages, played a pernicious role in bringing about the recent financial crisis of 2008. That crisis destabilized the global economy and jeopardized the financial position of the average person.

OSEC files this amicus to advocate for the interests of current and future fraud victims, whose access to justice would be severely limited if the Court were swayed by the Petitioners' arguments in favor of a broad interpretation of the "in connection with" requirement.

Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by interpreting SLUSA in a way that safeguards the right of fraud victims to file class actions under state law in cases where there is only a tenuous connection to a securities transaction.

SUMMARY OF ARGUMENT

The Court should affirm the Fifth Circuit by holding that SLUSA only precludes fraud class actions brought under state law where the crux of the alleged fraud has more than a tangential connection to a covered securities transaction. Contrary to the assertions of the Petitioners, a plain reading of the statute, 15 U.S.C. § 78bb(f)(1)(A), does not illuminate the actual bounds of

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[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration/.

what constitutes a preclusive "connection." Prior Supreme Court cases analyzing the "in connection with" language have also resulted in conflicting holdings on how it should be interpreted. The decision below adroitly balanced the competing mandates of these decisions by focusing its inquiry on whether the asserted connection between an alleged fraud and a covered securities transaction is a *bona fide* one. The Court should follow this common sense approach.

Numerous policy considerations also weigh in favor of affirmation of *Roland*. First and foremost, the Court should recognize that a broad interpretation of the "in connection with" requirement would severely hamper fraud victims' access to justice by expanding SLUSA preclusion into the realm of non-security transactions. Under the overbroad interpretation championed by the Petitioners, frauds based on non-security transactions like mortgage deals and traditional loans could be swept into SLUSA's purview, on the mere basis of some tenuous connection to a securities transaction. Congress hardly intended to produce such an outcome in passing SLUSA.

Further, the Court should recognize that this overreaching would place undue limits on state sovereignty. Such an outcome would be most troubling because state court claims have been recognized, both by Congress and by this Court, as valuable tools of redress. Indeed, SLUSA was passed to preclude actions firmly tied to simple securities-based transactions, and not the complex, non-security based schemes like the one at issue here.

ARGUMENT

I. THE FIFTH CIRCUIT APPROPRIATELY INTERPRETED SLUSA AND BALANCED CONFLICTING SUPREME COURT PRECEDENT IN DEFINING THE SCOPE OF THE "IN CONNECTION WITH" REQUIREMENT

The statute at question in this case, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), precludes certain fraud claims under state law where those claims are "in connection with" securities transactions. 15 U.S.C. § 78bb(f)(1)(A) ("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 misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security."). The task before the Court is to delineate the contours of the phrase "in connection with." That is, how much of a connection does there have to be between a state fraud claim and a securities transaction for SLUSA preclusion to apply?

A. The "In Connection With" Requirement is Ambiguous

The answer to this question is not as self-evident as the Petitioners suggest. In today's sophisticated financial world, most economic transactions are at least tangentially "connected" to some securities purchases. As a result of steady financial deregulation during the

two decades that preceded the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203, 124 Stat. 1376 (2010), many financial transactions (including fraudulent ones) have become exceedingly complex, such that even the most mundane, localized transaction will involve some downstream securities component.

As noted by the Fifth Circuit below, practically every bank nationwide owns some covered securities in its "treasury" portfolio, and every debt instrument issued by such banks is backed by that portfolio. *See Roland v. Green*, 675 F.3d 503, 518 (5th Cir. 2012). Similarly, the typical retail bank does not store its customers' deposits in a vault. Rather, such deposits are routinely invested in securities of varying maturity. Therefore, there is some "connection," however gossamer, between virtually every bank deposit/loan nationwide and some extant covered securities transaction. Does that mean that *any* class action alleging common law fraud against a deposit-taking or loan-issuing bank is precluded under SLUSA? The Petitioners and their *amici* advocate for this absurd view, perhaps unwittingly. However, the Supreme Court will not construe a statute in a way that leads to absurd outcomes. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-01 (1993).

The Petitioners' briefs attempt to obfuscate the complexity of the issue before the Court by simplistically advocating for a "plain reading" of the "in connection with" requirement. Willis Pet. Br. 22, 25; Chadbourne Pet. Br. 36; Proskauer Pet. Br. 15-16. However, the plain language of the statute is eminently unrevealing as to exactly what constitutes enough of a "connection" for preclusion to take hold. This point is hardly contro-

versial, as the Supreme Court finds itself dealing with the same issue for a second time in the span of seven years. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006). The issue's asserted simplicity is further belied by the litany of circuit court decisions that have wrangled with the difficult question of delimiting the "in connection with" language, each establishing a different benchmark. *See Segal v. Fifth Third Bank, NA*, 581 F.3d 305 (6th Cir. 2009) ("depend on"); *Siepel v. Bank of America, NA*, 526 F.3d 1122 (8th Cir. 2008) ("related to"); *Gavin v. AT & T Corp.*, 464 F.3d 634 (7th Cir. 2006) ("involving," and more than "but for"); *Instituto de Prevision Militar v. Merrill Lynch ("IPM")*, 546 F.3d 1340 (11th Cir. 2008) ("induced by" or "depended upon"); *Madden v. Cowen & Co.*, 576 F.3d 957 (9th Cir. 2009) ("more than tangentially related to"); *Romano v. Kazacos*, 609 F.3d 512 (2d Cir. 2010) ("necessarily allege, necessarily involve, or rest on").

There can be no dispute that the "in connection with" language is ambiguous. The SLUSA statute does not elucidate what constitutes a sufficiently substantial "connection" between a fraud allegation under state law and a covered securities transaction. *See* 15 U.S.C. § 78bb(f)(1)(A). Indeed, this Court has recognized the ambiguity of the very same language in the analogous 10(b) context. *SEC v. Zandford*, 535 U.S. 813, 819 (2002). Under the principle of statutory construction called *in pari materia*, this Court should similarly find the "in connection with" language to be ambiguous for SLUSA preclusion purposes. *See United States v. Freeman*, 3 How. 556, 564 (1845) ("if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an

established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law.").

Courts look to Congressional intent to resolve a statutory provision that is ambiguous. *See, e.g.*, *United States v. Great Northern Ry.*, 287 U.S. 144, 154-55 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."). SLUSA's legislative history reveals that it was intended to apply only to transactions involving national securities. 144 Cong. Rec. 10780 (1998) (statement of Rep. Anna Eshoo) ("This legislation is limited in scope and only affects class action lawsuits involving nationally traded securities.").[3] There is no evidence that Congress desired SLUSA's "in connection with" language to subsume state-law fraud claims with only a speck of a connection to national securities transactions. Indeed, there is legislative evidence to the contrary. *See id.*; *see also* S. Rep. 105-182, at 8 (1998) ("national standards for nationally traded securities must be enacted, while preserving the appropriate enforcement powers of state regulators, and the right of individuals to bring suit.").

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[3] This statement by Representative Eshoo, one of SLUSA's principal sponsors, should be considered especially probative of the legislative intent behind that Act, as the legislative remarks "of the sponsor of the language ultimately enacted[] are an authoritative guide to [a] statute's construction." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982).

B. The Petitioners Have Misconstrued the Fifth Circuit Decision, Prior Caselaw and Congressional History Regarding SLUSA's "In Connection With" Requirement

The Petitioners miscite relevant Supreme Court precedent for the proposition that "in connection with" should be interpreted broadly. *See* Willis Pet. Br. 27; Chadbourne Pet. Br. 16; Proskauer Pet. Br. 17. Specifically, they cite *Dabit*, which held that SLUSA preclusion requires that the alleged fraud "coincide" with a securities transaction, and further held that an overly narrow reading of the statute would undercut the effectiveness of SLUSA and its predecessor, the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *Dabit*, 547 U.S. at 85-86.

However, they fail to give due regard to the tension in the caselaw over the appropriate construction of "in connection with." The Court in *Zandford* stated that identical language in the 10(b) context "must not be construed so broadly as to convert every common-law fraud that happens to involve [covered] securities into a violation of § 10(b)." 535 U.S. at 820. Given the *in pari material* principle cited above, the Court should recognize that there is actually a direct conflict in relevant precedent over the applicable construction of "in connection with." The existence of this conflicting caselaw should cause the Court to question the Petitioners' claim that relevant precedent unequivocally mandates a broad construction. Moreover, as explained here and in the Respondents' brief, the Court should resolve the conflict between *Dabit* and *Zandford* in a manner than reaffirms the Fifth Circuit's decision.

The Court has previously cautioned that "in connection with" must be construed in a manner that is "flexible, not technically and restrictively." *Zandford*, 535 U.S. at 821 (quoting *Supt. of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971)). The Fifth Circuit's standard, which assesses whether a securities transaction is "more than tangentially related" to the heart of an alleged fraud, deftly balances the competing tenets of *Dabit* and *Zandford*, settling upon a practical standard that focuses the inquiry on whether the assertedly preclusive connection to a covered security is substantial or can be disregarded as *de minimis*. This pliable standard allows courts to apply SLUSA preclusion in exactly those circumstances that Congress intended, and stands in stark contrast to the rigid, mechanistic approach propounded by the Petitioners. SLUSA was not passed in order to preclude every private state class action with only a tenuous connection to a securities transaction, and the Fifth Circuit's standard avoids that unwonted result.

The Willis Petitioners argue that the Fifth Circuit effectively rewrote the SLUSA statute by restricting preclusion to complaints that "predominantly" allege misrepresentations in connection with SLUSA-covered securities. Willis Pet. Br. 22. However, this reasoning fallaciously confuses quantity and quality. The number of state law allegations is immaterial under the Fifth Circuit's reasoning. What matters is whether "a" security transaction is sufficiently related to the crux of "a" misrepresentation claim to warrant preclusion. *See Roland*, 675 F.3d at 521.

The number of allegations in a complaint is irrelevant, as SLUSA preclusion applies even if one state-law fraud claim has a *bona fide* link to a securities

transaction. *See id.* Thus, the Petitioners are misguided in suggesting that plaintiffs can evade SLUSA preclusion by simply padding their complaints with non-securities claims. Willis Pet. Br. 35, 46; Chadbourne Pet. Br. 38. Any so-called "padding" of claims would not change a court's analysis under the *Roland* standard and further would not increase the prospect of vexatious securities claims. In fact, if plaintiffs "padded" their state law class actions with superfluous allegations, the inclusion of each additional allegation would marginally *increase* the chance of SLUSA preclusion, as *any* such allegation could potentially be deemed to have a sufficiently substantial connection to a covered securities transaction. Therefore, there should be no concern that the Fifth Circuit's reasoning allows a covered state law class action complaint to escape the application of SLUSA by merely including other allegations that are farther removed from a covered securities transaction.

Petitioners also contend that *Roland*'s "inquiry into whether representations about covered securities were central or peripheral is beside the point." Willis Pet. Br. 35. Under their reasoning, the mere existence of any connection between a state law fraud claim and a securities transaction, *however tenuous*, is enough for preclusion. However, the majority of circuit courts would disagree, having held in different ways that the nature and tenor of the "connection" between an alleged fraud and a potentially preclusive securities transactions is vital -- a strong connection will lead to preclusion, while a weak connection will not. *See Romano*, 609 F.3d at 522 (2d Cir. 2010); *Madden*, 576 F.3d at 965-66 (9th Cir. 2009); *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008); *IPM*, 546 F.3d at 1349

(11th Cir. 2008); *Roland*, 675 F.3d at 521 (5th Cir. 2012). Whether a preclusive "connection" exists is necessarily fact-specific, and the Court should not be persuaded by Petitioners' attempts to fabricate a rigid *per se* standard out of SLUSA's inherently malleable "in connection with" language.

Another argument raised by the Petitioners further manifests that they have misconceived the decision below. They argue that *Roland* stands for the proposition that SLUSA preclusion absolutely requires that a plaintiff's *form of investment* be "in connection with" a covered securities transaction. Willis Pet. Br. 22. However, the *Roland* court did not base its decision on such a requirement. Rather, it focused its inquiry on the link between the misrepresentation claim and the securities transactions implicated in the Stanford scheme. *Roland*, 675 F.3d at 521-22. In assessing that connection, it recognized that the fraud claim's most relevant connection actually was to non-security certificates of deposit. *Id.* *A fortiori*, the asserted connection between the fraud allegation and the downstream securities transactions in the Stanford scheme was relatively weaker. *See id.* The Fifth Circuit found the securities transactions in the scheme to be tangential, such that the fraud allegation and the covered securities transactions were not "in connection with" and did not "coincide" with each other. *Id.* at 523.

Further, the Petitioners' arguments suffer from inconsistencies that undermine their reliability. On the one hand, they make the legal argument that SLUSA preclusion applies if "a" misrepresentation allegation can be massaged in any way to relate to "a" covered security transaction, no matter how flimsy the connection. *See* Willis Pet. Br. 22, 25; Chadbourne Pet. Br. 36;

Proskauer Pet. Br. 15-16. However, their factual arguments do not demonstrate confidence in this standard, as they repeatedly emphasize the centrality of securities transactions to the Ponzi scheme that defrauded the Respondents. Willis Pet. Br. 29-30; Chadbourne Pet. Br. 28-30; Proskauer Pet. Br. 33-35. Their fact-based arguments are premised on the notion that, in order to make a credible preclusion argument, a substantial or *bona fide* connection to a securities transaction has to be established. Thus, these arguments should be seen as an affirmation of the Fifth Circuit's focus on whether a securities transaction has more than a tangential relationship to the heart of an alleged fraud. *See Roland*, 675 F.3d at 521.

The Petitioners also contradict each other in framing the appropriate standard for analysis of the "in connection with" requirement. On the one hand, the Willis Petitioners admit that *Dabit* stood for the proposition that SLUSA "requires only that the misrepresentation coincide with the purchase or sale of covered securities." Willis Pet. Br. 37-38 (citing *Dabit*, 547 U.S. at 85-86). On the other hand, the Proskauer Petitioners claim that *Dabit* did not purport to adopt a "coincide" requirement. Proskauer Pet. Br. 18. This inconsistency has two implications: first, whatever standard was established by *Dabit* is ripe for repeal, as learned counsel remain at odds as to exactly how that case defined the "in connection with" requirement. Second, the Petitioners' exhortations as to the precedential value of *Dabit* must be taken with a grain of salt, as their arguments undermine each other.

II. THE COURT SHOULD NARROWLY INTERPRET "IN CONNECTION WITH" FOR PUBLIC POLICY REASONS

The Supreme Court has expressly endorsed the examination of "policy considerations" in determining the appropriate scope of SLUSA's "in connection with" language. *Dabit*, 547 U.S. at 81. Here, numerous policy considerations militate in favor of a narrow interpretation of the "in connection with" requirement.

A. A Broad Interpretation Will Benefit Fraudsters and Hurt the Defrauded

The Petitioners make the counter-intuitive and illogical claim that a broad interpretation of the "in connection with" language would benefit investors. Willis Pet. Br. 26 ("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 actuality, such an interpretation would have the opposite effect: a broad reading would magnify SLUSA's preclusive effect, thereby limiting venue options for fraud victims.

Investors in national securities have some measure of protection over their investments, as such securities are regulated by the Securities and Exchange Commission ("SEC"). Thus, even if SLUSA limits the ability of defrauded investors in national securities to seek redress through state law class actions, such a result is mitigated by the prospect of SEC oversight and enforcement. However, investors in non-securities (like the certificates of deposit that were central to the Stanford ponzi scheme) may not benefit from robust

SEC oversight.[4] Thus, state law fraud class actions are vital weapons that can safeguard the interests of non-securities investors, whom the SEC does not protect. Unfortunately, a broad interpretation of SLUSA would improperly preclude many non-security transactions, to the considerable detriment of fraud victims.

As explained above, practically any non-securities transaction has at least a tenuous link to a securities transaction. An overbroad interpretation of the "in connection with" requirement would allow SLUSA's preclusive effect to seep into the realm of non-securities, like the Stanford certificates of deposit.

This outcome would create a black hole in regulation, given that the SEC's enforcement authority does not reach unregulated non-securities. Fraudsters would flock to fill this lacuna, emboldened by the fact that the investors they defraud would not be able to find redress through state law class actions or through the SEC. Under the broad interpretation supported by the Petitioners, a con-artist could escape state law scrutiny by simply linking a fraudulent scheme to some distant securities transaction. Congress did not pass SLUSA to facilitate this unjust outcome.

Recent frauds perpetrated by the likes of Enron, Worldcom, Bernie Madoff and Allen Stanford have evinced, in many cases, staggering layers of complexity based on multiple subsidiaries and pass-through entities. Under a broad construction of the "in connection with" requirement, each such layer presents an oppor-

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[4] Indeed, the Stanford International Bank's ("SIB") lawyers are alleged to have misrepresented to the SEC that the agency did not have regulatory authority over the certificates of deposit. *Roland*, 675 F.3d at 523-24.

tunity for a fraudster to escape state law liability. As an obvious matter of policy, defrauders should not be rewarded with class action immunity under state law on the mere basis that they have crafted overwrought schemes. Financial fraud has become a matter of particular concern in the last few years given the catastrophic impact that excesses on Wall Street have had on all participants in the global economy. While recessions are cyclical in nature, fraud played a significant role in propelling the onset and exacerbating the severity of the recent financial crisis. The government has recognized the causative role that financial fraud played in the 2008 financial crisis,[5] which has devastated the economic position of multinational conglomerates and poor individuals alike.

Expanded preclusion under SLUSA would most severely impinge upon the rights of relatively small firms and individuals, the very parties that are most in need of protection under the law. While a defrauded investor could theoretically file an *individual* state law claim despite SLUSA, Norman S. Poser, Broker-Dealer Law And Regulation § 17.2 (2012), this is not a viable alternative for most small parties. Fraud victims with few resources likely cannot afford to file lawsuits without the cost-sharing benefits of large class actions.

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[5] For instance, the Financial Fraud Enforcement Task Force, a government body comprised of twenty federal agencies, ninety-four US Attorneys Offices and state and local partners, states on its website that it was created in November 2009 "to hold accountable those who helped bring about the last financial crisis as well as those who would attempt to take advantage of the efforts at economic recovery." About the Task Force, http://www.stopfraud.gov/about.html (last visited July 23, 2013).

One area of particular concern is the deleterious impact that a broad interpretation of the "in connection with" requirement would have on defrauded mortgagors. Given the proliferation of mortgage-backed securities over the last two decades, one might argue that most mortgages nationwide are actually issued "in connection with" a securities transaction. A broad interpretation of this phrase could have a devastating impact on the capacity of defrauded mortgagors to bring state law-based class actions against their defrauders. The recent financial crisis is testament to the dangers of mortgage fraud, which flourished in an environment of collapsing lending standards and lax regulation. A study by the Financial Crisis Inquiry Commission estimated that the total economic loss attributable to mortgage fraud alone between 2005 and 2007 was $112 billion. The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xxii (2011). The Great Recession, borne largely of acquisitive speculation, mismanagement, negligence and fraud at financial institutions, extinguished nearly 40% of family wealth from 2007 to 2010. Jesse Bricker, *et al.*, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* 17, Federal Reserve Bulletin (June 2012). The inflation-adjusted median household net worth in the country actually regressed back to 1992 levels. *Id.* Should similar levels of mortgage fraud resurface, victims must retain the capacity to file class action suits based on state law claims, especially in light of the fact that mortgage fraud typically has little to do, at heart, with securities transactions.

B. Federalism Principles Require that the Court Reject a Broad Interpretation of the "In Connection With" Requirement in Deference to State Courts

Under Article III of the U.S. Constitution, federal courts are courts of limited jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). State courts retain any powers not specifically delegated to federal courts. *See Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.").

While SLUSA was passed to place certain limits on securities class actions under state law, its preclusive effect is not boundless. The statute is incontrovertibly limited to purchases or sales of covered securities. 15 U.S.C. § 78bb(f). As argued above, the Congressional intent behind SLUSA was to specifically exclude non-securities transactions from preclusion. A broad interpretation of the "in connection with" requirement is a back-door mechanism by which non-securities can be engulfed into SLUSA's scope. If the view propounded by the Petitioners prevails, SLUSA would preclude a state law class action alleging fraud in a non-securities transaction even if the fraud had only an incidental link to a securities transaction. The Court should avoid such an interpretation in recognition of the fine-line that Congress established around covered securities transactions in SLUSA, and in light of principles of federalism and state sovereignty.

C. The Continued Availability of State Court Claims Would Yield Efficient Outcomes

Aside from infringing on state sovereignty, the broad interpretation championed by the Petitioners would also lead to less efficient public outcomes. The Supreme Court has recognized that private lawsuits can be a "most effective weapon" in the enforcement of securities regulations. *JI Case Co. v. Borak*, 377 U.S. 426, 432 (1964). State law actions involving non-securities can benefit the greater public as a valuable secondary source of securities enforcement, as they often provide the SEC with evidence of securities violations that is revealed through the discovery process in such cases.[6] An expansion of SLUSA preclusion by this Court would reduce the number of venues available to fraud victims for pursuit of redress. As a result, the number of private lawsuits seeking justice against fraud would concomitantly be reduced, meaning that a greater number of fraudsters would escape liability. To make matters worse, this outcome would only encourage future deception by malefactors. The Court can avoid this unsalutary outcome by affirming the Fifth Circuit's balanced interpretation of the "in connection with" requirement.

The Court should also safeguard the availability of state law claims because of the increasing burden that

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[6] This secondary source of evidence can be invaluable to the SEC, which has seen its budget remain relatively static despite a burgeoning regulatory mandate under the Dodd-Frank Act. *See* James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. Times, July 15, 2011, *available at* http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html.

has been imposed on federal courts. Since 2003, the federal caseload in district courts has increased by 11 percent. United States Courts, *Judicial Caseload Indicators* (March 2012), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statis-tics/FederalJudicialCaseloadStatistics/2012/front/March12Indicators.pdf. Expanding the scope of the "in connection with" requirement would only exacerbate the considerable strain that federal dockets already experience. In contrast, allowing state courts to entertain fraud class actions having only tangential relationships to securities transactions might actually reduce the federal judiciary's caseload, and would certainly promote judicial efficiency, as ideally state courts should be the ones to adjudicate state law claims.

D. SLUSA and PSLRA's Antagonism to Vexatious Third Party Litigation Was Not Directed to Complex Non-Security Based Schemes

While the Petitioners and their *amici* correctly note that SLUSA and the PSLRA were designed to limit "vexatious" private securities litigation, they incorrectly apply that presumption to the facts at hand. *See* Willis Pet. Br. 5; Breazeale, Sachse & Wilson Am. Br. 5, 8.

This Court has examined the legislative history of PSLRA and SLUSA to find that these statutes were designed to preclude fraud class actions against third parties, because such third party actions could, *inter alia*, endanger the whole economy. *Dabit*, 547 U.S. at 81 (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf.

Rep.)). As noted by the Breazeale *amicus curiae*, the fraudulent scheme perpetrated by Charles Keating in the 1980's was "the paradigmatic case" that Congress had in mind in passing PSLRA and SLUSA. Breazeale Am. Br. 3, 6 (citing, *e.g.*, 141 Cong. Rec. S9208 (daily ed. June 28, 1995)). That is, Congress intended these statutes to preclude class action suits against third-party lawyers, auditors, and others associated with frauds similar to the Keating scheme. *Id.*

Keating's deception was to straight-forwardly sell securities and bonds while obscuring the underlying business's health through other actions. *See In re American Continental Lincoln S&L Sec. Lit.*, 794 F. Supp. 1424, 1432-33 (D. Ariz. 1992); *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 907-08 (D.D.C. 1990). The fraudulent transactions perpetrated by SIB, however, were markedly more complex than those underlying the Keating S&L scandal. The fraud in this case, for instance, revolves not around statements and actions in support of a single securities fraud scheme but rather a pattern of statements in support of the sale of a complex financial instrument with "multiple layers of separation between the CDs and any security purchased. " *Roland*, 675 F.3d at 522 (5th Cir. 2012) (internal citation omitted). The CDs' complexity obscured their true value and basis. *See id.* at 508-511, 521-23.

Admittedly, not all fraudulent schemes involve complex layers that limit investor transparency towards the heart of the transaction. However, where fraudsters do sell complex and opaque instruments, third parties such as the Willis insurers and outside auditors often perform a central role in abetting that fraud, by issuing misstatements that deceptively wangle inves-

tor confidence. *Roland*, 675 F.3d at 521-22. SLUSA's antagonism to third party litigation was not intended to excuse such culpable conduct.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondents and hold that the Fifth Circuit correctly construed the "in connection with" language found in 15 U.S.C. § 78bb(f).

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Respectfully submitted,

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