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

In the Supreme Court of the United States

CHADBOURNE & PARKE LLP, *Petitioner,*

v.

SAMUEL TROICE, *ET AL.*, *Respondents.*

WILLIS OF COLORADO INC., *ET AL.*, *Petitioners,*

v.

SAMUEL TROICE, *ET AL.*, *Respondents.*

PROSKAUER ROSE LLP, *Petitioner,*

v.

SAMUEL TROICE, *ET AL.*, *Respondents.*

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

BRIEF OF THE COURT-APPOINTED RECEIVER AND THE COURT-APPOINTED EXAMINER AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 78bb, expressly applies only to securities-fraud lawsuits involving "covered securities," which are statutorily defined as securities (a) that are listed on national exchanges; (b) that are issued by a registered investment company; or (c) for which a registration statement has been filed under the Investment Company Act of 1940. 15 U.S.C. § 78bb(f)(5)(E). The securities marketed and sold to the Respondents here are not "covered securities." Does SLUSA apply where the securities marketed and sold to the plaintiffs are not "covered securities"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

In February 2009, the SEC filed suit in the United States District Court for the Northern District of Texas (the "Receivership Court") against R. Allen Stanford, James M. Davis, Laura Pendergest-Holt,[2] and three companies wholly owned by Stanford (the "Stanford Entities"). The SEC alleged that Stanford ran a multi-billion dollar Ponzi scheme through the Stanford Entities. The primary mechanism for Stanford's scheme was a purported certificate of deposit ("CD") issued by Antigua-based Stanford International Bank, Ltd. ("SIB"). Unbeknownst to the investors, interest and principal payments to outstanding owners of the CDs were

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1 Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and its counsel made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* certify that counsel of record for both parties have filed letters with the Clerk giving blanket consent to the filing of *amicus* briefs.

2 Stanford and Pendergest-Holt were indicted in Case Number 4:09-CR-0342 in the U.S. District Court for the Southern District of Texas, Houston Division. Stanford was tried, convicted as to thirteen of fourteen counts, and sentenced to 1,320 months in prison. Doc. No. 878, Case Number 4:09-CR-0342-1. He has appealed his conviction. Pendergest-Holt pled guilty to one count and was sentenced to 36 months in prison. Doc. No. 1035, Case Number 4:09-CR-0342-2. Davis was indicted in Case Number 4:09-CR-355. He pled guilty to three counts and was sentenced to 60 months in prison. Doc. No. 93, Case Number 4:09-CR-355.

funded with money invested by subsequent purchasers.

The Receivership Court appointed Ralph S. Janvey as Receiver for Stanford, other individuals, and all entities owned or controlled by Stanford to dismantle Stanford's Ponzi scheme and to recoup all possible assets for the receivership estate. The Receivership Court also appointed John J. Little as Examiner, to act as a unified voice for Stanford's victims. Finally, the Receivership Court created the Official Stanford Investors Committee to represent the creditors of the receivership estate who had funds on deposit at SIB or were holding SIB CDs. The Examiner was appointed to serve as a member of Investors Committee and as its initial Chair.[3]

The Receiver and the Investors Committee have filed and are prosecuting approximately 70 asset-recovery, fraudulent-transfer, and third-party liability lawsuits for the benefit of the receivership estate. Those include lawsuits against Petitioners Proskauer Rose LLP and Chadbourne & Parke LLP. The Receiver has assigned his potential claims against the Petitioners in Case No. 12-86 (Willis of Colorado, Inc., *et al*.,) to the Investors Committee.

Because of their long-standing, deep involvement in the day-to-day workings of the Stanford receivership estate, including litigation for the estate, the Receiver and the Examiner have a strong interest in these cases. The Receiver and the Examiner filed briefs as *amici curiae* regarding the applicability of

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[3] The Examiner continues to serve as chair of the Investors Committee.

SLUSA in both the Receivership Court and on appeal in the Fifth Circuit.[4]

SUMMARY OF ARGUMENT

The Receiver and the Examiner address two specific issues concerning SLUSA's application to the cases before the Court.

First, the Receiver and the Examiner respectfully submit that SLUSA does not, and cannot, apply to any lawsuit focused on the purchase and sale of SIB CDs—the security at the heart of the Stanford Ponzi scheme. SLUSA's plain text, illuminated by its legislative history, demonstrates that SLUSA precludes only state-law class-action claims that are based on fraud related to the purchase or sale of a "covered security." And a "covered security" is one that is nationally traded. The inquiry must focus on the product actually marketed to the plaintiffs. The inquiry should not skip this threshold issue to instead focus on what the fraudsters actually did (or said they would do) with the plaintiffs' money.

The SIB CDs marketed to and purchased by Respondents are the only "securities" that give the Respondents standing to sue. Here, both the Receivership Court and the Fifth Circuit correctly found that the SIB CDs are not "covered securities" under SLUSA. That finding should have ended the inquiry and compelled the conclusion that SLUSA does not apply.

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[4] The *amicus* brief filed in the Fifth Circuit was filed jointly by the Examiner and the Investors Committee.

Second, the Receiver and the Examiner address a collateral issue raised by (1) the Receivership Court's *Roland* opinion, (2) *In re Enron Corp. Securities Der. & ERISA Litigation*, 535 F.3d 325 (5th Cir. 2008) ("*Enron*"), and (3) *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008) ("*IPM*"). *IPM* and *Enron* suggest that SLUSA may preclude Stanford's victims from pursuing their own *individual* state-law claims against Stanford's alleged aiders and abettors.[5] That conclusion stands in sharp contrast to this Court's statement in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 88 (2006) ("*Dabit*"), that SLUSA "does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state law cause of action that may exist." *See also Newby v. Enron Corporation*, 542 F.3d 463, 474 (5th Cir. 2008) ("*Newby*") (suggesting that plaintiffs can properly tailor individual suits to avoid SLUSA preclusion). Given the decisions in *IPM* and *Enron*, and the Multidistrict Litigation enveloping the Stanford cases, real doubt exists as to whether Stanford's investor-victims can *ever* sue third-party aiders or abettors if SLUSA applies.[6] SLUSA was

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[5] If the *Roland* decision is affirmed, Stanford's investor-victims cannot use federal causes of action to sue responsible third parties who allegedly aided or abetted Stanford's fraud because this Court has held that *there is **no** aider, abettor, or conspiracy-type liability in private actions 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).

[6] *See, e.g., Dabit*, 547 U.S. at 76 (noting the consolidation of plaintiff's action with "dozens of other suits" in Multidistrict Litigation).

never intended to leave almost 20,000 Stanford investor-victims without a state-law remedy, and the statute should not be interpreted to produce such a result.

ARGUMENT

A. Petitioners' Alleged Roles in Stanford's Ponzi Scheme

Worldwide Ponzi schemes do not happen overnight; moreover, such schemes can rarely succeed unless the originators (here, Stanford and Davis) get considerable help from others. The Petitioners are alleged to have played integral roles in perpetuating and expanding Stanford's worldwide Ponzi scheme. Their alleged conduct was a significant cause of the losses sustained by some 20,000 Stanford investor-victims worldwide.

1. The Willis/BMB Petitioners

The complaint in Case No. 12-86 (against Willis of Colorado, Inc., *et al.* (the "Willis Defendants")), JA 612-770 (the "Willis/BMB Complaint"), alleges that the victims purchased SIB CDs because they were led to believe that the Stanford Entities, including SIB, were United States-based and carried sufficient insurance coverage to "ensure that investments in [SIB] CDs were safer and more secure than investments in CDs issued by U.S. Banks insured by the FDIC." Willis/BMB Complaint, ¶35 (JA 628). Stanford's representations concerning the supposed safety and security of the SIB CDs were at all times false and misleading.

The Willis Defendants are alleged to have played a critical role in creating and perpetuating the lie about the safety and security of the SIB CDs. From 1996 through 2008, the Willis Defendants provided Stanford with "safety and soundness" letters[7] attesting to both the professionalism of SIB's personnel and the safety and security of SIB's business practices. Willis/BMB Complaint, ¶75 and Ex. 4 (JA 649, 751-66). Those "safety and soundness" letters each included the following representations by the Willis Defendants:

- that the Willis Defendants knew SIB's personnel to be "first class business people;"
- that the Willis Defendants had placed certain insurance policies for SIB with Lloyds of London and other carriers; and
- that SIB had undergone a "stringent Risk Management Review conducted by an outside audit firm" to qualify for the referenced insurance.

Willis/BMB Complaint, ¶77 and Ex. 4 (JA 650, 751-66).

Respondents allege that statements made by the Willis Defendants in these "safety and soundness" letters were false and misleading. Willis/BMB Complaint, ¶¶91-99 (JA 657-662). Among other things, SIB never underwent a Risk Management

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[7] Bowen, Miclette & Britt, Inc. issued these "safety and soundness" letters in 1996, 1998, 1999, 2000, 2001, 2002 and 2004. Willis issued the letters in 2005, 2006, and 2008. Willis/BMB Complaint, ¶75 (JA 649).

Review—stringent or otherwise—conducted by an outside audit firm. Willis/BMB Complaint, ¶92 (JA 658). Respondents also specifically allege that the Willis Defendants provided these letters to Stanford with the understanding and intention that Stanford would circulate the letters to both existing and prospective SIB CD investors. Willis/BMB Complaint, ¶¶ 78, 82 (JA 651, 653). The complaint alleges that thousands of SIB CD investors relied on these "safety and soundness" letters, which lent credence to Stanford's own misrepresentations concerning the extent to which the SIB CDs were more fully insured than CDs issued by U.S. banks.

2. Chadbourne & Park LLP and Proskauer Rose LLP

The Petitioners in Case No. 12-79 (Chadbourne & Park LLP ("Chadbourne")) and Case No. 12-88 (Proskauer Rose LLP ("Proskauer")) are alleged to have played similar and successive roles in helping Stanford perpetuate and expand his Ponzi scheme. *See* JA 422-493 ("Chadbourne/Proskauer Complaint"). Both Chadbourne and Proskauer became involved with Stanford through Thomas Sjoblom, a former SEC enforcement attorney with twenty years of experience at the SEC. Sjoblom was first a partner with Chadbourne and thereafter with Proskauer. Chadbourne/Proskauer Complaint, ¶¶ 26, 60, 115 (JA 435, 455, 490). Respondents allege that Chadbourne and Proskauer—through Sjoblom—helped run interference for Stanford with the SEC from 2005 forward, effectively thwarting SEC efforts to investigate Stanford. During this time, the amount of money invested in SIB CDs expanded exponentially.[8]

Chadbourne's involvement came first. Stanford retained Chadbourne, through Sjoblom, to represent the Stanford Entities in response to an investigation begun by the SEC in mid-2005. Chadbourne/ Proskauer Complaint, ¶60 (JA 455). Respondents specifically allege that Sjoblom worked with Stanford, Davis, and Leroy King[9] to obstruct the SEC's investigation. *Id.* Among other things, Sjoblom became familiar with the SIB CD sale operation and the marketing materials being used to promote those CDs. *Id.* at ¶¶61-65 (JA 455-58). In October 2005, Sjoblom sent a letter to the SEC urging that it had no jurisdiction to investigate CD sales, because the

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[8] Respondents allege that SIB sold between $4 and $5 billion in CDs between 2005 and February 2009. Chadbourne/ Proskauer Complaint, ¶49 (JA 449). The Receiver's forensic accounting expert, Karyl Van Tassel, has determined that the amount invested in SIB CDs (and SIB's liability to CD holders) grew from $3.78 million at year end 2005 to $5.03 million at year end 2006 to $6.70 million at year end 2007 to $7.44 million at year end 2008. Supplemental Affidavit of Karyl Van Tassel dated June 2, 2011, filed in *Janvey v. Alguire*, Civil Action No. 09-CV-0724-N, in the U.S. District Court for the Northern District of Texas, Doc. No. 616-2 at 27 of 250.

[9] Leroy King was the head of Antigua's Financial Services Regulatory Commission, the supposed regulator of SIB. Leroy King was also bought and paid for by Allen Stanford. Mr. King has been indicted for his role in Stanford's Ponzi scheme in Case Number 4:09-CR-0342-5 in the U.S. District Court for the Southern District of Texas, Houston Division. He has not yet been extradited by Antigua.

CDs were not "securities" under the federal securities laws. *Id.* at ¶63 (JA 457).

Sjoblom left Chadbourne in August 2006 and joined Proskauer as a partner. *Id.* at ¶115 (JA 490). Stanford immediately retained Proskauer as its new counsel, and Respondents allege that Sjoblom went right back to work obstructing the SEC's efforts to investigate Stanford. In September 2006, he contacted the SEC and, based on his extensive enforcement experience and his personal dealings with SIB, attempted to convince the SEC that SIB was a credible institution in all of its business dealings. *Id.* at ¶¶67-68 (JA 459-60).

According to the complaint, in late 2008 and January 2009, Sjoblom learned that a significant portion of SIB's supposed investment portfolio was in illiquid private equity and real estate investments, and that these illiquid investments had never been disclosed to SIB CD investors. *Id.* at ¶72 (JA 462-63). Sjoblom also received, on Stanford's behalf, service of SEC subpoenas seeking information about SIB's investment portfolio. *Id.* at ¶73 (JA 463). Sjoblom met with Stanford, Davis, Pendergest-Holt, and others to address how SIB could respond to these subpoenas. Respondents contend that Sjoblom participated in developing a plan to convince the SEC that neither Stanford nor Davis had information concerning the investment portfolio. Instead, they would convince the SEC to meet with Pendergest-Holt and Juan Rodriguez-Tolentino.[10] Respondents have alleged

[10] Mr. Tolentino held the title of President of SIB. In reality, he was a figurehead, performed no executive functions, and

that Sjoblom then needed to get Pendergest-Holt and Rodriguez-Tolentino "up to speed." *Id.* at ¶¶74-75 (JA 463-64).

Sjoblom met with an SEC attorney on January 23, 2011, and convinced the attorney to defer the subpoenas directed to Stanford and Davis by representing that Pendergest-Holt and Rodriguez-Tolentino would be better able to provide the information sought. *Id.* at ¶76 (JA 464-65). Sjoblom then spent the first week of February 2009 preparing both Pendergest-Holt and Rodriguez-Tolentino to testify. Respondents have specifically alleged that Sjoblom knew that neither of them knew what Stanford and Davis had actually done with the money invested in SIB CDs. *Id.* at ¶80 (JA 466-67). Respondents contend that during these meetings, it became clear, at least to Rodriguez-Tolentino, that SIB's disclosures concerning its investment portfolio were false and misleading, and he announced that he would not testify before the SEC. *Id.*

But Pendergest-Holt appeared and testified before the SEC on February 10, 2009, allegedly committing perjury on numerous occasions. Two days later, on February 12, 2009, Proskauer and Sjoblom informed the SEC that they were withdrawing from representing the Stanford Entities. *Id.* at ¶84 (JA 469). Two days after that, on February 14, 2009, Sjoblom sent an email to the SEC, disavowing "all prior oral and written representations" that he had made to the SEC concerning the Stanford Entities

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served mostly as a tour guide for well-heeled potential investors in SIB CDs.

from mid-2005 (while a partner at Chadbourne) through February 2009. *Id.*

B. SLUSA does not apply because the SIB CDs at the heart of the Ponzi scheme are not a "covered security."

Petitioners seek to avoid being called to account for their alleged conduct by invoking the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to argue that the cases against them should be dismissed. But because the SIB CDs are not the type of securities to which SLUSA applies, the Fifth Circuit properly rejected the Petitioners' arguments and remanded the cases for trial.

SLUSA (codified at 15 U.S.C. § 78bb) was enacted to close what Congress perceived as a loophole in the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1; 78u-4. *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006) (SLUSA enacted to block plaintiffs' efforts to "bypass" the PSLRA); *Dabit*, 547 U.S. at 82.

SLUSA applies to a carefully defined set of class-action lawsuits. It applies only when a "covered class action" based on state law includes allegations of fraud "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f). This appeal centers on SLUSA's application to class-action suits alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." *Id.* § 78bb(f)(1)(A). Because the SIB CDs at issue here are not a "covered security," SLUSA should not apply.

1. SLUSA must be applied in light of Congress's precise, narrow definition of "covered security."

There is nothing vague or ambiguous about SLUSA's definition of "covered security." *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) ("If the statute is clear and unambiguous that is the end of the matter[.]"). A "covered security" includes only:

> (a) securities traded on national exchanges (*e.g.*, the New York Stock Exchange, the American Stock Exchange, or the NASDAQ National Market);
>
> (b) securities issued by a registered investment company (*e.g.*, registered mutual-fund shares like those issued by Vanguard or Fidelity); or
>
> (c) securities for which a registration statement has been filed under the Investment Company Act of 1940.

15 U.S.C. §§ 77r(b)(1); 78bb(f)(5)(E). A key characteristic of a "covered security" is that it is nationally traded. Congress specifically found a need for "national standards for securities class action lawsuits involving *nationally traded securities*." SLUSA, Pub. L. No. 105-353 § 2(5), 112 Stat. 3227 (1998) (emphasis added).

SLUSA's legislative history also reflects its restricted application to lawsuits involving nationally traded securities:

- "The Committee strongly notes that this legislation *only* covers precisely those securities defined in the NSMIA [National Securities Markets Improvement Act of 1996], principally those securities that are *traded on national exchanges*." Report of the Senate Committee on Banking, Housing and Urban Affairs, S. REP. NO. 105-182, at 5 (1998) (emphasis added).

- "The solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving *nationally traded securities*." Joint Explanatory Statement of the Committee of Conference, H.R. REP. NO. 105-803, at 13 (1998) (emphasis added).
- "[SLUSA] closes this [PSLRA] loophole by assuring that lawsuits involving *nationally traded securities* remain in Federal courts where they have always been heard." Remarks of Representative Oxley, 144 CONG. REC. H10779-80 (Oct. 13, 1998) (emphasis added).
- "It applies only to class-action suits. It applies *only* to stocks that are *traded nationally*." Remarks of Senator Gramm, 144 CONG. REC. S4792 (May 13, 1998) (emphasis added).
- "[T]he securities governed by this bill—and it is important to emphasize this point—are by definition *trading on national exchanges*. As we all know, securities traded on national exchanges are bought and sold by investors in every State, and those investors rely on information distributed on a national basis."

> Remarks of Senator Lieberman, 144 CONG. REC. S4799 (May 13, 1998) (emphasis added).

SLUSA's precise, narrow focus on nationally traded securities means that SLUSA should have a precise, narrow application. If Congress had intended SLUSA to apply to a broader range of securities, it could have used a broader definition of "covered security." For example, Congress could have used the definition of "security" from the Securities Act of 1933 (15 U.S.C. § 77b(1)), the Securities Act of 1934 (15 U.S.C. § 78c-(a)(10)), the Investment Company Act of 1940 (15 U.S.C. § 80a-2(36)), or the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(18)). Or Congress could have made SLUSA applicable to "a misrepresentation or omission of a material fact in connection with the purchase or sale of *any* security." But Congress did not do so, and the application of SLUSA should reflect the choice to limit "covered security" to nationally traded securities.

A narrow application is also warranted by SLUSA's underlying purpose: to ensure the efficacy of the PSLRA. Congress had enacted the PSLRA to curb abusive class actions involving nationally traded securities. *Dabit*, 547 U.S. at 81. In particular, the targets of the PSLRA were meritless "nuisance filings," which were rampant. *Id*. These abuses resulted in "extortionate settlements," chilled disclosure from issuers, and "deterred qualified individuals from serving on boards of directors." *Id*. To stop this abuse, the PSLRA erected a substantial set of pleading hurdles that a plaintiff must clear before the suit can progress to discovery and beyond.

Id. In short, Congress enacted the PSLRA to quell "strike suits." *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (PSLRA was adopted "[a]s a check against abusive litigation by private parties"); *Cal. Pub. Emp. Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 98 (2d Cir. 2004) ("The PSLRA was intended to curtail "strike suits … .").

But the PSLRA's success led to an unintended consequence. Rather than attempt to clear the PSLRA's hurdles, plaintiffs instead brought similar nuisance class actions under state law in state court. *Id*. at 82. Congress enacted SLUSA to stop this shift from federal to state courts and to prevent state class action lawsuits from frustrating the objectives of the PSLRA. *Dabit*, 547 U.S. at 82. Thus, Congress enacted SLUSA to quell strike suits in state court. *See* Remarks of Representative Boehner, 144 CONG. REC. E1384-85 (July 22, 1998) ("This bill would prevent strike suit lawyers from abusing convenient state law … .").

2. The "covered security" inquiry should start and stop with the product actually marketed to the investor.

Given SLUSA's narrow focus, the central inquiry here should be whether the SIB CDs at the center of the Stanford Ponzi scheme are, in fact, a "covered security." They are not.[11] The CDs were never listed

[11] The SIB CDs are "securities" under Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10), Section 2(36) of the Investment Company Act of

nor authorized for listing on the New York Stock Exchange, the American Stock Exchange, the NASDAQ National Market, or any similar exchange. The CDs were not issued by a registered investment company, nor was a registration statement ever filed with respect to the CDs. Based on the largely undisputed facts concerning the SIB CDs, both the district court and the Fifth Circuit correctly concluded that the SIB CDs purchased by Respondents ***were not*** "covered securities." *Roland v. Green*, 675 F.3d 503, 510, 521 (5th Cir. 2012).

The determination that SIB CDs were not "covered securities" should have ended the inquiry concerning SLUSA's application to these cases. The Second Circuit has recognized the central importance of the product that was actually marketed to and purchased by the plaintiffs. *See Ring v. AXA Fin., Inc.,* 483 F.3d 95 (2d Cir. 2007). In *Ring*, the plaintiffs' claims focused on an insurance product, a Children's Term Rider ("CTR"), purchased in conjunction with either a whole-life policy or a variable-life policy. 483 F.3d at 98. The Second Circuit rejected the contention that the CTR should be treated as a "covered security" because it could only be purchased in conjunction with another insurance policy, and was often purchased in conjunction with variable-life policies, which were "covered securities."[12] The court instead focused solely on the CTR that gave rise to plaintiffs' claims:

1940, 15 U.S.C. § 80a-2(36), and Section 202(18) of the Investment Advisers Act of 1940. 15 U.S.C. § 80b-2(18).

[12] *Ring*, 483 F.3d at 99, citing *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 104 (2d Cir. 2001).

> The fact that the CTR can be appended to either a whole life policy or a variable life policy, does not change the character of the CTR depending on the product to which it is attached. The CTR standing alone is pure insurance, with the underwriting risks borne by the insurer and no residual value remaining at the end of the term. The CTR does not take on the qualities of the insurance or annuity with which it must be purchased simply because it cannot be sold alone.

Id. at 101. The Second Circuit concluded that "[b]ecause the CTR is not a 'covered security,' we need not address SLUSA's 'in connection with' requirement." *Id.* at 98.

The Eleventh Circuit has also recognized the need to focus on the product marketed to the investor. *Instituto de Prevision Militar v. Merrill Lynch*, 546 F.3d 1340 (11th Cir. 2008) (in determining whether a lawsuit involves a "covered security" under SLUSA the controlling consideration should be "the product that was marketed to the investor, not what the defendant actually did with the investor's money").

Petitioners argue for a broad application of SLUSA by focusing on the "in connection with" language in section 78bb(f)(1)(A). But when courts search upstream and downstream for "covered securities" other than the ones actually marketed to and purchased by the investor-plaintiff, they disregard both the securities and the allegations that are the substance of the plaintiffs' claims. The securities actually purchased, sold, or held by the plaintiffs are the only securities that give those plaintiffs the requisite standing to assert securities-fraud claims (whether under federal or state law) in the first place.

Here, if the Respondents had not purchased the SIB CDs, they would not have standing to complain about how Stanford (or anyone else) used money from those CD purchases. Thus, the SIB CDs—and only the SIB CDs—should be considered in deciding whether Respondents' claims involve "covered securities." This Court should conclude that SLUSA does not apply to these cases because the only securities actually marketed and sold to the Respondents—the SIB CDs—were not "covered securities."

This result also makes sense because the cases before the Court today are not strike suits. Indeed, they fall well outside the zone targeted by the PSLRA, and, by extension, SLUSA. These are not meritless nuisance suits meant to extort a quick settlement from an issuer with stock trading on national U.S. stock exchanges. Rather, these are state-law tort claims aimed at defendants who aided and abetted one of the largest frauds in American history. And the goal of these suits is to compensate over 20,000 individual victims harmed by Stanford and his cohorts. These are quintessential state-law claims, which should be allowed to proceed.

In short, there is simply nothing in the express language of SLUSA or in its legislative history to suggest that Congress intended to give blanket civil-lawsuit immunity to a seller of a fraudulent CD issued by a Caribbean bank merely because that seller and its representatives worked in the brokerage business.

3. This Court's opinion in *Dabit* does not compel a different result.

Neither of the courts below ended its analysis after concluding that the SIB CDs are not a "covered security." Instead, both courts felt compelled by this Court's decision in *Dabit* to give SLUSA an "expansive interpretation." *See Roland* 675 F.3d at 521; *Roland* Order at 12-14 (Pet. App. (12-79) at 61a-63a)[13] (citing *Dabit*, 547 U.S. at 85).

To do so, the Receivership Court strained to seek out "covered securities" that were in any way "connected" to the claims alleged by Respondents. *Roland* Order at 12-20 (Pet. App. (12-79) at 61a-70a). Searching upstream and downstream, and traveling far afield from the pleadings on file, the Receivership Court ultimately concluded that Respondents' claims were "connected" to "covered securities" in two separate ways. First, the Receivership Court surmised that some Respondents were likely induced to purchase SIB CDs by misrepresentations about how SIB would invest CD proceeds ***for its own account***.[14] *Roland* Order at 15-17 (Pet. App. (12-79) at

[13] The District Court's Order in *Roland v. Green* is found in the Petitioner's Appendix in Support of Petition for Writ of Certiorari in No. 12-79, at 54-75. It is referred to herein as the "*Roland* Order."

[14] It is worth noting that Respondents, as purchasers of SIB CDs, were entitled only to the rate of interest stated on

64a-66a). Second, the Receivership Court also surmised that "at least one" Respondent likely sold "covered securities" and used the proceeds from that sale to purchase SIB CDs. *Roland* Order at 17-20 (Pet. App. (12-79) at 68a-70a). Thus, rather than focusing on the actual product marketed to the victims, the Receivership Court stretched "in connection with" to force the Respondents' claims within the coverage of SLUSA.

The Fifth Circuit appropriately rejected the Receivership Court's focus on the source of funds as a basis for applying SLUSA, concluding that such an effort could lead to absurd results. *Roland*, 675 F.3d at 523 n.7.[15] The Fifth Circuit also correctly concluded that the SIB CDs purchased by Respondents were not "covered securities." The analysis should have ended there. Nevertheless, the Fifth Circuit engaged in an extended effort to determine both the appropriate test to be applied to satisfy SLUSA's "in connection with" requirement, 675 F.3d at 511-20, and how Respondents' allegations fared when

their CDs. Respondents had no right or expectation to profit as a result of whatever investments SIB made (or did not make) with funds invested in the CDs. SIB invested the CD proceeds for its *own* account. Similarly, Respondents, as investors in SIB CDs, were not exposed to any risk of loss associated with the investments SIB made (or did not make) with CD proceeds (other than the risk that SIB would fail to repay the deposits with interest).

[15] Only Petitioner Proskauer continues to argue in this Court that the source of funds used to buy the product at issue can bring the suit within the coverage of SLUSA. This Court should reject this argument for the same rationale embraced by the Fifth Circuit.

measured by that test. *Id.* at 521-24. While the Fifth Circuit reached the correct result—Respondents' claims are not precluded by SLUSA—it did not have to consider SLUSA's "in connection with" requirement in order to do so. As in *Ring*, the Fifth Circuit's conclusion that the SIB CDs were not "covered securities" rendered consideration of SLUSA's "in connection with" requirement unnecessary. *Ring*, 483 F.3d at 98.

Dabit did *not* require the Receivership Court or the Fifth Circuit to reach the analysis of "in connection with." But both courts misread *Dabit*. This Court's opinion in *Dabit* says *nothing* about the meaning of "covered security" under SLUSA. Indeed, this Court was not asked in *Dabit* to consider (nor did it address) the meaning of "covered security":

> Respondent does not dispute that both the class and the securities at issue in this case are "covered" within the meaning of the statute, or that the complaint alleges misrepresentations and omissions of material facts. *The only disputed issue is whether the alleged wrongdoing was 'in connection with the purchase or sale' of securities.*

Dabit, 547 U.S. at 83-84 (emphasis added). Because the existence of a "covered security" was conceded in *Dabit*, there was no reason for the Court to address that element.

Instead, the Court's inquiry in *Dabit* focused on SLUSA's "in connection with" requirement. 547 U.S. at 84. *Dabit* stands for the proposition that the words "in connection with the purchase or sale" must be given the same "broad construction" that they are given in Rule 10b-5 cases. *Id.* This "broad construction" principle need not, and should not, be extended to other parts of SLUSA. In particular, the construction of "covered security" should not be broader than the definition in the statute.

Similarly, the various circuit court cases considered by the Receivership Court and the Fifth Circuit all dealt with undisputed "covered securities." For example, in *Madden v. Cowan & Co.*, 576 F.3d 957 (9th Cir. 2009), the Ninth Circuit concluded that registered securities of a closely-held company were "covered securities." *Id.* at 967-968. The Eleventh Circuit also concluded that the securities it was considering in *IPM* were "covered securities", 546 F.3d 1340, 1352 (11th Cir. 2008). *See also Romano v. Kazacos*, 609 F.3d 512, 520-21 (2d Cir. 2010) (claims involved investments in Morgan Stanley IRA accounts containing mutual funds and listed securities); *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 309 (6th Cir. 2009) (claimants conceded that bank's proprietary mutual funds were "covered securities"); *Siepel v. Bank of America, N.A.*, 526 F.3d 1122, 1126 (8th Cir. 2008) ("no dispute" that mutual fund listed in amended complaint was a "covered security"); *Gavin v. AT&T Corp.*, 464 F.3d 634, 638 (7th Cir. 2006) (Media One stock at issue was a "covered security").

In sum, there is no reason to analyze the phrase "in connection with" if the security marketed to the victims is not a "covered security." SLUSA's application is clearly and intentionally limited to nationally traded securities. This Court should not bypass the threshold limitations of "covered security" to expand SLUSA's coverage by employing a broad construction of "in connection with."

C. SLUSA should not be interpreted to preclude all investor claims.

Both the legislative history and judicial interpretations of SLUSA make clear that SLUSA was ***not*** designed to deny defrauded investors their day in court.[16] *See, e.g., Dabit*, 547 U.S. at 87 ("[SLUSA] does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist."); *Newby v. Enron Corporation,* 542 F.3d 463, 474 (5th Cir. 2008) (noting that a party can tailor a suit to avoid SLUSA, and that Congress did not intend SLUSA to preclude individual actions "*simply because more than fifty persons commence the actions in the same state court against a single defendant*") (emphasis added).

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[16] For example*,* Senator Dodd stated that:

> [SLUSA] will not affect the ability of any individual, or even a small group of individuals, to bring a suit in state court against any security, nationally traded or not. It will not affect any suit, class action or otherwise, against penny stocks or any stock that is not traded on a national exchange.

Remarks of Senator Dodd, 144 CONG. REC. S4791 (May 13, 1998); *see also* Remarks of Representative Tauzin, 144 CONG. REC. H10786 (Oct. 13, 1998) ("[T]he bill is carefully designed to make sure that other actions, indeed, can still be brought in State courts . . . .").

But the Eleventh Circuit's decision in *IPM* and the Fifth Circuit's decision in *Enron*, 535 F.3d 325 (5th Cir. 2008), cast considerable doubt on the ability of even a single investor to bring a claim that can survive SLUSA preclusion. Relying on *IPM* and *Enron*, the district court below suggested that, regardless of consolidation, the plaintiffs' claims meet the definition of "covered class action" under SLUSA. Pet. App. (12-79) at 71a-72a, n.19.

In *IPM,* the Eleventh Circuit applied SLUSA's "group of lawsuits" provision, 15 U.S.C. § 78bb(f)(5)(B)(ii), to three separate lawsuits, two of which were brought by a single plaintiff (a pension plan), and ultimately held that all three lawsuits were precluded by SLUSA. 546 F.3d at 1347 (grouping lawsuits), 1352 (finding SLUSA preclusion). The three lawsuits were all filed in the Southern District of Florida pursuant to a case management order.[17] *Id.* at 1343-44. Because the cases were thereafter consolidated for discovery purposes, and (at least in part) because the plaintiff in *IPM* did not object to that consolidation, the *IPM* court found that the cases were a "group of lawsuits" within the meaning of SLUSA. [18] *Id.* at 1347.

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[17] The case management order in *IPM* is likely similar to the order entered by the Receivership Court below, pursuant to which all actions against Stanford's vendors, service providers and others were required to be filed as ancillary proceedings to the SEC's enforcement action. *Roland*, 675 F.3d at 508 (describing case management order).

[18] In *IPM,* the 11th Circuit suggested, but did not address, that the consolidation of cases over plaintiffs' objections, leading to SLUSA preclusion, might be an abuse of discretion by a trial court. 546 F.3d at 1347. Certainly,

In *Enron*, the Fifth Circuit applied SLUSA to preclude multiple lawsuits, each brought by fewer than 50 plaintiffs, because the court concluded that the cases were proceeding "as a single action" or in a coordinated manner. *See* 535 F.3d at 340. The *Enron* court reached that conclusion even though the plaintiffs went to considerable lengths to structure their lawsuits to avoid SLUSA preclusion. The *Enron* court found that SLUSA applied because: (1) the individual lawsuits had been consolidated; and (2) the lawsuits were proceeding as a single action because the plaintiffs had (i) acted in unison, (ii) filed nearly identical complaints, (iii) jointly scheduled discovery, (iv) filed joint motions, (v) provided nearly identical discovery responses, and (vi) used the same expert and expert reports. *See Enron*, 535 F.3d at 333, 340. *Enron* seemed to place particular emphasis on the plaintiffs' use of a single damages expert who provided a single damage figure for all the plaintiffs in all the cases. *Id.* [19]

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defendants ought not be able to manufacture SLUSA preclusion (through petitions for removal, transfer motions, and motions to consolidate) where plaintiffs have specifically structured and prosecuted their lawsuits to avoid such preclusion.

[19] The Receiver and Examiner note that in *Enron* the factors which apparently contribute to SLUSA preclusion are typically things that courts *encourage* in pending lawsuits. It is curious, and at least a little ironic, that plaintiffs may find themselves precluded under SLUSA because they did not oppose the consolidation of actions, or they agreed on coordinated discovery, or they opted to use a single expert. *See Enron*, 535 F.3d at 333, 340.

If this Court reverses the Fifth Circuit and concludes that Respondents' claims are precluded by SLUSA, all class-action lawsuits now pending in the Receivership Court are likely to be dismissed. Any future lawsuits filed in state court against alleged aiders and abettors, whether filed by individuals or small groups, will almost certainly be removed to federal court pursuant to SLUSA.[20] After removal, such cases will likely be transferred to the Receivership Court (because the Stanford cases are being administered as Multidistrict Litigation, *In re Stanford Entities Securities Litigation*, MDL No. 2099) and then be subject to potential consolidation. Individual and small-group cases may then be subject to SLUSA preclusion and dismissal if there are more than 50 total plaintiffs.

Ultimately, as few as 50 Stanford victims may be able to pursue any particular alleged aider or abettor of Stanford's fraud, as the remaining victims—some 20,000 of them—are forced to watch from the sidelines. SIB CD investors with smaller losses will almost certainly be left out (although their losses may still represent the investors' life savings). Given the complexity of the Stanford litigation, very few lawyers are likely to agree to represent Stanford investors with smaller losses on a contingent fee basis, even in groups of 49 plaintiffs. Moreover, for

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[20] The *Worldcom* decision (which the Fifth Court relied on in *Enron*) cautioned against abusive removal practices through which defendants attempt to use SLUSA removal to "bootstrap" a finding of SLUSA preclusion. *In re Worldcom Inc. Secs. Litig.,* 308 F. Supp. 2d 236, 246 (S.D.N.Y. 2004).

the reasons set forth above, even those small groups would not be certain to avoid SLUSA preclusion. This result would deny smaller investors their day in court and the right to vindicate their claims against those that allegedly contributed to their injuries.

The Court need not address this unfortunate result here. The Court can and should hold that the securities marketed and sold to the Respondents—the SIB CDs—are not "covered securities" under SLUSA, and that SLUSA therefore does not apply to these actions. But should the Court conclude that SLUSA does apply to Respondents' claims, the Receiver and the Examiner urge the Court to clarify the standards to be applied under SLUSA to lawsuits brought by individuals, or groups of less than 49 individuals, so that Stanford's investor-victims will know whether they will ever have their day in court and, if so, how to get there.

CONCLUSION

SLUSA expressly defines and limits its reach; it applies only to class action lawsuits invoking state law that involve a "covered security." As both Congress and this Court have recognized, a "covered security" is one that is traded on a national exchange. Here, the securities actually marketed and sold to the Respondents that give rise to their claims are CDs issued by SIB. Both the Receivership Court and the Fifth Circuit correctly concluded that the SIB CDs were not "covered securities" under SLUSA. That conclusion should have ended the inquiry because SLUSA does not apply in the absence of a "covered security."

This Court should affirm the Fifth Circuit's judgment that SLUSA does not preclude Respondents' lawsuits for the simple reason that the SIB CDs are not "covered securities" under SLUSA.

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