**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.

WILLIS OF COLORADO INCORPORATED, ET AL., PETITIONERS

*v.*

SAMUEL TROICE, ET AL.

PROSKAUER ROSE LLP, PETITIONER

*v.*

SAMUEL TROICE, ET AL.

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

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS**


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## QUESTION PRESENTED

The Securities Litigation Uniform Standards Act of 1998 (SLUSA) precludes most state-law class actions in which the plaintiffs allege misrepresentations "in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(A). The term "covered security" encompasses, *inter alia*, securities listed on a regulated national exchange. See 15 U.S.C. 77r(b) (2006 & Supp. V 2011), as amended by Pub. L. No. 112-106, §§ 305(a), 401(b), 126 Stat. 322, 325; 15 U.S.C. 78bb(f)(5)(E). The question presented is as follows:

Whether SLUSA precludes a class action alleging that plaintiffs purchased uncovered securities in reliance on misrepresentations that those securities were backed by investments in covered securities.

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# In the Supreme Court of the United States

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## INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal

securities laws. These consolidated cases involve the construction of the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, which precludes certain class actions that are based on state law and "alleg[e] * * * 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); see 15 U.S.C. 77p(b). In *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71 (2006), this Court held that the relevant language in SLUSA was borrowed from, and should be interpreted consistently with, similar language in Section 10(b) of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.[1] Accordingly, the United States has a substantial interest in the resolution of the question presented. At the Court's invitation, the United States filed a brief at the petition stage of these cases.

## STATEMENT

1. Section 10(b) of the 1934 Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. 78j(b). The SEC adopted Rule 10b-5 to implement Section 10(b). Rule 10b-5 declares it unlawful, "in connection with the purchase or sale of any security," to "employ any device, scheme, or

[1] "SLUSA amends the [Securities Act of 1933] and the [1934 Act] in substantially identical ways." *Dabit*, 547 U.S. at 82 n.6. Citations to SLUSA in this brief are generally to 15 U.S.C. 78bb(f), which amended the 1934 Act.

artifice to defraud"; to "make any untrue statement of a material fact or * * * omit to state a material fact necessary in order to make the statements made * * * not misleading"; or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5.

The Commission may bring a civil enforcement action against "any person" who has "violated any provision of [the 1934 Act]" or "the rules or regulations thereunder." 15 U.S.C. 78u(d)(3)(A); see 15 U.S.C. 78u(d)(1). The United States may bring criminal prosecutions for willful violations. 15 U.S.C. 78ff(a). Section 10(b) also has been construed to afford an implied right of action to private parties, although this Court has placed various limitations on such private lawsuits. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) (holding that private actions may not be brought for aiding and abetting); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 725, 754-755 (1975) (holding that private actions may be brought only by purchasers or sellers of securities).

Prompted by concern that the salutary purposes of private securities litigation were being "undermined by * * * abusive and meritless suits," H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995) (1995 House Conf. Rep.), Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. The PSLRA established numerous reforms—including heightened pleading standards, an automatic stay of discovery, and a safe harbor for forward-looking statements—that apply to securities-fraud actions brought under federal law. See 15 U.S.C. 78u-4(b) (2006 & Supp. V 2011); 15 U.S.C. 78u-5.

After the PSLRA was enacted, however, Congress observed a sharp increase in the number of securities-related class actions that alleged only state-law claims. In response to that development, Congress enacted SLUSA. The statute reflects Congress's view that the growing prevalence of state-law securities-fraud class actions had "prevented [the PSLRA] from fully achieving its objectives" of "prevent[ing] abuses in private securities fraud lawsuits." SLUSA § 2(1)-(3), 112 Stat. 3227; see *Dabit*, 547 U.S. at 82. Congress therefore found it "appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators." SLUSA § 2(5), 112 Stat. 3227.

To that end, Congress directed 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" either "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" or "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)(A) and (B); see 15 U.S.C. 77p(b).[2] The term "covered class

[2] SLUSA includes several exceptions to preclusion, none of which is at issue here. See 15 U.S.C. 78bb(f)(3) (exempting from preclusion a "covered class action * * * based upon the statutory or common law of the State in which the issuer is incorporated * * * or organized"; an action brought by a "class comprised solely of * * * States, political subdivisions, or State pension plans"; and an otherwise "covered class action" if it "seeks to enforce a contractual agreement between an issuer and an indenture trustee"); see also 15 U.S.C. 78bb(f)(4) (providing that the "securities commission (or any agency or office

action" includes a suit in which damages are sought on behalf of more than 50 people. 15 U.S.C. 78bb(f)(5)(B)(ii). The term "covered security" includes a security that was listed on a regulated United States national exchange and traded nationally "at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred." 15 U.S.C. 78bb(f)(5)(E); see 15 U.S.C. 77r(b) (2006 & Supp. V 2011), as amended by Pub. L. No. 112-106, §§ 305(a), 401(b), 126 Stat. 322, 325.

SLUSA's "preclusion provision" does not bar state-law claims entirely. *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006). Rather, it makes certain "claims nonactionable through the class-action device in federal as well as state court." *Ibid.* If a suit that falls within the scope of the preclusion provision is brought in state court, the action is "removable to the Federal district court for the district in which the action is pending," 15 U.S.C. 78bb(f)(2), where it is subject to dismissal.

2. a. This case arises from a multi-billion-dollar Ponzi scheme run by Allen Stanford and various entities that he controlled. Among those entities was Stanford International Bank (SIB), which was chartered in Antigua. SIB issued fixed-return certificates of deposit (CDs) that it falsely claimed were backed by safe, liquid investments. See Pet. App. 6a-7a, 37a.[3] In fact, the claimed investments did not exist, and "SIB had to use new CD sales proceeds to make interest and redemption

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performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions").

[3] All citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 12-79.

payments on pre-existing CDs." *Id.* at 6a (quoting *Janvey* v. *Alguire*, 647 F.3d 585, 590 (5th Cir. 2011)).[4]

Multiple suits alleging violations of state law were filed after the fraud was discovered. Two groups of Louisiana investors filed suits in state court in Baton Rouge against a number of Stanford-related companies, employees, and others (the SEI Defendants), alleging violations of Louisiana law. Pet. App. 7a. A different group of investors brought separate class actions in federal court against SIB's insurance brokers (the Willis Defendants) and SIB's lawyers (the Proskauer Defendants, which include petitioners Proskauer Rose LLP and Chadbourne & Parke LLP), alleging violations of Texas law. *Id.* at 9a-10a.

All of the complaints allege that, in luring the plaintiffs to purchase its CDs, SIB represented that the CDs were safe and secure because SIB invested the money it received "in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks." Pet. App. 8a; see *id.* at 9a; see also J.A. 433, 444, 458, 480, 628. The complaints also allege that (1) persons making "marketing pitches to prospective investors" were trained to stress the "liquidity/marketability of SIB's invested assets" as the "most important factor to provide security to SIB clients," J.A. 444-445 (Proskauer Defendants); see J.A. 249, 253-254, 341, 345, 675 (SEI Defendants and Willis Defendants); (2) that plaintiffs "purchased participation interests in

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[4] The SEC brought an action alleging fraud with respect to the CDs (which are "securities" within the meaning of Section 10(b), though not "covered securities" within the meaning of SLUSA), and the United States prosecuted Stanford for fraud, conspiracy, and obstruction of justice. See Pet. App. 6a-7a.

* * * SIB's investment portfolio, just like any mutual or hedge fund," J.A. 442-443 (Proskauer Defendants); and (3) that plaintiffs "would not have purchased the SIB CDs" if they had "been aware of the truth" that SIB's "portfolio consisted primarily of illiquid investments or no investments at all," Pet. App. 12a-13a (SEI Defendants); see J.A. 480, 715 (alleging that statement that the "money was being invested in safe, liquid investments that were completely insured" was a "material misstatement") (Proskauer Defendants and Willis Defendants). The complaints additionally allege that SIB made a number of other misrepresentations about the security of the CDs, including that SIB was closely regulated, staffed by experienced professionals, and insured by Lloyd's of London. Pet. App. 8a-9a, 37a.

The SEI Defendants removed the Louisiana cases to federal court, and all of the actions were ultimately transferred to the Northern District of Texas. The district court dismissed the complaints as precluded under SLUSA. The court held that the CDs themselves are not "covered securities," see Pet. App. 60a-61a, but that the plaintiffs had nevertheless alleged misrepresentations "made in connection with transactions in covered securities," *id.* at 63a.[5]

The district court based that holding on two grounds. First, the court focused on SIB's alleged false representation that it invested its assets in "highly marketable securities issued by stable governments, strong multinational companies and major international banks." Pet. App. 64a. Noting "the prevalence of multinational com-

[5] The district court's opinion analyzes whether SLUSA precludes the Louisiana actions. The court later issued separate orders dismissing the other suits for the reasons set forth in that opinion. See Pet. App. 8a, 10a, 13a.

panies on national stock exchanges," *id.* at 65a n.11, the court found that SIB had "led the Plaintiffs to believe that the SIB CDs were backed, at least in part, by SIB's investments in SLUSA-covered securities," *id.* at 64a-65a. The court concluded that preclusion is required when plaintiffs "premise[] their claims on * * * 'fraud that induced [the plaintiffs] to invest.'" *Id.* at 64a (quoting *Instituto de Prevision Militar* v. *Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) (alterations and omissions in original). Second, the court held that "[p]laintiffs' allegations * * * reasonably imply" that some investors had sold covered securities in order to obtain the money to purchase CDs. *Id.* at 67a. In the court's view, "SLUSA preclusion applies even if only a single plaintiff sold a single SLUSA-covered security" to finance such an "acquisition." *Id.* at 69a.

b. The court of appeals reversed. Pet. App. 1a-41a. The court stated that "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." *Id.* at 32a (quoting *Madden* v. *Cowen & Co.*, 576 F.3d 957, 965-966 (9th Cir. 2009)) (emphasis omitted). Relying in part on "policy considerations," *id.* at 26a-29a, the court concluded that neither of the grounds for preclusion invoked by the district court satisfied that standard.

First, the court of appeals deemed the "references to SIB's portfolio being backed by 'covered securities' to be merely tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendants' fraud." Pet. App. 36a; see *id.* at 37a. In the court's view, the alleged misrepresentation about the nature of SIB's investments was only one of a "host of (mis)representations" that were intended to induce investors to purchase the CDs. See *id.* at 35a-36a

& n.3. The court also observed that, because the CDs promised a fixed rate of return, they were not "tied to the success of any of SIB's purported investments" in covered securities. *Id.* at 37a; see *ibid.* (stating that respondents did not allege that "they deposited their money in the bank for the purpose of purchasing covered securities") (internal quotation marks and citation omitted).

Second, the court of appeals held that there was an insufficient "connection between the fraud and [the] sales" of covered securities that certain investors had undertaken to raise money to buy CDs. Pet. App. 39a. The court concluded that "[c]onstruing SLUSA to depend on the source of funds where the defendant does not care leads to absurd results," permitting different preclusion outcomes in cases involving virtually identical claims. *Id.* at 39a n.7.[6]

**SUMMARY OF ARGUMENT**

A. Under SLUSA, a state-law covered class action is precluded if the plaintiffs allege a material misrepresentation "in connection with the purchase or sale of a covered security." Congress imported that language from Section 10(b) of the 1934 Act, and this Court has consistently given the parallel Section 10(b) language a broad construction. The paradigmatic "connection" between a misrepresentation and a securities transaction exists when a wrongdoer misrepresents facts about

[6] The court of appeals also separately analyzed the allegations that the Proskauer Defendants had made misrepresentations to the Commission that it lacked authority to investigate the Stanford entities. Pet. App. 40a-41a. The court concluded that those statements did not trigger SLUSA preclusion because they were "not more than tangentially related to the purchase or sale of covered securities." *Id.* at 41a.

a security in order to induce others to purchase or sell that security. This Court has made clear, however, that a broad range of other "connection[s]" to a securities transaction may be sufficient to trigger either Section 10(b) or SLUSA.

That broad reading is essential to the achievement of Congress's purposes in enacting both Section 10(b) and SLUSA. Under Section 10(b), it enhances the SEC's ability to protect the securities markets against a variety of different forms of fraud. Under SLUSA, it furthers Congress's objective of preventing the use of state-law class actions to circumvent the restrictions imposed by the PSLRA and by this Court's decisions constraining private securities-fraud suits.

B. To induce potential investors to purchase its CDs, SIB falsely represented that its assets were invested in the types of securities that are typically listed on a regulated national exchange. Under SLUSA, those false statements were "misrepresentation[s] * * * of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(A). Indeed, the "connection" between the misrepresentations and the purported securities trades was particularly close because the misrepresentations were made *about* the trades. The misrepresentations thus "touch[ed]" and "coincide[d]" with the purported trades within the meaning of this Court's precedents.

The fact that the purported securities transactions did not actually occur does not render SLUSA inapplicable. In formal adjudications, the SEC has construed Section 10(b)'s "in connection with" requirement to encompass fraudulent schemes in which a wrongdoer falsely claims to have purchased or sold securities, or falsely states his intent to do so. A contrary approach

would produce anomalous results since, *inter alia*, it would immunize from Section 10(b) liability a particularly extreme form of deception. And, to the extent the statutory language is ambiguous, the reasonable view taken by the SEC in formal adjudications is entitled to judicial deference.

C. The court of appeals did not appear to dispute that, if the false statements concerning SIB's investments in covered securities were the *only* misrepresentations alleged in this case, respondents' complaints would be precluded by SLUSA. The court nevertheless held that the suits could go forward because, in the court's view, those misrepresentations were tangential to the overall fraud alleged in this case. Nothing in SLUSA's text supports that approach. Rather, Section 78bb(f)(1)(A) unambiguously encompasses all state-law covered class actions in which the plaintiff alleges a material misrepresentation having the requisite connection to a transaction in covered securities.

The court of appeals' approach would also disserve the purposes of both SLUSA itself and the antifraud provisions (Section 10(b) and Rule 10b-5) from which SLUSA's "in connection with" requirement is drawn. In the SLUSA context, that approach would increase the complexity of the preclusion analysis and would encourage plaintiffs to make wide-ranging allegations of non-securities-related misrepresentations simply to avoid preclusion. In the Section 10(b) context, it would create a loophole that could be exploited by unscrupulous actors, thereby impairing the SEC's ability to protect the securities markets.

Even if preclusion under Section 78bb(f)(1)(A) depended on the centrality of particular misrepresentations to an overall fraudulent scheme, respondents' suits

would be precluded. Respondents' own complaints stressed that the supposed liquidity of SIB's investments was crucial to respondents' perception that the CDs were a sound investment. And while the complaints also alleged other misrepresentations that reasonable investors would have viewed as relevant, only the securities-related misrepresentations purported to explain *how* SIB could deliver the promised above-market returns.

## ARGUMENT

### A. In SLUSA, As In Section 10(b), The Phrase "In Connection With" Should Be Given A Broad Construction

1. SLUSA precludes state-law covered class actions alleging a "misrepresentation or omission of a material fact," or the use of a "manipulative or deceptive device or contrivance," "in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(A) and (B). In *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71 (2006), this Court explained that the phrase "in connection with the purchase or sale of any security" appears in Section 10(b) and Rule 10b-5 and has received a settled judicial construction in that context. See *id.* at 85-86. Accordingly, the Court in *Dabit* gave the SLUSA language at issue in this case the same "broad interpretation" that this Court has long accorded "to the phrase in the context of § 10(b) and Rule 10b-5." *Id.* at 85.

Under Section 10(b) and Rule 10b-5, this Court has construed the phrase "not technically and restrictively, but flexibly," *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (quoting *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972)), to prohibit "*all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type

variety of fraud, or present a unique form of deception." *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 10-12 & n.7 (1971) (quoting *A.T. Brod & Co.* v. *Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)); see, *e.g.*, 3C Harold S. Bloomenthal & Samuel Wolff, *Securities and Federal Corporate Law* § 16:198.50 (West 2013). The Court has held that a misrepresentation or deceptive device is "in connection with the purchase or sale" of a security so long as it "touch[es]" a securities transaction. *Bankers Life*, 404 U.S. at 12-13; see *Dabit*, 547 U.S. at 80; *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 475-476 (1977). For example, "it is enough" under this Court's precedents (albeit not a requirement) that the alleged misrepresentation or deceptive device "'coincide' with a securities transaction." *Dabit*, 547 U.S. at 85; see *Zandford*, 535 U.S. at 822; *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 597 (2001); *United States* v. *O'Hagan*, 521 U.S. 642, 656 (1997); see also *Alley* v. *Miramon*, 614 F.2d 1372, 1378 n.11 (5th Cir. 1980) (Wisdom, J.) (stating that a connection exists "when the proscribed conduct and the sale [or purchase] are part of the same fraudulent scheme").

Such a broad interpretation is necessary to effectuate the purposes of both Section 10(b) and SLUSA. With respect to Section 10(b), Congress intended the phrase "in connection with" to sweep widely enough to ensure the achievement of "a high standard of business ethics in the securities industry" and the successful substitution of "a philosophy of full disclosure for the philosophy of *caveat emptor*." *Zandford*, 535 U.S. at 819 (quoting *Affiliated Ute Citizens*, 406 U.S. at 151); see *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382, 386-387 (1983) (describing Section 10(b) as "a 'catchall' antifraud provision"); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185,

202 (1976) (describing Section 10(b) as reaching all "cunning devices" related to securities transactions) (quoting *Stock Exchange Regulation: Hearing on H.R. 7852 and H.R. 8720 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934) (statement of Thomas Corcoran)). With respect to SLUSA, a narrow reading of "in connection with" would "run contrary to SLUSA's stated purpose." *Dabit*, 547 U.S. at 86. Congress intended SLUSA "'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]." *Ibid.* (quoting SLUSA § 2(5)). If plaintiffs could readily escape from the PSLRA's strictures by bringing securities-related class actions under state law, then the "effectiveness of the 1995 Reform Act" would be "undercut." *Ibid.*

2. In construing the phrase "in connection with" in these contexts, this Court has not attempted to construct an elaborate test, or to enumerate all the potential "connection[s]" that might exist between deceptive conduct and the purchase or sale of securities. Cf. *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1318-1319 (2011) (stating that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive") (citation omitted); *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 465 (1969) (characterizing the securities laws as "an area where glib generalizations and unthinking abstractions are major occupational hazards"). The most obvious "connection" exists when a defendant misrepresents facts about a security in order to induce purchases or sales of that security. See Pet. App. 60a; cf. *Dabit*, 547 U.S. at 89. The Court has made clear,

however, that a variety of different kinds of connections, extending well beyond that paradigm, fall within Congress's broad and flexible language.[7]

First, a plaintiff need not be a party to a covered securities transaction in order for SLUSA preclusion to apply. The plaintiffs in *Dabit* had not bought or sold covered securities as a result of misrepresentations made during the relevant period, but had continued to hold such securities "long beyond the point when, had the truth been known, they would have sold." *Dabit*, 547 U.S. at 75. The Court nevertheless found the suit to be precluded, explaining that "[u]nder our precedents, it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone

[7] Attempts by the courts of appeals to restate the "in connection with" language in a way that is more restrictive than this Court's reference to "touch[ing]" are generally tailored to the facts of a particular case and do not encompass the whole range of possible connections under Section 78bb(f). See, *e.g.*, *Romano* v. *Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010) (explaining that requiring deception to have "induced" a transaction is "more exacting" than simply requiring "coincide[nce]"). Of the different formulations used by the courts of appeals, however, the standard adopted by the Fifth and Ninth Circuits—*i.e.*, whether the alleged material misrepresentation (or the alleged use of a manipulative or deceptive device) and a covered securities transaction "coincide or are more than tangentially related," Pet. App. 32a (emphasis omitted)—is the most apt. Although the court below misapplied that standard to the facts of this case, see pp. 24-31, *infra*, the standard itself appropriately covers a broad range of connections, including those in which "coincide[nce]" may not be present. See U.S. Pet. Stage Br. 9-10. That inclusive understanding of the relevant statutory language best serves the purposes of both SLUSA and Section 10(b). Accordingly, if this Court finds it advisable to provide additional guidance in light of the varying formulations used by different courts of appeals, see Pet. App. 29a-32a, it should endorse the standard previously adopted by the Fifth and Ninth Circuits.

else. * * * The requisite showing, in other words, is 'deception "in connection with the purchase or sale of any security," not deception of an identifiable purchaser or seller.'" *Id.* at 85 (quoting *O'Hagan*, 521 U.S. at 651, 658); see *id.* at 89 (stating that "the identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities").

Second, a material misrepresentation or use of a deceptive device may be "in connection with the purchase or sale of [a] security" even though the parties to the relevant securities transaction have not been deceived. In *O'Hagan*, the defendant fiduciary (a lawyer) committed fraud when he secretly misappropriated confidential information from his principal and used it to engage in securities trading with third parties. See 521 U.S. at 648. The Court found that misconduct to be "in connection" with the securities transactions "even though the person or entity defrauded [wa]s not the other party to the trade, but [wa]s, instead, the source of the nonpublic information." *Id.* at 656; see *Dabit*, 547 U.S. at 89; *Zandford*, 535 U.S. at 824; cf. *United States* v. *Naftalin*, 441 U.S. 768, 772-773 & n.4 (1979) (rejecting the contention that Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1)—which prohibits any device, scheme, or artifice to defraud "in the offer or sale of any securities"—requires that the deception be practiced on a party to a securities trade).

Third, the "in connection with" standard may be satisfied even when the misrepresentation in question neither addresses nor affects the value of a security. See *Zandford*, 535 U.S. at 820 ("[N]either the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to

run afoul of the Act."). Thus, in *O'Hagan*, the misrepresentation was the fiduciary's false profession of his intent to honor his duty of loyalty to his principal. See 521 U.S. at 653-654. In *Bankers Life*, the misrepresentation was that the seller of the securities would receive the sales proceeds, when insiders actually intended to misappropriate those proceeds for their own use. See 404 U.S. at 9-10.

To be sure, the phrase "in connection with" does not have unlimited breadth. This Court has explained, for instance, that the language "must not be construed so broadly as to convert any common-law fraud that happens to involve securities into a violation of § 10(b)." *Zandford*, 535 U.S. at 820; see *O'Hagan*, 521 U.S. at 656-657.[8] The Court has made clear, however, that a wide variety of "connection[s]" between the defendant's misconduct and the relevant securities transaction can trigger Section 10(b), Rule 10b-5, and SLUSA preclusion. That inclusive reading is essential to ensure, *inter alia*, that the federal securities laws can serve their intended functions even with respect to novel forms of fraud.

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[8] Section 10(b) and Rule 10b-5 also do not apply when a plaintiff alleges mere breach of fiduciary duty or breach of contract. See *Zandford*, 535 U.S. at 820 (indicating that Section 10(b) does not cover "a case in which a thief simply invested the proceeds of a [nondeceptive] conversion in the stock market"); *Wharf Holdings*, 532 U.S. at 596-597 (indicating that Section 10(b) does not cover a mere "fail[ure]" to carry out a promise to sell securities"); *Bankers Life*, 404 U.S. at 12 (indicating that Section 10(b) does not cover acts that amount to "no more than internal corporate mismanagement"); see also *Santa Fe*, 430 U.S. at 474-475.

### B. Respondents' Complaints Allege Material Misrepresentations In Connection With The Purchase Or Sale Of Covered Securities

1. a. The overarching fraudulent scheme in this case depended on continued CD purchases over time so that new infusions of money could be used to pay earlier investors. See Pet. App. 6a. Respondents have alleged misrepresentations to the effect that "SIB's assets were 'invested in a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks.'" *Id.* at 8a; see J.A. 744-745. Because securities having those characteristics "typically qualify as SLUSA-covered securities," Pet. App. 72a; see *id.* at 65a n.11, those alleged false statements are properly treated, for purposes of SLUSA preclusion, as representations that SIB was investing the proceeds of CD sales in securities listed on a regulated national exchange.

Those misrepresentations—which were doubtless intended to convince the respondents that investments in the CDs were as secure and liquid as investments in securities publicly traded on U.S. exchanges—were directly linked to the purchase or sale of covered securities. See generally *Dabit*, 547 U.S. at 77-78; *Zandford*, 535 U.S. at 819-825; *O'Hagan*, 521 U.S. at 656; *Bankers Life*, 404 U.S. at 10-13. 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. And a misrepresentation about whether a transaction took place at all (or will take place in the future) has a particularly tight—indeed, inherent—connection to "the purchase or sale." Nothing is more fundamental to a purchase or sale than its very existence.

To be sure, the scheme alleged here differs from the paradigmatic SLUSA-precluded case, because the misrepresentations about SIB's investments were not used to induce respondents to become parties to any covered securities transaction. But neither the text of SLUSA nor the prior Section 10(b) jurisprudence that Congress sought to incorporate requires that this *particular* "connection" with a covered securities transaction exist in order for SLUSA preclusion to be triggered. As in *Dabit*, *Zandford*, *O'Hagan*, and *Bankers Life*, the misrepresentations here "touch[ed]" and "coincide[d]" with covered securities transactions, and the requisite connection therefore exists.

b. The misrepresentations alleged in respondents' complaints were "of a material fact." 15 U.S.C. 78bb(f)(1)(A). A misrepresentation is material if there is a "substantial likelihood that the disclosure" would have "significantly altered the 'total mix' of information made available." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-232 (1988) (citation omitted); see *Matrixx*, 131 S. Ct. at 1321-1323; *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976) (concluding in the proxy-solicitation context that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote"). The misrepresentations about SIB's investments would have been significant to reasonable CD purchasers because those misrepresentations bore on the safety and liquidity of the CDs and the likelihood that SIB could deliver the promised returns. Indeed, respondents specifically alleged that the promise that "money was being invested in safe, liquid investments that were completely insured" was a "material misstatement be-

cause the money was not invested in safe, liquid and fully insured investments." J.A. 480; see J.A. 715.

2. Respondents have argued that there can be no "misrepresentation * * * in connection with the purchase or sale" of covered securities if no actual transaction involving those securities ever took place. *E.g.*, Supp. Br. for Troice Resp. 2-3. That is incorrect.[9] See Pet. App. 61a-63a. In keeping with this Court's statements that securities-related "offerings [should] be judged as being what they were represented to be," *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943); see *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211 n.15 (1967); *SEC* v. *Lauer*, 52 F.3d 667, 670-671 (7th Cir. 1995), lower courts have recognized that the "in connection with" requirement can be satisfied when a party falsely promises to carry out a securities purchase or sale or falsely claims to have done so. See, *e.g.*, *Instituto De Prevision Militar* v. *Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) (citing *Grippo* v. *Perazzo*, 357 F.3d 1218, 1223-1224 (11th Cir. 2004)); *In re Herald, Primeo & Thema Sec. Litig.*, No. 09-289, 2011 WL 5928952, at *6, *8 (S.D.N.Y. Nov. 29, 2011); *Barron* v. *Igolnikov*, 2010 WL 882890, at *4-*5 (S.D.N.Y. Mar. 10, 2010) ("It is not essential that Madoff actually performed any trades or acquired any securities."); see also 1 *McLaughlin on Class Actions: Practice and Procedure* § 2:44, at 332 (9th ed. 2012).

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[9] Respondents' complaints do not clearly allege whether SIB failed to engage in any transactions at all involving "highly marketable securities issued by stable governments, strong multinational companies and major international banks," Pet. App. 64a, or whether it merely engaged in significantly fewer of them than it had represented it would. See, *e.g.*, J.A. 444-445, 462-463. Respondents' suits are precluded under either reading of their complaints.

The SEC has taken the same position in formal adjudications. In *In re Orlando Joseph Jett*, Admin. Pro. File No. 3-8919, 2004 WL 2809317 (Mar. 5, 2004), for example, a trader told his employer that he had engaged in profitable securities trades that did not actually occur. See *id.* at *22. The SEC determined that the trader's fraud "coincided with 'purchases or sales,'" *id.* at *21, because, *inter alia*, he had "portray[ed] activities as securities purchases and sales that, in fact, are no such thing," and had thereby deceived his employer "into believing that his reported trading profits derived from real securities trading," *id.* at *22. The SEC further explained that "the connection between the purported securities trades and the fraud could not be more direct because the fraud goes to the very question of whether any purchase or sale even existed." *Ibid.*

In *In re Richard J. Line*, Admin. Pro. File No. 3-9134, 1996 WL 582948 (Sept. 30, 1996), a broker solicited transfers of money from parents of college-bound students to reduce the parents' holdings and increase their eligibility for financial aid. See *id.* at *1. He promised that he would invest the transferred money in stocks and mutual funds and later return the money to the parents "together with interest calculated at above-market rates." *Id.* at *2. Instead, the broker "misappropriated" the money "to pay for personal expenses." *Ibid.* The SEC found violations of Section 10(b) and Rule 10b-5 even though the broker's claimed securities transactions had never actually occurred. See *ibid.*; see also *In re D.S. Waddy & Co.*, Release No. 34-4322, 1949 WL 35528, at *2 (Oct. 6, 1949).[10]

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[10] "A contract to purchase or sell securities is expressly defined by § 3(a) of the 1934 Act, 15 U.S.C. § 78c(a), as a purchase or sale of securities for the purposes of that Act," even when (due to one party's

Here, respondents' complaints are fairly read to allege that SIB falsely promised to buy covered securities using the money it received from respondents and other investors (and falsely claimed it had already made such purchases with past investors' money). The misrepresentations were thus "in connection with" purported transactions in covered securities. The fact that SIB is alleged not to have made the purchases and sales it claimed does not sever that connection. Cf. *Zandford*, 535 U.S. at 819 (noting that the SEC has long "maintained that a broker who accepts payment for securities that he never intends to deliver * * * violates § 10(b) and Rule 10b-5"); *Naftalin*, 441 U.S. at 770-771, 773 n.4; see also generally *Durland* v. *United States*, 161 U.S. 306 (1896); 3 Restatement (Second) of Torts § 530 cmt. c, 64-65 (1977).

A contrary interpretation of the statutory language would produce anomalous results. It would protect the most egregious forms of fraud, involving the most extensive deception, from the reach of the preclusion provision (as well as from the reach of Section 10(b)). A

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breach of the agreement) no securities ultimately change hands. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 750-751 (1975) (footnote omitted). Thus, when a customer provides money to a broker for use in buying securities, and the broker promises to do so but instead diverts the funds to another use, an *actual* "purchase * * * of securities" (as the 1934 Act defines that term) has occurred. Section 10(b) would apply in that situation even if it did not cover misrepresentations about *non-existent* purchases or sales. The SEC adjudications described in the text, however, did not involve that fact pattern, and the SEC did not suggest that either case turned on the existence of a "contract to purchase or sell securities." See 15 U.S.C. 78c(a). Rather, the SEC concluded in both cases that fraud "in connection with the purchase or sale of [a] security" occurs when a wrongdoer falsely represents that he has consummated (or intends to consummate) such a transaction.

wrongdoer who regularly purchased and sold covered securities, but who claimed that his trading activities were more successful than they actually were, would clearly make a "misrepresentation * * * in connection with the purchase or sale of a covered security." 15 U.S.C. 78bb(f)(1)(A). Because a misrepresentation about the very existence of a transaction is simply a more extreme version of that kind of lie, there is no sound reason to conclude (for purposes either of SLUSA or of Section 10(b) and Rule 10b-5) that it lacks the requisite "connection" with a purchase or sale. Cf. *Bankers Life*, 404 U.S. at 10-11 n.7 (stating that the phrase "in connection with" extends to schemes that "present a unique form of deception," since "[n]ovel or atypical methods should not provide immunity from the securities laws") (quoting *A.T. Brod*, 375 F.2d at 397); *Dabit*, 547 U.S. at 86 ("It would be odd, to say the least, if SLUSA exempted [a] particularly troublesome subset of class actions from its pre-emptive sweep.").

To the extent that the statutory language is ambiguous, the SEC's view should be afforded deference. The SEC has reasonably determined, including in the formal adjudications described above, that a false statement about the existence of a securities transaction is a misrepresentation "in connection with" the purchase or sale of securities for purposes of Section 10(b) and Rule 10b-5. See 15 U.S.C. 78j(b); *Zandford*, 535 U.S. at 819-820 (explaining that the SEC's "interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference if it is reasonable"); see also *Matrixx*, 131 S. Ct. at 1321-1322 n.10. Because the phrase "in connection with" has the same meaning in SLUSA as in those antifraud provisions, the SEC's reasonable interpretation is controlling here.

### C. The Court Of Appeals Erred In Allowing Respondents' Suits To Go Forward Based On The Court's Determination That Misrepresentations About Transactions In Covered Securities Were Tangential To The Overall Fraudulent Scheme

1. The court of appeals described the alleged statement that "SIB's portfolio of assets was invested in 'highly marketable securities issued by stable governments, strong multinational companies and major international banks'" as "one of" the "(mis)representations * * * made to the [respondents] in an attempt to lure them into buying the worthless CDs." Pet. App. 35a-36a. The court did not appear to dispute that, if that had been the *only* misrepresentation alleged in respondents' complaints, respondents' suits would be precluded by SLUSA. The court discounted the significance of that misrepresentation, however, on the ground that it was "merely tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendants' fraud," which included a "host of" other misrepresentations about the safety and security of an investment in the CDs. *Id.* at 35a-37a (footnotes omitted). The court thus viewed SLUSA preclusion as turning on the centrality to the overall Ponzi scheme of the alleged misrepresentations about transactions in covered securities.

That limitation is inconsistent with the text of the SLUSA provision on which petitioners have relied. Section 78bb(f)(1)(A) precludes state-law class actions that allege "*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) (emphasis added). That provision applies by its terms so long as the relevant misrepresentation concerns a "material fact" and bears the requisite "connection" to a transac-

tion in covered securities.[11] If Congress had intended SLUSA preclusion to turn on the link between covered securities transactions and the overall fraudulent scheme, it might have drafted the provision to refer to a "scheme to defraud in connection with the purchase or sale of a covered security."[12] See *Naftalin*, 441 U.S. at 773 ("Congress did not write the statute that way").

The approach taken by the court of appeals, which turns on the perceived relationship between the defendant's alleged misrepresentations and the "heart, crux, or gravamen" of the fraud, Pet. App. 36a (internal quotation marks and footnotes omitted), would further contravene the language of the statute by shifting the focus of SLUSA preclusion away from the allegations of the complaint. See 15 U.S.C. 78bb(f)(1) (limiting class actions "by any private party *alleging*" particular bad acts) (emphasis added). To be sure, some effort to fore-

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[11] Under Section 10(b) and Rule 10b-5, "[t]he role of the materiality requirement is * * * to filter out essentially useless information." *Basic Inc.*, 485 U.S. at 234-235; see *TSC Indus., Inc.*, 426 U.S. at 449. Congress's inclusion of a materiality requirement in Section 78bb(f)(1)(A) ensures that SLUSA preclusion will not sweep in every state-law class action that includes a stray allegation of a misrepresentation connected with a covered securities transaction.

[12] Indeed, the next subsection of SLUSA separately precludes state-law covered class actions alleging "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)(B). In addition, Congress tailored the scope of SLUSA preclusion by crafting several exceptions to the general preclusion rule. See note 2, *supra*. The express inclusion of those exceptions confirms that Congress did not intend any others. See *Dabit*, 547 U.S. at 87-88 (explaining that the existence of the exceptions "evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions"); cf. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

cast the manner in which the plaintiff's case will ultimately be proved may be useful as a way to counter artful pleading—that is, to capture a complaint in which a plaintiff tries to escape SLUSA preclusion by avoiding reference to misrepresentations or deceptive devices connected with covered securities transactions, while asserting a claim that could not be proved without evidence of such misrepresentation or deception. See, *e.g.*, *Freeman Invs., L.P.* v. *Pacific Life Ins. Co.*, 704 F.3d 1110, 1115 (9th Cir. 2013); *Backus* v. *Connecticut Cmty. Bank, N.A.*, 2009 WL 5184360, at *10-*11 (D. Conn. Dec. 23, 2009), cited in Pet App. 36a n.6; see also *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6 (2003); cf. *Bankers Life*, 404 U.S. at 12-13. But there is no justification for disregarding an allegation that is actually *in* the complaint and that falls within the scope of the preclusion provision. Under Section 78bb(f)(1)(A), the focus of the preclusion analysis must remain on the allegations themselves. Here, respondents alleged material misrepresentations having the requisite connection with the purchase or sale of covered securities.

2. The court of appeals' approach to the "in connection with" requirement also disserves the purposes of both SLUSA and the antifraud provisions (Section 10(b) and Rule 10b-5) from which that language is drawn. Attempting to identify the heart or crux of an alleged fraud will often be a difficult and subjective task. In enacting SLUSA, Congress sought to head off precluded actions at their inception, before defendants are forced to expend significant resources on suits that would otherwise have to satisfy the heightened pleading standards and other restrictions of the PSLRA, or be subject to dismissal as "abusive and meritless," 1995 House Conf. Rep. 31; see SLUSA § 2(1)-(3), 112 Stat. 3227; 15

U.S.C. 78bb(f)(2) (allowing for removal of suits covered by Section 78bb(f)(1)).

A preclusion test that requires courts to intuit the theme or main idea of the complaint, or to assess the relative importance of securities-related and other misrepresentations to the overall fraudulent scheme, would undermine that congressional purpose. Such a test could give rise to lengthy and expensive litigation over the application of Section 78bb(f), particularly in cases involving wide-ranging fraudulent schemes. And because the test is so subjective (and untethered from the language of the statute), it would increase the likelihood of inconsistent outcomes in cases involving similar allegations. Cf., *e.g.*, *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 552 (1994) (rejecting judge-made test requiring "highly subjective determinations" that "would be bound to lead to haphazard results").

The court of appeals' approach would also invite plaintiffs seeking to avoid SLUSA preclusion to surround allegations of material misrepresentations "in connection with" covered securities transactions with allegations of other kinds of misrepresentations. That, too, would undermine the purpose of SLUSA—a statute that was enacted to prevent end-runs around the requirements of the PSLRA, see *Dabit*, 547 U.S. at 82—by increasing the complexity and cost of this type of litigation and by limiting the effect of the broad language that Congress borrowed from Section 10(b), see *id.* at 86; *Zandford*, 535 U.S. at 819; see also H.R. Conf. Rep. No. 803, 105th Cong., 2d Sess. 14 (1998) (1998 House Conf. Rep.) (stating that "increase in state activity has the potential not only to undermine the intent of the Act, but to increase the overall cost of litigation") (citation omitted).

The temptation to bury a preclusion-triggering allegation in this way would be particularly great where, as here, the defendants in the suit are service providers who are alleged to have aided and abetted a securities fraud. Such providers are not subject to a private action under the federal securities laws. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). But under an approach to SLUSA preclusion that discounts a misrepresentation about a covered securities transaction if the complaint alleges enough other kinds of misrepresentations, class-action plaintiffs would have a powerful reason to allege that the providers took a variety of misleading actions. See *id.* at 189 (discussing "danger of vexatiousness" in private suits against secondary actors, including "increased costs" passed onto "client companies" and "the company's investors"); 1998 House Conf. Rep. 14-15.

Finally, because the language of SLUSA is so similar to (and is drawn from) the language of Section 10(b) and Rule 10b-5, the court of appeals' approach could ultimately impair the SEC's authority to enforce the securities laws. If SLUSA's "in connection with" requirement depends on whether an alleged misrepresentation about the existence of a covered securities transaction is central to the defendant's overall fraudulent scheme, the same centrality element presumably would be required by the antifraud provisions that the SEC enforces. Thus, a similar misrepresentation could escape antifraud coverage on the ground that it was not central to a fraud having a significantly broader purpose or focus. Such a rule has no grounding in this Court's Section 10(b) precedents or in the administrative decisions of the SEC, and it would create a loophole that might be exploited by unscrupulous actors, thereby undermining

"the fundamental purpose of the 1934 Act 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*.'" *Santa Fe*, 430 U.S. at 477 (citation omitted); see *Dabit*, 547 U.S. at 78 (explaining that "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated").

In contrast, there is no force to any of the "policy considerations" on which the court of appeals relied in deciding that it was necessary to identify the "heart" of the fraud. Pet. App. 26a.[13] The court of appeals expressed concern that applying SLUSA according to its plain text would unduly interfere with the "vital role of state law in regulating non-national securities." Pet. App. 28a. But "the evident purpose of [SLUSA] is to limit the availability of remedies under state law," *Dabit*, 547 U.S. at 88 n.13, and Congress defined the set of class actions that it intended to preclude by reference to a pre-existing statutory phrase that this Court has broadly construed.

In any event, SLUSA "does not actually pre-empt any state cause of action" (since it applies only to class actions or actions brought on behalf of 50 or more plaintiffs), and it contains tailored exceptions that "evince[] congressional sensitivity to state prerogatives in this

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[13] The court of appeals stated that this Court has "reli[ed] on 'policy considerations' in its determination of the scope of the 'in connection with' language in Section 10(b)." Pet. App. 26a (quoting *Blue Chip Stamps*, 421 U.S. at 737). That is incorrect. The Court in *Blue Chip Stamps* relied on "policy considerations" not to construe the phrase "in connection with" in Section 10(b), but rather to determine the scope of the judicially created private right of action. See *Dabit*, 547 U.S. at 84. That distinction is crucial, since the "in connection with" requirement applies to SEC enforcement actions as well as to private suits.

field." *Dabit*, 547 U.S. at 87. Moreover, the text of SLUSA contains sufficient limits to allay any concern that SLUSA will block every "group claim" against an issuer that "advertises that it owns [covered securities] in its portfolio." Pet. App. 29a. Unless such a case involves a material misrepresentation (or the use of a manipulative or deceptive device or contrivance) in connection with transactions in those covered securities, SLUSA preclusion will not be an issue.

3. Even if SLUSA preclusion depended on the centrality to the overall fraud of a defendant's securities-related misrepresentations, that requirement would be satisfied in this case. Although respondents did not allege that Stanford and SIB sought to induce investors to purchase covered securities, their misrepresentations about their own holdings were crucial to the Ponzi scheme. The court of appeals reached the opposite conclusion only because it underestimated the role the statements about SIB's investment portfolio played in the fraud on the CDs' purchasers.

The "crux" of the fraud, Pet. App. 36a, was to convince investors that the CDs were safe, liquid investments that would deliver high returns. The representation that the CDs would be backed by "a well-diversified portfolio of highly marketable securities issued by stable national governments, strong multinational companies, and major international banks," Pet. App. 8a, was integral to the success of that tactic. There was no other apparent source of the funds necessary to make the CDs function "[l]ike well-performing equities," *id.* at 11a, and to allow the investors to realize the financial benefits they had been promised. See *id.* at 12a (noting allegation by certain respondents that they "would not have purchased the SIB CDs" if they had "been aware of the

truth" that SIB's "portfolio consisted primarily of illiquid investments or no investments at all"); J.A. 444-445 (alleging that persons making "marketing pitches to prospective investors" were trained to stress the "liquidity/marketability of SIB's invested assets" as the "most important factor to provide security to SIB clients"). Accordingly, the misrepresentations concerning SIB's purported transactions in covered securities were central to the fraudulent scheme.

Contrary to the court of appeals' suggestion (Pet. App. 35a-37a), the importance of those statements was not diminished by the existence of the various other misrepresentations (*e.g.*, that SIB was scrutinized by government auditors, that it employed a professional staff, and that the CDs were protected by insurance, see, *e.g.*, *id.* at 8a-9a, 37a) that SIB allegedly used to convince investors that the CDs were a sound purchase. Those other misrepresentations could certainly have been relevant to a prospective purchaser. But only the assertions about covered securities would have answered investors' questions about *how* SIB could 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. And many of the other misrepresentations to which the court of appeals referred seem to have been designed to bolster the lie about the backing securities, suggesting to investors that trained staff operating under knowledgeable supervision were successfully carrying out trades in "highly marketable securities" to ensure the bank's financial health. See *id.* at 8a, 37a.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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