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

IN THE

Supreme Court of the United States

CHADBOURNE & PARKE LLP,
Petitioner,

v.

SAMUEL TROICE, *et al.*,
Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF BREAZEALE, SACHSE & WILSON, LLP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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August 22, 2012

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Breazeale, Sachse & Wilson, LLP ("BSW") hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* supporting the Petitions for a Writ of Certiorari in this case. Timely notice under Rule 37.1(a) of the intent to file this brief was provided to Petitioners and Respondents. Petitioners and Respondents Samuel Troice et al. have consented to the filing of this brief. Respondents James Roland et al. and Leah Farr et al. have declined to consent on the ground that they believe "the Supreme Court has no jurisdiction to hear this appeal . . . based upon *Kircher v. Putnam Funds Trust*, 545 U.S. 633 (2006)."

BSW, a law firm in Louisiana, is a defendant in a securities class action lawsuit under Texas state law currently pending in the U.S. District Court for the Northern District of Texas. That lawsuit centers on allegations that BSW aided and abetted and conspired with a Ponzi scheme perpetrated by R. Allen Stanford through numerous corporate entities. BSW allegedly provided legal services to certain of these entities, and one of its partners, Claude F. Reynaud, Jr., allegedly also served as a director for one of these entities.

The Fifth Circuit decision that is the subject of the Petitions before this Court, *Roland v. Green*, 675 F.3d 502 (2012), also addresses allegations arising out of the Stanford Ponzi scheme. The holding of that decision relates directly to the issues raised in the lawsuit against BSW. As a result of the Fifth Circuit's decision, BSW has been unable to obtain dismissal of its lawsuit. Accordingly, BSW has a direct and

immediate interest in the outcome of the pending Petitions for a Writ of Certiorari.

BSW believes that the attached brief sheds additional light on the issues presented in the Petitions for a Writ of Certiorari. In view of its interest in and unique perspective on these issues, BSW respectfully requests that the Court grant it leave to participate as *amicus curiae* by filing the accompanying brief in support of the Petitions for a Writ of Certiorari.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Breazeale, Sachse & Wilson, LLP is among the oldest and largest law firms in Louisiana. It is a defendant in a securities class action lawsuit under Texas state law currently pending in the U.S. District Court for the Northern District of Texas. The plaintiffs in that lawsuit allege that *amicus* aided and abetted and conspired with a Ponzi scheme perpetrated by R. Allen Stanford through numerous corporate entities. *Amicus* allegedly provided legal services to certain of these entities, and one of its partners, defendant Claude F. Reynaud, Jr., allegedly also served as a director for one of them.

Under the Securities Litigation Uniform Standards Act (SLUSA), plaintiffs cannot pursue a class action under state law in any state or federal court if they 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). As a result of the Fifth Circuit's ruling in *Roland v. Green*, 675 F.3d 502 (5th Cir. 2012)—another case arising out of the Stanford Ponzi scheme—*amicus* has been unable to obtain dismissal of its lawsuit under SLUSA. Accordingly, *amicus* has a direct and immediate interest in the outcome of the pending Petitions for a Writ of Certiorari.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus*, its counsel or its members made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents Samuel Troice et al. have consented to the filing of this brief, but Respondents' counsel for James Roland et al. and Leah Farr et al. has withheld consent. Consequently, *amicus* has filed a motion for leave to file this brief. Counsel of record provided the required notice to the parties at least ten days before the filing deadline for this brief.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision in *Roland v. Green* substantially undermines the protections Congress has provided securities class action defendants, particularly parties such as *amicus* who are alleged to have aided and abetted state law securities violations. The court's interpretations of SLUSA's "in connection with" requirement are incorrect and inconsistent with the holdings of other courts of appeal.

First, the Fifth Circuit applied a standard for SLUSA's "in connection with" requirement that limits preclusion to cases in which the alleged misrepresentation in connection with a covered security predominates the complaint and directly involves the defendant named in the complaint. Pet. App. 42–43. This ruling conflicts with the plain language of the statute and the decisions of this Court, as well as rulings of other courts of appeal.

Second, the Fifth Circuit held that SLUSA's "in connection with" requirement cannot be met if the complaint brings claims "solely for aiding and abetting" a fraudulent scheme and does not allege any misrepresentations in connection with a security made by the aider or abettor to the plaintiffs. *Id.* at 42. Again, this ruling conflicts with the plain language of the statute and the decisions of this Court, as well as rulings of other courts of appeal.

As illustrated by the circumstances of *amicus*, the Fifth Circuit's holding is particularly problematic for alleged aiding and abetting violators. With respect to such defendants, who are necessarily "one level removed" from the alleged fraud, *id.* at 42, plaintiffs can easily argue under the Fifth Circuit standard

that alleged misrepresentations in connection with the purchase or sale of securities are "merely tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendant's fraud," *id.* at 37–38.

Moreover, the Fifth Circuit's holding would allow plaintiffs who have no private right of action to allege aiding and abetting liability for alleged misrepresentations under federal law to bring virtually identical class action claims under state law, undermining SLUSA's purpose and leading to wasteful, duplicative litigation.

Respectfully, the Court should grant the Petitions for a Writ of Certiorari to resolve the entrenched circuit split on these issues and to ensure that SLUSA's plain language and clear legislative purpose are given effect.

REASONS FOR GRANTING THE PETITIONS

I. THE COURT SHOULD GRANT THE PETITIONS TO CLARIFY A NATIONAL STANDARD FOR SLUSA'S "IN CONNECTION WITH" REQUIREMENT THAT COMPORTS WITH THE STATUTE'S LANGUAGE

SLUSA precludes certain class actions under state law alleging "a misrepresentation . . . in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). SLUSA's purpose, clearly stated in the statute itself, is to impose "national standards for securities class action lawsuits involving nationally traded securities," and to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the Private Securities Litigation Reform Act (PSLRA).

SLUSA, Pub. L. No. 105-353, § 2(5), 112 Stat. 3227, 3227 (1998). The PSLRA, in turn, imposes heightened pleading standards and other restrictions on securities fraud cases filed in federal court in order to prevent "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

Consistent with SLUSA's stated purpose, the Act's "in connection with" requirement is given the same "broad construction" that is applied to the identical language of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). *Dabit*, 547 U.S. at 85–86. This Court has instructed that the "in connection with" requirement "should be construed not technically and restrictively, but flexibly to effectuate its remedial purpose." *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotation marks omitted); *accord Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (explaining, prior to enactment of SLUSA, that "Section 10(b) must be read flexibly, not technically and restrictively"). Specifically, "it is enough that the scheme to defraud and the sale of securities coincide." *Zandford*, 535 U.S. at 822.

In the ruling below, the Fifth Circuit departed from the plain language of SLUSA and this Court's guidance. The court recognized that the complaints alleged a misrepresentation involving the purchase or sale of covered securities—namely, that the Certificates of Deposit marketed and sold by the Stanford entities were backed by a portfolio of covered securities "issued by stable governments, strong multinational companies and major international banks." Pet. App. 12 (internal quotation marks

omitted). Nonetheless, the court concluded that the alleged misrepresentation was only "one of a host of (mis)representations made . . . in an attempt to lure [investors] into buying the worthless CDs." *Id.* at 36. The court also concluded that the sale of covered securities by at least one of the plaintiffs in order to generate funds to purchase the CDs was "not more than tangentially related to the fraudulent scheme." *Id.* at 41.

1. The Fifth Circuit's novel interpretation of SLUSA's "in connection with" requirement—imposing the additional burden that the alleged misrepresentation must be at the heart of the defendant's fraud and not too tangential—cannot be squared with the plain language of the statute. That language refers to actions alleging "*a* misrepresentation," without qualification, "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1) (emphasis added).

Moreover, the "in connection with" requirement is not restrictive; "[i]t is enough that the scheme to defraud and the sale of securities coincide." *Zandford*, 535 U.S. at 822. A misrepresentation may be in connection with the purchase or sale of a security even if, as a result of the fraud, the transaction proves to be "purported" rather than "real." Pet. App. 34; *see Grippo v. Perazzo*, 357 F.3d 1218, 1223–24 (11th Cir. 2004) ("in connection with" requirement met because money accepted as payment for securities even if not "actually used to purchase any security"); *In re Beacon Assocs. Litig.*, 745 F. Supp. 2d 386, 430 (S.D.N.Y. 2010) ("in connection with" requirement met because investors told covered securities would be purchased, even though "trades never took place").

SLUSA requires only an alleged "misrepresentation . . . in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). Contrary to the Fifth Circuit's decision, nothing in this statutory language permits courts to require that the alleged misrepresentation in connection with a covered security *predominate* the complaint.

2. The Fifth Circuit's ruling is inconsistent with this Court's precedent holding that the focus of the "in connection with" inquiry should be the nature of the fraudulent scheme, not the specific roles of the parties to the action. In *Dabit*, the Court held that an alleged fraud was "in connection with" the purchase or sale of covered securities despite the fact that the plaintiffs were only holders, not purchasers or sellers, of the securities. The Court explained that the identity of the party was "irrelevant" and that the focus should be the wrongdoing at issue: "[T]he identity of the plaintiffs does not determine whether the complaint alleges fraud 'in connection with the purchase or sale' of securities. The misconduct of which respondent complains here . . . unquestionably qualifies . . . ." *Dabit*, 547 U.S. at 89.

Similarly, in *United States v. O'Hagan*, 521 U.S. 642 (1997), the Court held that the "in connection with" requirement was satisfied in an alleged misappropriation case "even though the person or entity defrauded [was] not the other party to the trade [of covered securities], but [was], instead, the source of the nonpublic information." *Id.* at 656. The Court "note[d] again that § 10(b) refers to 'the purchase or sale of any security,' not to identifiable purchasers or sellers of securities." *Id.* at 660.

3. The Fifth Circuit's holding creates a clear circuit split over the proper interpretation of the "in con-

nection with" requirement. The court below expressly rejected Second and Eleventh Circuit standards that would have dictated SLUSA preclusion in this case. Pet. App. 32. Under Eleventh Circuit precedent, the "in connection with" requirement is met if the plaintiff alleges "fraud that induced [the plaintiff] to invest with [the primary violator] . . . or a fraudulent scheme that coincided and depended upon the purchase or sale of securities." *Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1349 (11th Cir. 2008) ("*IPM*"). In the Second Circuit, the "in connection with" requirement is met if the plaintiff's claims "necessarily allege, necessarily involve, or rest on the purchase or sale of securities." *Romano v. Kazacos*, 609 F.3d 512, 522 (2d Cir. 2010) (internal quotation marks omitted).

The Fifth Circuit purported to adopt the Ninth Circuit's standard 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*." Pet. App. 33 (quoting *Madden v. Cowen & Co.*, 576 F.3d 957, 965–66 (9th Cir. 2009)). However, the Fifth Circuit went far beyond the holding in the *Madden* case, which applied the SLUSA preclusion provision to claims based on a misleading fairness opinion related to a stock-for-stock merger. *Madden*, 576 F.3d at 965–69. The Ninth Circuit held that the SLUSA provision applied even to a claim of mal-practice for failing to give good advice while plaintiffs were considering a cash offer. *Id.* at 967.

Under both the Eleventh and Second Circuit standards, courts have ruled that SLUSA preclusion applies to alleged facts very similar to those in the cases at bar. In *IPM*, the Eleventh Circuit held that

SLUSA precluded claims against Merrill Lynch for assisting a pension fund that allegedly "defrauded investors . . . by stealing their money rather than investing it" in covered securities. 546 F.3d at 1342, 1352. District courts in the Second Circuit have repeatedly held that SLUSA precludes claims against funds that invested with Bernard Madoff, who falsely claimed to be using the investments to purchase covered securities. *See , e.g.*, *In re Herald, Primeo & Thema Sec. Litig.*, No. 09 Civ. 289, 2011 WL 5928952, at *8 (S.D.N.Y. Nov. 29, 2011); *Backus v. Conn. Cmty. Bank, N.A.*, 789 F. Supp. 2d 292, 302–06 (D. Conn. 2011). *But see Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 398–99 (S.D.N.Y. 2010). Had the Fifth Circuit applied these standards below, the state claims would have been precluded.

This Court should grant the Petitions for a Writ of Certiorari to correct the Fifth Circuit's erroneous interpretation of the "in connection with" requirement and to resolve the conflict among several circuits regarding the appropriate legal standard.

II. THE COURT SHOULD GRANT THE PETITIONS TO CLARIFY THE TREATMENT OF AIDING AND ABETTING CLAIMS UNDER SLUSA

As an extension of its ruling on SLUSA's general applicability to state law securities claims, the Fifth Circuit also concluded that SLUSA's "in connection with" requirement cannot be met if the complaint brings claims "solely for aiding and abetting" a fraudulent scheme and does not allege any misrepresentations in connection with a covered security by the aider or abettor to the plaintiffs. Pet. App. 42–43. For the same reasons discussed above,

this holding is inconsistent with the plain language of the statute and this Court's precedent. It is also in conflict with the rulings of other courts of appeal. *See IPM*, 546 F.3d at 1348–49; *Proctor v. Vishay Intertech. Inc.*, 584 F.3d 1208, 1222–23 (9th Cir. 2009).

This case has important implications for *amicus*, which is alleged to have aided and abetted and conspired in the Stanford Ponzi scheme but not to have made any misrepresentations of its own. The Fifth Circuit's holding allows class action plaintiffs to defeat SLUSA's legislative purpose and evade the protections of the PSLRA by pursuing state law claims of secondary liability against some defendants even while they are precluded from bringing parallel claims against the primary tortfeasors. With respect to secondary defendants, who are one level removed from the alleged fraud, plaintiffs can easily circumvent the PSLRA by arguing under the Fifth Circuit standard that alleged misrepresentations in connection with the purchase or sale of securities are "merely tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendant's fraud." Pet. App. 37–38. Wasteful, duplicative litigation will result.

SLUSA requires only that a state law class action complaint allege "a misrepresentation . . . in connection with the purchase or sale of a covered security." The Act does not distinguish between different types of defendants based on their level of involvement or claims of primary or secondary liability. Certainly nothing in the statutory language requires that the alleged misrepresentation be made *by each defendant* or that it otherwise *directly involve each defendant*.

By contrast, the next provision of SLUSA precludes state law 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) (emphasis added). If Congress had intended to limit SLUSA preclusion only to defendants who are alleged to have made their own misrepresentations in connection with the purchase or sale of a covered security, Congress would have written the statute the same way. "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quotation omitted).

The Fifth Circuit's holding regarding aiding and abetting defendants is inconsistent with this Court's reasoning in *Dabit*. In contrast to the broad scope of the "in connection with" requirement under both Section 10(b) and SLUSA, this Court has recognized a narrower judicially created private right of action under Rule 10b-5. *See* 547 U.S. at 84–85. Private claims under Rule 10b-5 can only be brought by those who purchased or sold securities, not by mere holders of securities. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754–55 (1975). In addition, private claims can only be brought against primary violators, not against aiders and abettors or other secondary violators. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162–63 (2008); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994); *see also* 15 U.S.C. § 78t(e).

In *Dabit*, the Court confronted and rejected the argument that one of these limitations on private rights of action (the securities holder limitation) should also apply to limit the scope of SLUSA. 547

U.S. at 86. The Court held that SLUSA preempts state law class actions by holders even while the same plaintiffs do not have a private right of action under the "in connection with" provision of Rule 10b-5. *Id.* at 87.

In reaching this conclusion, the Court relied upon the "broad construction" of SLUSA. *Id.* at 85. The Court also emphasized the perverse practical consequences of the plaintiff's argument against preclusion:

> Respondent's preferred construction . . . would give rise to wasteful, duplicative litigation. Facts supporting an action by purchasers under Rule 10b-5 (which must proceed in federal court if at all) typically support an action by holders as well . . . . *The prospect is raised, then, of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts.* That prospect . . . squarely conflicts with the congressional preference for "national standards for securities class action lawsuits involving nationally traded securities."

Id. at 86–87 (quoting SLUSA, § 2(5), 112 Stat. at 3227) (emphasis added).

Precisely the same reasoning applies to the Fifth Circuit's ruling here. If the ruling is allowed to stand, plaintiffs will be able to bring securities claims against alleged aiders and abettors such as *amicus* in state law class actions, without PSLRA protections, because they do not allege any misrepresentations made by such defendants. Meanwhile, litigation

against the primary violators who allegedly made the misrepresentations will have to proceed in federal court under SLUSA and the PSLRA. As this Court forewarned, the result would be duplicative securities litigation under inconsistent standards, exactly what SLUSA was intended to prevent.

In other words, just as *Dabit* affirmed that SLUSA preempts state law class actions by holders, the Court should affirm too that SLUSA preempts state law class actions alleging aiding and abetting liability. Respectfully, the Court should grant the Petitions for a Writ of Certiorari in order to clarify the treatment of aider and abettor claims under SLUSA, consistent with that Act's clear legislative purpose.

CONCLUSION

For the foregoing reasons, the Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

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