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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 INCORPORATED, *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 THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C. and is the United States regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs in cases that raise matters of vital concern to participants in the securities industry.

SIFMA has appeared before this Court as *amicus curiae* in many cases involving issues arising under the federal securities laws, most recently in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013), *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414 (2012), *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), *Erica P. John Fund, Inc. v. Halliburton Co.*, 131

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[1] The parties have consented to the filing of this brief. Petitioners and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus curiae* briefs.

Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

S. Ct. 2179 (2011), and *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011). SIFMA's predecessors also appeared as *amici* in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006), this Court's leading case interpreting the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").

This case involves important issues concerning the application of SLUSA to preclude state law class actions that allege "a" misrepresentation "in connection with" the purchase or sale of a SLUSA-covered security. Those issues are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. It is critically important to SIFMA that Congress's efforts to curb vexatious litigation in state law securities class actions by enacting SLUSA not be compromised by plaintiffs who attempt creatively to plead around SLUSA preclusion and stricter uniform national federal securities standards. Such uniform standards are essential to the competitiveness of the U.S. securities markets for both domestic and foreign issuers. *Amicus* therefore has a vital interest in the issues presented in this case, and its views and experience can assist the Court in resolving those issues.

STATUTORY PROVISION INVOLVED

The Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb(f)(1), provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or

> Federal court by any private party alleging— (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

SUMMARY OF ARGUMENT

SLUSA precludes any covered class action brought under state law that alleges "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) (emphasis added). This Court has previously held that SLUSA's "in connection with" language requires only that a misrepresentation "coincide" with a transaction in a covered security. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006).

This case calls upon this Court to address the narrow question of whether a state law class action alleging fraud based on the intentionally false promise that money would be used to purchase covered securities is precluded under SLUSA. This case also presents the question of whether to enforce what Congress explicitly wrote—namely, that "a" *single* misrepresentation that meets the "in connection with" requirement is sufficient to preclude an "action" under SLUSA. As we explain below, this Court need not revisit its prior decisions or expand its prior interpretations of SLUSA to reach a decision here.

First, this case calls for a straightforward application of *Dabit* and related precedent defining "in connection with." Under *Dabit* it is enough that a misrepresentation or omission "coincide" with a securities transaction to trigger SLUSA preclusion. Moreover, SLUSA does not require that securities actually be purchased or sold. Rather, a false representation that a transaction in a covered security would occur is sufficient. Here, Respondents alleged just such a false representation and their actions should have been precluded by SLUSA. The Fifth Circuit, however, applied an unduly narrow interpretation of SLUSA that defies SLUSA's text and this Court's precedent. If allowed to stand, the Fifth Circuit's decision would foment uncertainty and increase risk for entities and individuals connected to the securities industry, encourage vexatious and frivolous litigation (particularly against those who are least culpable), and vindicate gamesmanship and artful pleading at the expense of fealty to congressional intent. This would threaten to increase costs for the securities industry and ordinary investors alike, and to undermine U.S. competitiveness in the capital markets.

Second, this Court should adopt a bright-line rule—required by the text and purpose of SLUSA—under which a *single* misrepresentation or omission in connection with the purchase or sale of a covered security in a state law class action precludes the entire class action. On this issue, Congress could not have been clearer. The text of SLUSA provides that "alleging . . . a" triggering misrepresentation or omission precludes the "class action." This means that *one* triggering misrepresentation—regardless of the

presence of other misrepresentations—precludes the entire class action. Moreover, a bright-line rule also effectuates congressional intent by ensuring predictability and certainty in courts' SLUSA analysis. In contrast, allowing courts to weigh the connection between a covered securities fraud allegation and the rest of the class action would improperly contradict the text and introduce subjectivity into the process, thus encouraging plaintiffs to try to plead around SLUSA by burying SLUSA-triggering allegations amidst other allegations in hopes of avoiding preclusion.

Accordingly, SIFMA respectfully submits that this Court should reverse the decision of the Fifth Circuit and reject an unduly narrow application of SLUSA.

ARGUMENT

I. SLUSA'S "IN CONNECTION WITH" REQUIREMENT IS SATISFIED IN THIS CASE BECAUSE THE ALLEGED FRAUD INVOLVES THE REPRESENTATION THAT COVERED SECURITIES WOULD BE PURCHASED.

As this Court made clear, SLUSA "denies plaintiffs the right to use the class-action device to vindicate certain claims," thereby precluding such actions. *Dabit*, 547 U.S. at 87; *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633, 637 n.1 (2006). The text of SLUSA compels preclusion when four conditions are satisfied: (1) the action is a "covered class action;"[2] (2) "based

[2] "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people." *Dabit*, 547 U.S. at 83.

upon the statutory or common law of any State;" (3) that alleges "a misrepresentation or omission of a material fact in connection with the purchase or sale;" and (4) "of a covered security."[3] 15 U.S.C. § 78bb(f)(1); *see also Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1345 (11th Cir. 2008) ("*IPM*"). At issue in this action is the third element—SLUSA's "in connection with" requirement.

A. SLUSA's "In Connection With" Requirement Is Satisfied Where The Alleged Fraud Involves A False Representation About Purchasing Covered Securities.

The Court need not revisit or expand its previous decisions defining SLUSA's "in connection with" requirement to decide this case. Rather, this case calls for a straightforward application of existing precedent and a narrow ruling that Respondents' allegations that they were defrauded by intentionally false representations that their money would be re-invested in a covered security warrant preclusion of their state law class actions under SLUSA.

In *Dabit*, this Court held that, to satisfy the "in connection with" element for SLUSA preclusion, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Dabit*, 547 U.S. at 85. Under well-settled principles, an allegation of a false

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[3] "A 'covered security' is one traded nationally and listed on a regulated national exchange." *Dabit*, 547 U.S. at 83.

representation that money will be used to purchase a covered security is "in connection with" the purchase or sale of a security. Indeed, in *SEC v. Zandford*, this Court expressly endorsed the SEC's interpretation that "a broker who accepts payment for securities that he *never intends to deliver*, or who sells customer securities with intent to misappropriate the proceeds, violates § 10(b) and Rule 10b-5." 535 U.S. 813, 819 (2002) (emphasis added); *see also Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 595 (2001) (finding that defendant's sale of stock option that it never intended to honor was "in connection with" the purchase or sale of a security under § 10(b)).[4] Such allegations "describe[] a fraudulent scheme in which the securities transactions" and the purported deceptions "coincide;" that is, they were made "in connection with" one another. *Zandford*, 535 U.S. at 825; *see also Grippo v. Perazzo*, 357 F.3d 1218, 1223–24 (11th Cir. 2004) (finding that in connection with requirement had been met in securities fraud case even though plaintiff "failed to identify any particular security purchased"); *Sulkow v. Crosstown Apparel*

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[4] The prior brief of the United States is not correct that "in connection with" in § 10(b) should be construed broadly. *See* Brief for the United States as *Amicus Curiae* at 9. Certainly, when interpreting § 10(b) in the criminal context, the rule of lenity should apply to § 10(b)'s "in connection with" requirement. *United States v. O'Hagan*, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part). Similarly, this Court has also emphasized that it must afford a "narrow scope" to the text of § 10(b) when a broad construction would expand the implied private right of action under § 10(b). *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 (2011). Most important, this Court has no reason in this case to address when, if ever, § 10(b) should be construed broadly.

Inc., 807 F.2d 33, 36 (2d Cir. 1986) (finding that actual transfer of securities was not necessary for a misrepresentation to have been made "in connection with the purchase or sale" of a security).[5]

That is the case here. Respondents, who purchased certificates of deposit ("CDs") from Stanford International Bank ("SIB"), alleged that SIB and its owner, Allen Stanford, falsely represented that the CDs were backed by publicly traded securities (*i.e.*, securities covered by SLUSA). Specifically, the complaints alleged that SIB's promotional materials touted that SIB's portfolio was "invested in a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks." J.A. 253 (Roland Complaint ¶ 36); J.A. 444 (Proskauer Second Amended Complaint ¶ 41). Respondents further alleged that SIB led Plaintiffs "to believe that their money was being invested in safe, liquid investments that were insured, which was a *material misstatement*." J.A. 715 (Willis Complaint ¶ 180) (emphasis added); *see* J.A. 628 (Willis Complaint ¶ 34). These "safe liquid investments" were predominantly "first grade investment bonds (AAA, AA+, AA) and shares of stock (of great reputation, liquidity and credibility)." J.A. 744 (Willis Complaint Ex. 2). Respondents also alleged that certain defendants falsely represented that "SIB *re*-invested [investor] funds in a 'globally diversified portfolio' of assets," J.A. 250 (Roland Complaint ¶ 23)

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[5] This is also consistent with the definition of "purchase" in the Securities Exchange Act of 1934, which includes "any contract to buy, purchase, or otherwise acquire." *See* 15 U.S.C. § 78c(a)(13).

(emphasis added),[6] and that "SIB took the money it received from the sale of CDs and itself invested in an allegedly diversified portfolio that included stocks, bonds, notes, private equity, precious metals and other commodities, much like a mutual fund." J.A. 458 (Proskauer Second Amended Complaint ¶ 65).

Respondents claim that all of these representations were false. They allege that they were the victims of a fraudulent Ponzi scheme orchestrated by Stanford and various entities under his control where money from new investors was used to pay prior investors. Because Respondents allege a representation that SIB was purchasing at least one covered security, SLUSA's "in connection with" requirement is satisfied. *See Zandford*, 535 U.S. at 819; *Grippo*, 357 F.3d at 1223–24; *Sulkow*, 807 F.2d at 36.[7]

That SIB did not represent that it purchased securities for Respondents in their own names and for

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[6] A "globally diversified portfolio" obviously includes one or more covered securities, especially given SIB's other alleged misrepresentation that the portfolio included "highly marketable securities issued by stable governments, *strong multinational companies and major international banks*." J.A. 253 (Roland Complaint ¶ 36) (emphasis added).

[7] Respondents, however, could not assert a claim under § 10(b). To the contrary, they lack standing to do so because they did not purchase or sell securities. *See Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 733, 749 (1975). As the Court explained in *Dabit*, that requirement is a judge-made limitation of the judicially implied private right of action. 547 U.S. at 80–81. The purchaser or seller requirement is not an application of the "in connection with" language. *Id.*

their own account makes no difference. This Court held in *Dabit* that SLUSA's application does not require the individual plaintiff to have actually purchased or sold securities. *See Dabit*, 547 U.S. at 85. Rather, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Id.*[8] Accordingly, "[f]or purposes of SLUSA," the distinction between plaintiffs who transact in securities and those who do not is "irrelevant." *Id.* at 88–89.

The Fifth Circuit reached the wrong result by applying an unduly narrow interpretation of the "in connection with" requirement. The Fifth Circuit held that "in connection with" means "more than tangentially related," which it described as the "best articulation of the 'coincide' requirement" expressed in *Dabit* and *Zandford*. *Roland v. Green*, 675 F.3d 503, 519–20 (5th Cir. 2012). The Fifth Circuit also added that the covered securities transaction must be more than tangentially related not just to any alleged misrepresentation or omission relating to a covered security, but to the "heart, crux or gravamen" of the defendant's fraud (*i.e.*, to the action itself). *Id.* at 521.

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[8] In finding that the alleged misrepresentations here were made "in connection with" the purchase or sale of a covered security, this Court need not resolve whether false representations in connection with *past* purchases or sales of securities are sufficient to trigger SLUSA. Respondents' allegation that certain defendants misrepresented that SIB "re-invested" investors' assets into covered securities indicates a deception concerning ongoing (present and future) securities transactions. *See* J.A. 250 (Roland Complaint ¶ 23).

The text and natural meaning of SLUSA do not support the Fifth Circuit's restrictive approach. Nowhere in the text of SLUSA does preclusion turn on a showing that there is more than a tangential relationship between the alleged fraud and the "heart, crux or gravamen" of the action as a whole. Rather, SLUSA precludes any "class action" that contains any allegation of "*a* misrepresentation or omission of *a* material fact in connection with the purchase or sale of *a* covered security"—whether or not those allegations are tangential to the crux of the claim. 15 U.S.C. § 78bb(f)(1) (emphasis added). As the Sixth Circuit has held, SLUSA "does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple." *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009).

Where, as here, the alleged fraud involves an intentionally false representation that money would be used to purchase a covered security, SLUSA's "in connection with" requirement is satisfied. The Court need and should go no further to reverse the Fifth Circuit's erroneous application of SLUSA.

B. The Policy Rationale And Purpose Of SLUSA Support Applying SLUSA In This Case.

In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 (the "Reform Act") to curb abusive securities class action litigation that "was being used to 'injure the entire U.S. economy.'" *Dabit*,

547 U.S. at 81 (quoting House Conference Report). The Reform Act implemented a number of substantive and procedural safeguards—including heightened pleading standards—to deter or dispose of "those suits whose nuisance value outweighs their merits." *Id.* at 82.

Following the passage of the Reform Act, however, plaintiffs sought to end-run "the obstacles set in their path" by filing suits in state court. *Id.* SLUSA was Congress's response to this tactic. In particular, the Senate Report concerning SLUSA stated that "promoting efficient national markets" was a "compelling consideration," and that permitting divergent standards for state and federal class action securities litigation would deter efforts to raise capital. S. Rep. No. 105-182, at 4–5 (1998). This Court has also recognized this policy rationale, declaring 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." *Dabit*, 547 U.S. at 78; *accord Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("*Central Bank*").

SLUSA has been successful in achieving its goals, resulting in "the effective elimination of state law securities class actions." Eric Talley, *Securities Fraud Class Actions: 70 Years Young*, Rand Rev., Summer 2004, *available at* http://www.rand.org/publications/randreview/issues/summer2004/42.html. As SLUSA intended, "federal courts are now the primary forum for most class actions involving allegations of fraud in the purchase or sale of nationally-traded securities." Steven M. Puiszis, *Developing Trends with the Class*

Action Fairness Act of 2005, 40 J. Marshall L. Rev. 115, 116 (2006).

Protecting SLUSA's policy goals counsels in favor of holding that SLUSA's "in connection with" requirement is satisfied in this case. Indeed, as this Court observed in *Dabit*, "[t]he presumption that Congress envisioned a broad construction [of SLUSA] follows not only from ordinary principles of statutory construction but also from the particular concerns that culminated in SLUSA's enactment." 547 U.S. at 86. "A narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose." *Id.*

Congress's objectives would be thwarted if plaintiffs could maintain a state law class action alleging an intentionally false representation that the money would be used to purchase a covered security simply because a district court deemed the securities allegations not important enough to the crux of the complaint. Forcing companies to defend class actions in connection with a misrepresentation about a covered security under the substantive and procedural laws of not one jurisdiction (federal) but potentially 50 others amplifies the risks and costs associated with doing business in the securities industry—an issue of particular concern to SIFMA. Those potential legal pitfalls affect not only securities firms, banks, and assets managers, but also entities that provide services to the industry, such as law firms and insurance brokerages, as the Fifth Circuit's decision below makes plain.

The Fifth Circuit's "tangentially related" test in fact creates a perverse incentive for plaintiffs to sue such secondary actors, whose activities are less consequential to the alleged fraud. Such a scenario is not hypothetical; it is precisely what happened in the underlying cases at issue here. Respondents sought to circumvent SLUSA by suing third parties who were not participants in the underlying fraud perpetrated by Allen Stanford and SIB. Those third parties included the trust that served as custodian for Respondents' investments with SIB, the trust's administrator, and SIB's insurance brokers and lawyers. *Roland*, 675 F.3d at 508–09.

This Court has expressed clear disapproval of similar attempts by opportunistic plaintiffs to sue those who have deep pockets but are the least culpable for a purported fraud. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, this Court refused to expand liability in private actions under § 10(b) to aiders and abettors, citing the "practical consequences" of doing so, including the danger of allowing "plaintiffs with weak claims to extort settlements from innocent companies." 552 U.S. 148, 163 (2008) (citing *Blue Chip Stamps*, 421 U.S. at 740–41). And, in *Central Bank*, this Court expressed concern that even in unmeritorious cases (of which unfortunately there are many in the securities context), third parties sued for securities fraud "may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." 511 U.S. at 189. That is, under federal securities laws, secondary actors such as the defendants in this case would not be subjected to liability. But under the Fifth Circuit's interpretation,

they now could be sued in state-law *class actions* for the very same conduct based on plaintiffs' artful pleading. Such an end-run is exactly what SLUSA was designed to prevent.

The narrow construction of SLUSA endorsed by the Fifth Circuit is not only at odds with decades of precedent from this Court, but also compromises the very purpose of SLUSA to curtail abusive litigation. Permitting state court class action litigation would increase the costs for a host of participants in the securities industry, depriving them of an exclusive federal forum, national standards, and the efficiency of consolidated litigation with coordinated discovery before a single judge. This would make access to the U.S. capital markets more expensive for all investors, who would bear higher costs to compensate for soaring expenses. The end result, as Congress has recognized, is that proliferating securities class action litigation in state courts would deter issuers from raising capital in U.S. markets, sabotaging the competitive footing of U.S. capital markets and the many businesses that serve them.

II. A SINGLE MISREPRESENTATION OR OMISSION "IN CONNECTION WITH" THE PURCHASE OR SALE OF A COVERED SECURITY PRECLUDES THE ENTIRE COVERED CLASS ACTION.

The Fifth Circuit not only applied the wrong standard for interpreting SLUSA's "in connection with" requirement, it went a step further in holding that SLUSA did not preclude a covered class action that indisputably alleged at least one misrepresentation in

connection with the purchase or sale of a covered security.

In this case, the complaints alleged that promotional materials distributed by SIB falsely represented that plaintiffs' moneys were going into covered securities. *Roland*, 675 F.3d at 521. The Fifth Circuit concluded that that alleged misrepresentation was one that ordinarily would be covered by SLUSA. *Id.* Nevertheless, because that alleged misrepresentation was "one of a host of (mis)representations made to [plaintiffs] in an attempt to lure them into buying worthless [certificates of deposit]," the court deemed it "merely tangentially related to the 'heart,' 'crux,' or 'gravamen' of the defendants' fraud" and found that the action was not precluded by SLUSA. *Id.* In short, the Fifth Circuit held that, by alleging a sufficient number of misrepresentations that did *not* trigger SLUSA preclusion, the plaintiffs had effectively canceled the preclusive effect of alleging a misrepresentation in connection with the purchase or sale of a covered security. *See id.*

As discussed below, the Fifth Circuit's analysis and conclusion run contrary to the text and underlying policy of SLUSA and this Court's precedent.

A. The Text Of SLUSA Supports A Bright-Line Rule Precluding Every Covered Class Action That Alleges A Single Misrepresentation In Connection With The Purchase Or Sale Of A Covered Security.

Congress designed SLUSA to be simple in its application and sweeping in its effect. SLUSA provides that "[n]o covered class action . . . may be maintained" based on state law that alleges "*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) (emphasis added). The clause is thus triggered by "a misrepresentation or omission," "a material fact," and "a covered security"—each in the singular form.

The plain meaning of SLUSA's text therefore indicates that the inclusion in a covered class action complaint of even *one* misrepresentation in connection with the purchase or sale of a covered security precludes the entire *action* (*i.e.*, not merely a particular claim). *See Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 305 (3d Cir. 2005) (SLUSA's plain language "does not preempt particular 'claims' or 'counts' but rather preempts 'actions,' suggesting that if any claims alleged in a covered class action are preempted, the entire action must be dismissed"); *accord Proctor v. Vishay Intertech. Inc.*, 584 F.3d 1208, 1221 (9th Cir. 2009) ("SLUSA provides for the removal of any covered class action, not just individual claims.") (internal citation omitted). To suggest otherwise, as the Fifth Circuit has done, is to manufacture ambiguity and uncertainty where none exists.

SLUSA's unambiguous text accordingly supports a concise bright-line rule for preclusion analysis: when the complaint alleges "a" single misrepresentation or omission of "a material fact" concerning "a" covered security, the "action" should be precluded. Injecting other variables—such as the weight of the connection between a covered securities transaction and the totality of the claims in the action—into the analysis is textually indefensible.

Several circuit courts have properly endorsed a bright-line test for SLUSA preclusion. The Sixth Circuit has stated that SLUSA "does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint *includes* these types of allegations, pure and simple." *Segal*, 581 F.3d at 311 (emphasis added); *accord IPM*, 546 F.3d at 1350 ("If a single claim premises liability on multiple factual theories, then that claim would be precluded if at least *one* of those theories hinges on representations made 'in connection with the purchase or sale' of a security."). As the Eleventh Circuit noted, SLUSA "does not require district courts to act like a prospector panning for a few non-precluded theories amid a river of precluded ones." *Id.*

SLUSA asks a basic "yes" or "no" question: does the state law class action include any allegation of a misrepresentation or omission of a material fact in connection with the purchase or sale of a security? Because the answer here is yes, the "class action" is precluded.

B. Policy Considerations Support A Bright-Line Rule.

Policy considerations also support a bright-line test that precludes a covered class action whenever plaintiffs allege a single misrepresentation in connection with the purchase or sale of a covered security.

First, a bright-line test would ensure consistent and predictable results in "an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). Uncertainty "deter[s] beneficial conduct and breed[s] costly litigation," but those problems can be mitigated if courts "craft legal rules with bright lines." Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) (cited approvingly in *Central Bank*, 511 U.S. at 189). Uncertainty also encourages plaintiffs to try to bury the existence of SLUSA-triggering allegations in a complaint through artful pleading.

The Fifth Circuit's decision improperly adds substantial uncertainty to the preclusion analysis by relying on inherently imprecise and subjective determinations about the connection between a plaintiff's securities fraud allegations and the rest of the action. One flaw of this approach is that it encourages case-by-case litigation and would inevitably foster conflicting results. Left unanswered by the Fifth Circuit are questions such as: How many non-preclusive misrepresentations must be alleged to outweigh an allegation of securities fraud? If one securities fraud allegation is not enough, are two or

three? Do dollar amounts matter? And generally, how should a court measure or determine whether the preclusive securities fraud is close enough to the "heart, crux or gravamen" of the overall alleged scheme?

The answers to those questions will vary unpredictably from case to case. Each new complaint's facts will present unique considerations, and each court might weigh differently whether one or more alleged misrepresentations in connection with the purchase or sale of a covered security is sufficient to satisfy the "heart, crux or gravamen" test. Decisions would thus be "made on an ad hoc basis, offering little predictive value to participants in securities transactions." *Pinter*, 486 U.S. at 652. Certainty and predictability under the Fifth Circuit's test would be utterly elusive. The only predictable result of endorsing such an interpretation would be an increase in vexatious and frivolous class actions and the attendant expense of defending and settling those suits in a multitude of jurisdictions under varying state laws. *See Central Bank*, 511 U.S. at 189.

Second, a bright-line test effectuates Congressional intent by preventing plaintiffs from exploiting the pleading loophole opened by the Fifth Circuit's decision. As discussed above, Respondents in this case seek to avoid preclusion under SLUSA despite the fact that their complaint indisputably alleged "a" misrepresentation in connection with the purchase or sale of "a" covered security. Respondents' strategy was to dilute the significance of that allegation by populating the complaint with numerous *additional* allegations of misrepresentations that were not covered

by SLUSA. *Roland*, 675 F.3d at 521. The Fifth Circuit's acceptance of this tactic invites future plaintiffs to avoid SLUSA preclusion simply through artful pleading. A bright-line test that requires courts to preclude any action in which plaintiffs allege a single securities fraud would close this loophole.

Third, a bright-line test also affords certainty to plaintiffs. The plaintiff, as "master of the complaint," has the ultimate responsibility for the allegations contained therein. *Segal*, 581 F.3d at 312. It should come as no surprise to plaintiffs that the inclusion of one or more securities fraud allegations in a class action compels preclusion under SLUSA, no matter what other allegations they add to their complaint. *Id.* ("SLUSA may be unforgiving when it applies, but it details in clear language when that is so."). Moreover, Plaintiffs wishing to avoid preclusion under SLUSA always have the option of foregoing the class action device and bringing state law claims in individual actions.

C. This Court's Removal Jurisdiction Precedent Supports A Bright-Line Rule.

A bright-line rule is also supported by this Court's well-established precedent that federal question and removal jurisdiction exists when one or more—but not all—claims in an action present federal questions. SLUSA is both a preclusion statute and a removal jurisdiction statute. SLUSA vests federal courts with exclusive jurisdiction over certain state law class actions and provides for their removal to federal court. *See* 15 U.S.C. § 77bb(f)(1)–(2).

Before SLUSA was enacted it was already well established that a *single* claim over which federal question jurisdiction exists enables the exercise of jurisdiction over and removal of *all* claims in the "action" under 28 U.S.C. §§ 1331 and 1441. *See Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983) (where a complaint sets forth two causes of action, "if *either* comes within the original jurisdiction of the federal courts, removal [is] proper as to the *whole case*") (emphasis added); *accord City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164–65 (1997) ("federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact'") (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 561 (2005) (noting that 28 U.S.C. § 1331 provides for "original jurisdiction in all actions where *at least one claim* meets the . . . requirements" for jurisdiction). This Court has emphasized that "statutory references to an 'action' have *not* typically been read to mean that every claim included in the action must meet the pertinent requirement." *Jones v. Bock*, 549 U.S. 199, 221 (2007) (emphasis added) (citing *Allapattah*, 545 U.S. at 560–63, and *College of Surgeons*, 522 U.S. at 166).

SLUSA follows this familiar structure. Under SLUSA, "alleging" "a" misrepresentation or omission of "a" material fact in connection with the purchase or sale of "a" covered security confers exclusive federal jurisdiction over and supports removal of the "class action." 15 U.S.C. § 78bb(f)(1)–(2). Because SLUSA confers federal and removal jurisdiction over an entire

"class *action*" based on "alleging" one trigger, it would rewrite the statute to add a requirement that the triggering allegation be weighed against other allegations.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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