No. _____

In The
Supreme Court of the United States

BORDIER ET CIE and DOMINICK COMPANY, AG,
Petitioners,

v.

JOSEPH P. LASALA and FRED S. ZEIDMAN, as Co-Trustees of the AremisSoft Corporation Liquidating Trust,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78bb(f), prohibits in both state and federal court certain state-law based securities-related "covered class action[s]," defined as "any single lawsuit in which * * * damages are sought on behalf of more than 50 persons and questions of law or fact common to those persons" predominate over questions, other than reliance, affecting only individual persons. *Id.* §§ 78bb(f)(1), (5)(B)(i)(I). Here, both a corporation and a class of more than 6000 purchasers of the corporation's securities assigned their respective claims to a trust, the trustees of which brought suit on those claims. The more than 6000 purchasers are the beneficiaries of the trust and they, not the corporation, are entitled to any recovery in the suit. The questions presented are:

1. Whether the Third Circuit erred in looking beyond the allegations of the complaint, and instead prematurely addressed the merits of individual claims, in order to avoid SLUSA preemption?

2. Whether, in deciding if an action seeks damages "on behalf of more than 50 persons" under SLUSA, the Third Circuit erred in looking to the person that allegedly suffered the original injury, rather than to the more than 50 beneficial owners of the claims for whose benefit damages are sought?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Bordier et Cie and Dominick Company, AG (the "Banks") were appellees in the Third Circuit and defendants in the district court.

Bordier et Cie is a privately held company with no parent companies and no publicly held companies owning 10% or more of the company's stock. Dominick Company, AG is a privately held company with a single parent company, Dominick & Partners Holding, AG, which also is privately held. No publicly held companies own 10% or more of either company's stock.

Respondents Joseph P. LaSala and Fred S. Zeidman are co-trustees of the AremisSoft Corporation Liquidating Trust and, in those capacities, were appellants in the Third Circuit and plaintiffs in the district court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Bordier et Cie and Dominick Company, AG (the "Banks") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the District Court for the District of New Jersey is published at 452 F. Supp.2d 575 and is attached as Appendix B (pages B1-B32). The decision of the Third Circuit is published at 519 F.3d 121 and is attached as Appendix A (pages A1-A39). The Third Circuit's order denying rehearing and rehearing *en banc* is unpublished and is attached as Appendix C (pages C1-C2).

JURISDICTION

The Third Circuit issued its opinion on March 11, 2008. A timely petition for rehearing and/or rehearing *en banc* was denied on April 9, 2008. Justice Souter granted petitioners an extension of time to file this petition through August 7, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78bb, provides, in relevant part:

> (f) Limitations on remedies
>
> (1) Class action limitations
>
> 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.

* * *

(5) Definitions

For purposes of this subsection, the following definitions shall apply:

* * *

(B) Covered class action

The term "covered class action" means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate

over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(C) Exception for derivative actions

Notwithstanding subparagraph (B), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(D) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

* * * * *

STATEMENT OF THE CASE

This case involves an action by a trust established to pursue legal claims for the benefit of investors in the now-bankrupt AremisSoft Corporation (the "Trust"). The investors claim to have been defrauded by AremisSoft and its top management into purchas-

ing overpriced company stock during the period from April 1999 to July 2001.

While the underlying alleged scheme was a classic "pump-and-dump" securities fraud – false statements to inflate the price of company stock followed by insiders dumping their stock at the inflated prices – the current suit is against two Swiss banks, petitioners here. The Trust claims that the Banks aided and abetted the securities fraud and violated Swiss law by failing to investigate the source of funds deposited with them. The complaint alleges that the Banks provided substantial assistance to the alleged scheme to misrepresent the true financial picture of AremisSoft, profit from the sale of AremisSoft shares at artificially inflated prices, and conceal the AremisSoft officers' ill-gotten gains. Complaint ¶¶ 110, 115.[1]

While petitioners staunchly maintain that the suit against them is without merit, the merits of the complaint are not currently at issue. Rather, the issues here involve whether the federal courts have power to hear such suit at all in light of the strict prohibition, under SLUSA, against certain actions seeking damages on behalf of more than 50 persons. 15 U.S.C. § 78bb(f)(5)(B).[2]

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[1] The complaint was electronically filed in the District Court and is available on Pacer, District Court for the District of New Jersey case number 3:05-cv-04520, Docket entry #1 (Sept. 14, 2005), at https://ecf.njd.uscourts.gov/doc1/11902464022.

[2] The statutory issues involved in this petition concern whether the suit against the Banks is a "covered class action" and whether it is "based upon the statutory or common law of any State." This petition does not present any issue as to SLUSA's requirement that the action involve misrepresentation,

1. SLUSA was designed to close a loophole in the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. §§ 77z-1, 78u-4, which was passed to make it more difficult to bring securities "strike suits" – typically class-action suits with little legal merit but significant settlement value due to their expense and nuisance. The PSLRA imposed heightened pleading standards on plaintiffs bringing federal securities lawsuits, made it easier for courts to dismiss strike suits, and limited the damages and attorneys' fees that could be recovered in such suits. *Id.* § 78u-4.

One inadvertent consequence of the PSLRA was to create an incentive for plaintiffs to bring suit based on state, rather than federal law, thus avoiding the PSLRA's restrictions. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 82 (2006). In order to close that loophole, Congress enacted SLUSA, which 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

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manipulation, or deception in connection with the purchase or sale of a covered security, which is satisfied by the allegations of the underlying pump-and-dump scheme involving AremisSoft stock, formerly traded on NASDAQ.

> (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.

15 U.S.C. § 78bb(f)(1). A "covered class action" is defined by SLUSA as, *inter alia*,

> (i) any single lawsuit in which--
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; * * *.

15 U.S.C. § 78bb(f)(5)(B)(i)(I).[3]

2. Respondent Trustees seek damages on behalf of more than 6000 beneficiaries who purchased AremisSoft stock during the pump-and-dump scheme described above (the "Purchasers").

The Trust was created under Delaware law pursuant to a Chapter 11 Plan of Reorganization and a class-action settlement disposing of several securities class actions brought against AremisSoft by the Purchasers. Pursuant to the Plan of Reorganization and the settlement agreement, both of which were ap-

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[3] SLUSA counts corporations, partnerships, trusts, and similar entities as only one person unless such entities are "established for the purpose of participating in the action." *Id.* § 78bb(f)(5)(D).

proved by the District Court for the District of New Jersey, the settling class-action plaintiffs (*i.e.*, the Purchasers) assigned to the Trust all of their individual claims related to the pump-and-dump scheme, and AremisSoft assigned to the Trust all of its pre-bankruptcy claims. The more than 6000 Purchasers are the sole beneficiaries of the Trust. [4]

On September 15, 2005, the Trust filed suit against the petitioner Banks, alleging that the Banks aided and abetted breaches of fiduciary duty in connection with the underlying securities fraud and violated Swiss law concerning the receipt and transfer of the proceeds of the underlying fraud.

The complaint alleges that the plaintiff Trustees "bring this action * * * for the benefit of the beneficiaries of the AremisSoft Trust to recover damages caused by the wrongful conduct of" the Banks in assisting the underlying "fraud perpetrated on AremisSoft Corporation * * * and its shareholders." Complaint ¶ 1. It further alleges that the "investing public, who are the beneficiaries of the AremisSoft Trust and whose interests are represented thereby, * * * sustained losses of approximately $500 million, which is the actual damage total approved by this Court, based upon allowed proofs of claim. The beneficiaries of the AremisSoft Trust, who number over 6,000 persons and entities all across the globe[,] are entitled under the Plan to recover 100% of these damages,

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[4] As alleged in the complaint, ¶ 27, 100% of the beneficial interest in the Trust is held by the more than 6000 Purchasers. AremisSoft shareholders who did not purchase during the pump-and-dump scheme, *e.g.*, those who became shareholders before the scheme began, are not beneficiaries of the Trust.

plus interest, net of [fees and expenses]." Complaint ¶ 27.[5] Although the complaint also refers to bringing claims on behalf of AremisSoft, Complaint ¶¶ 10, 13, 36, it seeks no damages for AremisSoft itself. And these few references are *in addition to*, not exclusive of, the numerous, detailed allegations of the damages to, and sought to be recovered by, the Purchasers.

3. In the district court, the Banks moved to dismiss the action as preempted by SLUSA because it seeks damages on behalf of more than 50 persons (the over 6000 beneficiaries of the Trust – *i.e.*, the Purchasers) and alleges misrepresentations in connection with the purchase or sale of securities.

4. On September 11, 2006, the same district court judge who approved the settlement of the Purchaser class actions and the creation of the Trust granted the Banks' motions to dismiss. App. B2, B32. The court first found that the action was a "covered class action" because damages were being sought on behalf of the over 6000 beneficiaries of the Trust. The court held that because the Trust was "established for the purpose" of litigating claims on behalf of its beneficia-

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[5] *See also*, Complaint ¶ 3 ("public investors who purchased shares at artificially inflated prices suffered loss and damage," and "investing public, who are the beneficiaries of the [Trust] * * * sustained losses of approximately $500 million"); ¶ 10 (the Trust "serves as the vehicle for the prosecution of all such claims on behalf of such former shareholders of AremisSoft" and will distribute all recoveries "proportionally to the beneficiaries" of the Trust"); ¶ 17 (alleging that Banks "are liable to the * * * Trust, which represents the former shareholders of AremisSoft"); ¶ 26 (AremisSoft insiders "reap[ed] huge profits at the expense of the beneficiaries of the * * * Trust by selling their AremisSoft shares at inflated prices to investors").

ries, it was not entitled to be treated as a single entity under the counting rules provided by SLUSA in § 78bb(f)(5)(B), (D). App. B12-B17. The court instead looked through the Trust and counted the beneficiaries of the Trust as the relevant "persons" for purposes of SLUSA's numerical threshold. App. B13-B17.

Based on the allegations of the complaint, the district court found that "no damages are claimed on behalf of AremisSoft itself," and that "any damages recovered by Plaintiffs will benefit a class of more than fifty persons." App. B29-B31. The court observed that the Trust's "bald contentions that it is pursuing this action on behalf of AremisSoft * * * lacks any factual support and is entirely contradictory with the method of recovery" pursued in the action. App. B30. The court expressly rejected the argument that the aiding and abetting claims pled by the Trust were "'fundamentally corporate' in nature." App. B30-B31.

Moreover, the court held that even if the Trust had pled any claims on behalf of AremisSoft itself, such claims would be preempted. The court pointed out that any supposed claims on behalf of AremisSoft were "*in addition to* the claims * * * brought on behalf of the class of former AremisSoft shareholders." App. B29 (emphasis added). The court held that SLUSA, by its terms, "preempts *actions* as opposed to *claims*." App. B27 (emphasis added). Consequently, "because Plaintiffs' aiding and abetting claims against Defendants asserted on behalf of [the Purchasers] are preempted by SLUSA, any claims asserted on behalf

of AremisSoft itself would also be preempted." App. B31.[6]

Regarding Counts III and IV, which assert violations of Swiss law by the Banks, the court acknowledged that SLUSA only preempts covered class actions based upon state law. However, it held that because SLUSA preempts "actions" rather than "claims," the entire action must be dismissed where any portion of the complaint met SLUSA's criteria. App. B27-28. The court further held that the full incorporation into Counts III and IV of all of the state-law claims from the preceding counts rendered Counts III and IV equally "based upon" state law and thus preempted. App. B28-B29.

5. The Trustees appealed to the Third Circuit.

6. On March 11, 2008, the Third Circuit reversed and remanded. App. A1-A39.

a. The Third Circuit began its analysis by considering the nature and merits of the separate claims it discerned in the complaint. Despite recognizing SLUSA's *jurisdictional* limits on the court, App. A8 n. 7 – and purporting to "remain agnostic" on the legal merits of the claims, App. A11 n. 12 – the court proceeded to determine which of the claims were viable and to analyze the means by which they came to be owned by the Trust.[7]

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[6] SLUSA by its terms speaks not of "claims," but rather of a covered class "action," which is defined as "any single lawsuit" or "any group of lawsuits" in which "damages are sought on behalf of more than 50 persons." 15 U.S.C. § 78bb(f)(5)(B).

[7] Although the court acknowledged that SLUSA applies to covered "actions," rather than to individual "claims," it did not

With regard to the aiding and abetting claims (Counts I and II), the court looked to Delaware law and recognized that both a corporation and, in some circumstances, its shareholders independently, could bring a claim for breach of fiduciary duty. The court further recognized that, unlike federal securities law, Delaware law permitted a claim for aiding and abetting a breach of fiduciary duty. App. A9-A10.[8]

The court then observed that Counts I and II "plead claims against the Banks for aiding and abetting the Directors' breaches of fiduciary duty * * * to AremisSoft *and its shareholders*." App. A11 (emphasis added). On their face, therefore, Counts I and II allege *both* individual claims assigned by the Purchasers to the Trust and corporate claims assigned by AremisSoft to the Trust. At that point the court could have (and should have) stopped its analysis and affirmed the dismissal of the action: the allegations of injury to the numerous Purchasers and the effort based on state law to recover damages for the benefit of those Purchasers satisfy the requirements of SLUSA and require the entire "action" to be dis-

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reach the question "[w]hether a single offending claim requires dismissal of the entire action." App. A8 n. 6.

[8] The court analyzed all aspects of the aiding and abetting claims in Counts I and II under Delaware law, without even acknowledging the Banks' position that *their* conduct should be governed by Swiss law, regardless whether questions concerning the insiders' breach of fiduciary duty are determined according to state law. That the fiduciary duty elements of the complaint allege violations of state law, however, is more than enough to make the action as a whole one that is "based upon" state law, even though it may also involve foreign law as to particular issues.

missed, regardless of what *other* claims might also have been pled in the action.

Rather than stopping there, however, the court instead looked beyond the criteria specified by SLUSA and – under the guise of trying to "understand the allegations in light of the elements of the pleaded cause of action" – proceeded to elide the claims for harm to the Purchasers by finding that they failed to state a claim on the merits. App. A11.

According to the court, the allegations regarding breach of duty and injury to the Purchasers did not adequately state a claim under Delaware law. *See* App. A13 (noting that although "Delaware law recognizes [purchaser overpayment for stock] as a direct harm, * * * Delaware law seems to provide that the harm is irremediable under state law"); *id.* at A14 (although both harm to the purchasers and harm to the corporation "appear on the face of the complaint * * * only the harm to AremisSoft is relevant to a claim for aiding and abetting a breach of fiduciary duty because such individual-purchaser harms are not cognizable under Delaware law.").

Having thus determined the merits under state law of the claims for harm to the Purchasers, the court simply ignored the allegations raising such claims (which would unquestionably trigger coverage under SLUSA) and construed the remainder of Counts I and II as limited to claims for injury to AremisSoft:

> Reading the complaint against the background of Delaware law, we believe that counts I and II allege aiding-and-abetting claims that

> originally belonged to AremisSoft, not to the purchasers of AremisSoft stock.

App. A15.

In essence, the court perceived two types of aiding and abetting claims in Counts I and II: Purchaser-originated claims based on their overpayment for the fraudulently "pumped" AremisSoft stock, and corporate-originated claims based upon the supposed adverse effects on AremisSoft of its stock price returning to its true value when the scheme was disclosed.[9] Instead of recognizing that the presence of the Purchaser-originated claims for aiding and abetting *per se* mandated dismissal under SLUSA, the court assessed the legal merit of these claims and concluded that they had none. What remained were the corporate-originated aiding and abetting claims, which the court saw as having been brought only on behalf of one person, AremisSoft, rather than on behalf of the beneficiaries of the Trust. Thus, the court in effect amended the complaint, narrowing it as though it only contained the corporate-originated aiding and abetting claims. The court then applied SLUSA to that narrowed version.

Only after thus considering the merits of the complaint to narrow Counts I and II did the court turn to the jurisdictional limits imposed by SLUSA. It then applied SLUSA only to what it deemed the viable

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[9] It is peculiar, to say the least, that the court stretched to find harm to AremisSoft from a scheme that raised its stock price, and from a bankruptcy that arose not from the fraudulent scheme, but from the termination of that scheme and from AremisSoft being valued according to its *true* condition.

claims in Counts I and II for injury to the corporation itself, ignoring the allegations supporting the supposedly non-viable claims for injury to the Purchasers.

As to the remaining corporate-originated claims – and notwithstanding that the over 6000 Purchasers are the beneficiaries of the Trust and the sole beneficial owners of even the corporate-originated claims – the court concluded that such corporate-originated claims were "on behalf of" AremisSoft (one person under SLUSA) and not on behalf of the numerous beneficiaries of the Trust.

The court based this conclusion on the fact that the corporate-originated claims had been assigned to the Trust by the AremisSoft bankruptcy estate. App. A17. Because the Trust was an assignee of claims originating with AremisSoft, the claims were seen as retaining their "corporate" character for purposes of SLUSA, App. A15, and as seeking damages "on behalf of" AremisSoft only. The court thus construed the phrase "seeking damages on behalf of more than 50 persons" to refer not to the persons having legal or beneficial title to the claims, or to the persons entitled to receive any resulting damage award, but rather to the "person" whose original injury gave rise to the claims – even where that person has no legal or beneficial interest in any recovery.

The court did not purport to base this reading on any reference to "injured" persons in SLUSA – there is no such language in the statute. Instead, the court relied on another use of the word "persons" in SLUSA's definition of a covered class action, which requires that "questions of law or fact common to *those persons*," excluding issues of individual re-

liance, "predominate over any questions affecting only individual persons or members." App. A18-A19 (discussing 15 U.S.C. § 78bb(f)(5)(B)(i)(I)) (emphasis added).

The court reasoned that the "persons" to be counted for SLUSA's numerical threshold must be the same as the "persons" raising common questions of law or fact. It then erroneously held that the Purchasers, as mere beneficiaries of the assigned corporate claims, have *no* questions in common with each other because at trial the Purchasers would not have to offer any proof about themselves individually. Despite the Purchasers jointly being the beneficial owners of the corporate-originated claims – and each having to prove the identical elements to recover on such claims – the court held that only the now-disinterested non-party, AremisSoft, as the originally injured entity, had any questions of law or fact relating to the conduct of AremisSoft, its top management, or the Banks.

Having thus concluded that the non-party AremisSoft was the only "person" to whom questions of law or fact applied, the court then reasoned that the "persons" to be counted under SLUSA must refer to the "original owners of the claim – those injured by the complained-of conduct." In the court's view, SLUSA's phrase "on behalf of" thus refers to the *assignors* of any given claim, not the current assignees of the claim who actually own the claim and/or bring the suit. App. A20.

As further support for its construction of the "persons" that SLUSA counts toward its numerical threshold as referring only to the originally injured per-

son rather than the parties bringing, or the beneficiaries of, the lawsuit, the court looked to SLUSA's exceptions and legislative history. It purported to find therein a policy of preserving "*any* corporate-originated claims," regardless of to whom such claims may have been transferred or the number of persons for whose benefit damages are being sought. App. A21, A22-A23 (emphasis in original). In declaring such a policy, the court did not analyze the limitations contained in SLUSA's rules regarding "exclusively derivative" actions and the counting of corporations and similar entities, but instead applied its own policy views regarding the effect of SLUSA on bankruptcy practice. App. A23-A25.

In summary, by addressing the *merits* of particular claims rather than the allegations of the complaint as a whole, the court effectively excluded the Purchaser-originated aiding and abetting claims from Counts I and II. Then, for the remaining corporate-originated aiding and abetting claims, the court counted only AremisSoft, rather than the more than 6000 beneficiaries of the Trust, as the only "person" on whose behalf damages were being sought, thereby circumventing SLUSA's numerical threshold.

b. Turning to Counts III and IV, regarding which the Purchasers are the originally injured parties as well as the beneficiaries, the court acknowledged that they readily satisfied the more-than-50-persons requirement even under the court's new construction of SLUSA. App. A27. However, the court found that those counts were based upon foreign law rather than state law, and thus were not covered by SLUSA for that reason. App. A27, A30. In reaching this conclu-

sion, the court once again ignored the allegations of the complaint – in particular, the allegations fully incorporating the breach of state-law fiduciary duties into the Swiss-law claims – by analyzing the supposed legal elements of those claims.[10] Because, in the court's view, such allegations were not necessary to the Swiss-law claims, the court treated them for SLUSA purposes as though they were simply not there. App. A33-A35.

As it did with Counts I and II, the court selectively disregarded certain allegations actually pleaded in the complaint – this time, in determining whether the Swiss-law claims were "based upon" breaches of state-law fiduciary duties for purposes of SLUSA. Despite plaintiffs, as masters of their complaint, having based their Swiss-law claims upon alleged breaches of state-law fiduciary duties, the court took it upon itself to create a new rule that only such allegations as are deemed by the court to be *necessary* to a claim may be considered for purposes of SLUSA preemption. Having used this new rule to exclude the state-law allegations upon which the Swiss-law claims were based, the court enabled itself to find that such claims were not "based upon" state law and hence not covered by SLUSA.

Having held that none of the claims in the complaint triggered SLUSA, the Third Circuit reversed and remanded.

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[10] The complaint, ¶¶ 109-10, 114-15, alleges aiding and abetting breach of fiduciary duty by the Banks. These allegations are expressly incorporated by reference into Counts III and IV. *See* Complaint ¶¶ 118 and 125.

7. On April 9, 2008, the Third Circuit denied defendants' petition for rehearing and/or rehearing *en banc*. App. C1-C2.

8. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because the decision below incorrectly construes SLUSA and conflicts with decisions from this and other courts and because, as this Court has previously recognized, maintaining the strict limits established by SLUSA is essential for preserving the orderly conduct of securities litigation and the securities markets.

I. The Third Circuit Erroneously Looked to the Nature and Merits of the Claims, Rather Than to the Allegations of the Complaint, in Deciding Whether SLUSA Applied.

SLUSA denies both state and federal courts the power to hear an entire class of actions. As a jurisdictional limitation on the federal courts, and by its own terms, SLUSA directs that courts look to what a suit *alleges* in order to determine whether the court even has the power to proceed further. The Third Circuit, however, leaped ahead to consider and decide the merits of certain claims in this case in order to avoid or disregard allegations that otherwise would trigger SLUSA's jurisdictional limits. That approach was contrary to the statute and in conflict with decisions of this and other courts.

A. SLUSA preemption is triggered by the allegations of the complaint, regardless whether such allegations are necessary or sufficient to state a claim.

Based upon the allegations of the complaint in this case, there can be no doubt that the plaintiff Trustees have brought multiple claims seeking damages on behalf of the more than 6000 beneficiaries of the Trust. The complaint expressly alleges that "the investing public, who are the beneficiaries of the AremisSoft Trust and whose interests are represented thereby, has sustained losses of approximately $500 million, which is the actual damage total approved by [the district court] based upon allowed proofs of claim." Complaint ¶ 27; *id.* ¶ 10 (the Trust "serves as the vehicle for the prosecution of all such claims on behalf of such former shareholders of AremisSoft").

When answering the threshold question of whether the suit sought damages on behalf of more than 50 persons, the Third Circuit – rather than looking to all of the actual allegations of the complaint – selectively disregarded, for purposes of Counts I and II, the allegations seeking damages suffered by the Purchasers in their capacity as such. The court cast aside those portions of the complaint as being without *merit* under Delaware law, and refused to consider them as part of Counts I and II at all. The court likewise disregarded those portions of Counts III and IV incorporating allegations of *state*-law violations into the Swiss-law claims. Prematurely making a determination of the legal elements of those claims, the court substituted its judgment regarding the *necessity* of such allegations for the judgment of plaintiffs in in-

cluding those allegations. The court thus reached out to examine the legal elements of particular claims, limited such claims to only the supposedly necessary and sufficient elements thereof, and thereby ignored numerous allegations in order to avoid triggering SLUSA. Such an approach conflicts with both the statute and various decisions of this Court. Indeed, the Third Circuit's approach is contrary both to SLUSA's focus on the *allegations* in a suit and to this Court's holdings that SLUSA is to be interpreted broadly and that jurisdictional questions are to be decided from the face of the complaint, prior to considering the merits.

In particular, refusing to apply SLUSA to allegations relating to claims that lack merit ignores SLUSA's focus on what an action "alleg[es]." 15 U.S.C. § 78bb(f)(1). It also misses the entire point of SLUSA and the PSLRA before it, which were adopted precisely to facilitate disposing of multi-party actions that lacked merit but nonetheless had substantial nuisance – and hence settlement – value. *See Dabit*, 547 U.S. at 80-82. The fact that part of an action lacks merit is no reason to ignore it when applying SLUSA. Rather, it is all the more reason to apply SLUSA broadly, as Congress intended. *See id.* at 82, 86 (broad construction of SLUSA proper to further stated purposes of statute in preserving effectiveness of PSLRA in restricting weak cases with substantial settlement value); *cf. Kircher* v. *Putnam Funds Trust*, 403 F.3d 478, 484 (CA7 2005) (SLUSA's "preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as plaintiffs suppose. It covers both good and bad securi-

ties claims – *especially* bad ones.") (emphasis in original), *vacated and remanded on other grounds*, 547 U.S. 633 (2006). Indeed, by disposing of (or effectively redacting) individual claims on the merits, the court avoided applying SLUSA and dismissing the "covered class action" in its entirety, thereby preserving an action that SLUSA was designed to eliminate.

Furthermore, the Third Circuit's approach conflicts with the general rule that jurisdictional issues must be resolved from the allegations of the complaint, prior to considering the merits of any claims.[11] *See, e.g., Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy"); *cf. Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, -- U.S. --, --, 127 S. Ct. 1184, 1191 (2007) (*Steel Co.* confirms that "jurisdictional ques-

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[11] The court below recognized that "SLUSA preemption is jurisdictional." App. A8 n. 7 (citing *Rowinski* v. *Salomon Smith Barney, Inc.*, 398 F.3d 294, 298 (CA3 2005)); *cf. Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 644 (2006) (in a case involving removal pursuant to SLUSA, and a subsequent motion to remand: "If the action is precluded, neither the District Court nor the state court may entertain it * * *. If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits * * *.").

tions ordinarily must precede merits determinations in dispositional order"). Reaching out to decide the merits of particular claims, or eliding supposedly irrelevant allegations prior to determining whether SLUSA prohibits an action raising such claims from being brought in state and federal court, conflicts with this well-established principle.

B. The decision below conflicts with decisions in other circuits.

In addition to being contrary to SLUSA and this Court's cases regarding how to analyze jurisdictional questions, the methodology used by the Third Circuit conflicts with two categories of decisions in other circuits.

First, it conflicts with decisions holding that SLUSA turns on the actual allegations, not the legal nature and merits of the claims. For example, in *Miller* v. *Nationwide Life Insurance Co.*, 391 F.3d 698, 701-02 (CA5 2004), the Fifth Circuit held that a breach of contract claim contained in a complaint alleging false and misleading statements in connection with the sale of securities was preempted by SLUSA. Rejecting the argument that SLUSA did not apply due to the contractual nature of the claim, the Fifth Circuit held that "the plain meaning of the statutory text and Congress' clearly expressed purpose in enacting it" are aimed at what "the complaint '*alleges*,'" and that the "issue of preemption thus hinges on the content of the allegations – not on the label af-

fixed to the cause of action." *Id.* at 702 (quoting 15 U.S.C. § 77p(b)(1) (emphasis in original).[12]

The Eighth Circuit likewise has held that SLUSA turns on the allegations of a complaint, not on the nature of the claims. In *Professional Management Associates, Inc. Employees' Profit Sharing Plan* v. *KPMG LLP*, 335 F.3d 800, 802-803 (CA8 2003), *cert. denied* 540 U.S. 1162 (2004), the Eighth Circuit held that a negligence claim, which as a legal matter does not *require* allegations of fraud, nonetheless triggered SLUSA. Looking solely to the allegations of the complaint, rather than the nature of the claim, the court found that the complaint incorporated into the negligence claim the requisite allegations of misrepresentation in connection with the purchase or sale of a covered security. More recently, in *Kutten* v. *Bank of America, N.A.*, 530 F.3d 669, 670 (CA8 2008), the Eighth Circuit confirmed that in "determining whether SLUSA applies, we do not rely on the names of the causes of action that the plaintiff alleges. Instead we look at the substance of the *allegations*, based on a fair reading. * * * SLUSA preemption is based on the conduct alleged, not the words used to describe the conduct." (Emphasis added.)

Both the Fifth and Eighth Circuits recognize that the application of SLUSA, by its express language, turns on the content of the allegations of the complaint, not on the legal characterization of a particu-

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[12] SLUSA was incorporated into both the Securities Act of 1933, 48 Stat. 74, and the Securities Exchange Act of 1934, 48 Stat. 881 (1934), in substantively identical form. *Dabit*, 547 U.S. at 82 n. 6. The provision quoted by the Fifth Circuit is identical to the provision found at 15 U.S.C. § 78bb(f) (1).

lar claim. The Third Circuit in this case, by contrast, looked first to the supposed nature and merits of particular claims and then used the results of that analysis to disregard numerous allegations in the complaint. Allegations of breach of fiduciary duty to, and damages suffered by, the Purchasers are stated plainly on the face of the complaint here, but the court side-stepped them by finding as a matter of law that they failed to state an adequate claim.

Similarly, in analyzing which facts were and were not "necessary" to state a Swiss-law claim, the court disregarded state-law allegations incorporated by reference into Counts III and IV. It did so for the express reason that, "according to the Trust's characterization of the Swiss-law claims, they [*i.e.*, the state-law allegations] have no bearing on whether the Banks' conduct is actionable." App. A35. The Third Circuit's selective reading of the allegations of Counts III and IV is in striking conflict with the Fifth and Eighth Circuits' admonitions that the allegations of a complaint, and not the plaintiffs' *characterizations* of the claims, determine whether SLUSA is applicable. Had this case been before the Fifth or Eighth Circuit, those courts would have looked to the allegations of the complaint, without addressing the merits of the claims or legal necessity of particular allegations, and concluded that SLUSA applied.

Second, disregarding particular allegations that would trigger SLUSA by looking to their legal necessity or legal sufficiency conflicts with the holdings of numerous courts that jurisdictional questions must be resolved from the face of the complaint regardless whether the complaint might ultimately fail to state

a meritorious claim. *E.g.*, *United States ex el. Atkins* v. *McInteer*, 470 F.3d 1350, 1357 (CA11 2006) ("'Jurisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action'") (quoting *Bell*, 327 U.S. at 682); *Carlson* v. *Principal Fin. Group*, 320 F.3d 301, 306-307 (CA2 2003) (jurisdictional inquiry "depends entirely on the allegations in the complaint;" district court "erred in even examining" issues that went to merits of plaintiff's claims, because "whether [plaintiff] is able to assert a valid claim * * * is irrelevant to the question of whether the District Court has subject matter jurisdiction over her complaint"); *Carpet, Linoleum and Resilient Title Layers* v. *Brown*, 656 F.2d 564, 567 (CA10 1981) ("allegations of the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction").[13]

The decision below prematurely looked to the merits of particular claims, disposing of or narrowing such claims as a mean of avoiding the application of SLUSA. The court thereby acted contrary to the statute and in conflict with the decisions of this Court

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[13] *See also Johnson* v. *Wattenbarger*, 361 F.3d 991, 993 (CA7 2004) ("By combining partial disposition of the merits with a dismissal of what remained, the district court either improperly entered a partial substantive judgment in a case over which it lacked jurisdiction, or improperly found that jurisdiction was missing"); *Louque* v. *Allstate Ins.* Co., 314 F.3d 776, 782 (CA 10 2002) (where amount in controversy for diversity jurisdiction depended on claim for recovery of attorney's fees, "jurisdiction is not defeated by the possibility that the complaint ultimately fails to state a claim on which [named class representative] could actually recover attorney's fees"), *cert. denied*, 540 U.S. 812 (2003).

and other circuit courts. This Court should grant certiorari to put a halt to this improper method for circumventing SLUSA and to resolve the conflict between the Third and other circuits.

II. The Third Circuit Erroneously Looked Beyond the Legal and Beneficial Owners of the Claims to the Originally Injured Party When Counting the Number of Persons on Whose Behalf Damages Are Sought.

In deciding which "persons" are to be counted toward SLUSA's 50-person numerical threshold, the Third Circuit looked not to the legal or beneficial owners of the claims – *i.e.*, the Trustees named as plaintiffs or the beneficiaries of the Trust – but rather to the originally injured corporate entity (AremisSoft) that is not a party and has no continuing legal or equitable interest in the claim. This approach is contrary to the counting rules set forth in SLUSA and to the salutary purpose that SLUSA is designed to serve.

SLUSA defines a "covered class action" subject to preemption as a "lawsuit" or "group of lawsuits" in which "damages are sought on behalf of more than 50 persons or prospective class members." 15 U.S.C. § 78bb(f)(5)(B). The "persons" to be counted under this provision are not defined directly. However, various aspects of SLUSA demonstrate that such "persons" are the legal owners of the claims in question or, in specified circumstances (as here, where the Trust was created for the purpose of participating in the litigation), the beneficial owners of claims

brought by the legal owners (the Trustees) on the beneficial owners' behalf.

In a formal class action, SLUSA counts "prospective class members," which includes both the named class representatives and unknown class members who have yet to be identified. *See* 15 U.S.C. § 78bb(f)(5)(B)(i)(I). Similarly, in suits that are not formal class actions, but instead use an analogous means of litigating "on a representative basis," SLUSA counts both the "named parties" and "other unnamed parties similarly situated." *See* 15 U.S.C. § 78bb(f)(5)(B)(i)(II). Thus, the "persons" to be counted include named, unnamed, prospective, and unknown plaintiffs – all of whom may be beneficial owners of claims that have been assigned to them. There is no reason under SLUSA to treat such plaintiffs differently merely because they are suing on assigned claims.

The specific counting rule for corporations, investment companies, and other legal entities that act on behalf of numerous beneficiaries confirms that, in bringing suits in their own names, they are each counted as but one person; provided that the entity was not "established for the purpose of participating in the action." 15 U.S.C. § 78bb(f)(5)(D). This exception for litigation entities would be unnecessary if the persons to be counted were limited to the originally injured persons. By definition, an entity established for purposes of litigation is not the originally injured person, but instead acts as a surrogate for such person(s). Under the Third Circuit's construction of the word "persons" in SLUSA, one would *always* look through a trust or other entity established to litigate

claims assigned by others who were injured, with the result that the exception in 15 U.S.C. § 78bb(f)(5)(D) would be mere surplusage.

Absent the applicability of the litigation entity exception in 15 U.S.C. § 78bb(f)(5)(D), SLUSA would count the corporation, trust, or similar entity as only one person, and would disregard the status of the assignor(s). This underscores that SLUSA looks not to the *source* of the claim, but rather to the *party or parties* that bring or own the claim, *i.e.*, those on whose behalf damages are sought. SLUSA's litigation entity exception to its counting rules confirms that courts should look to the legal or beneficial owners bringing a claim and not to the original source, such as an assignor. Notably, SLUSA makes no reference to the number of persons originally injured by the conduct complained of. The effect of the Third Circuit's approach is to impose a new hurdle for preemption found nowhere in the statute: the lawsuit must not only be brought on behalf of 50 or more persons, but those 50 or more persons must also have directly suffered the original injury on which the suit is based.

The Third Circuit's analysis of the meaning of the term "persons" under SLUSA also relies on an erroneous construction of what it means for a suit to have "questions of law or fact common to those persons." 15 U.S.C. § 78bb(f)(5)(B)(i)(I). The court holds that the apparent absence of issues *about* the individual Purchasers equates to an absence of common issues *among* them and hence the Purchasers cannot be the "persons" to whom SLUSA refers. But the court's holding regarding what questions may be "common" to a group of persons makes no sense on its face, and

is squarely in conflict with the construction of the substantively identical language from FEDERAL RULE OF CIVIL PROCEDURE 23, regarding class actions. *See, e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988) (fraud on the market case "required resolution of several common questions of law and fact concerning the falsity or misleading nature of the three public statements made by Basic, the presence or absence of scienter, and the materiality of the misrepresentations, if any.").[14] That a "question" in a case concerns the defendant or a third party, rather than a plaintiff individually, is precisely what makes that question "common to" the plaintiffs. Individual or personal issues generally defeat commonality; they are not its prerequisite.

Here, each Purchaser/beneficiary has in common with each other the same questions of law and fact

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[14] *See also Central Wesleyan College* v. *W.R. Grace & Co.*, 6 F.3d 177, 181 (CA4 1993) (noting common questions in asbestos cases, including "(1) the general health hazards of asbestos; (2) when defendants knew or had reason to know of these hazards; (3) whether defendants failed to test their products or warn the public about them; (4) whether the asbestos industry engaged in any concerted action or conspiracy; and (5) whether defendants should be liable for punitive damages"); *Blackie* v. *Barrack*, 524 F.2d 891, 904-05 (CA9 1975) ("overwhelming weight of authority holds that repeated misrepresentations of the sort alleged here satisfy the 'common question' requirement. * * * [T]he class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable"), *cert. denied*, 429 U.S. 816 (1976); *Maywalt* v. *Parker & Parsley Petroleum Co.*, 147 F.R.D. 51, 55 (S.D.N.Y. 1993) ("common course of conduct by the Defendants" including "material misrepresentations and omitted material facts" and "failing to comply with the applicable securities regulations" sufficient to show "questions of law and fact which predominate over individual questions").

that must be proven in order to obtain a recovery: each must prove what fiduciary duties were owed, how those duties were breached, the Banks' supposed knowledge of and assistance in the underlying breach, and how any harm was caused by such conduct. It is precisely because such issues are not personal or individual to the Purchasers that they are common questions. If each Purchaser were to commence an individual suit on the claims in Counts I and II, essentially every issue of law and fact would be identical and would have to be litigated more than 6000 times. That the beneficiaries of the Trust stand in identical positions relative to the claims assigned by AremisSoft – they are jointly the beneficial owners of the very same claims – demonstrates that they readily satisfy SLUSA's requirement that there be questions "common to" them and hence fit each of SLUSA's references to "persons" who have "common" questions and are to be counted toward the 50-person numerical threshold.

SLUSA's exception for an "exclusively derivative action brought by one or more shareholders on behalf of a corporation" further supports the baseline reading of "persons" (*i.e.*, the reading that applies before reaching the exceptions for litigation entities or derivative actions) as the parties bringing suit. The exception for exclusively derivative actions accommodates lawsuits which, although initiated by one or more shareholders, have long been viewed as different from class actions. Where an action is "exclusively derivative," the action is treated as being on behalf of the corporation alone, regardless of the number of

shareholder parties bringing suit.[15] This exception would be entirely unnecessary if "persons" under SLUSA referred only to originally injured persons who were the source of the claims. This is because in a derivative action, that person is the corporation, and only the corporation. Under the Third Circuit's approach, such a suit would by definition be solely on behalf of one person. Hence, the exclusively derivative action exception would merely apply the regular rule as articulated by the Third Circuit, rather than operate "[n]otwithstanding" such rule.

In this case, the Trust is the legal owner of the claims asserted in the lawsuit. The district court (which approved the creation of the Trust) found, and the court below accepted, that the Trust was established for the primary purpose of litigation. However, rather than look to the over 6000 beneficiaries of the Trust as the "persons" on whose behalf damages were being sought, the court below adopted a different definition of the word "persons" that looked not through the entity to its beneficiaries, but back to the person whose *original injury* supposedly gave rise to the claims. Having already determined that the Purchasers could not state a claim for relief under Counts I and II, the court hypothesized that the only cognizable injury was to AremisSoft. The court thus ignored not only the complaint's extensive allegations

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[15] Tellingly, the exception only applies to an "*exclusively* derivative *action*" (emphasis added), indicating that an action combining both derivative and non-derivative claims would fall outside the exception. This also demonstrates that the unit of litigation to be evaluated for SLUSA purposes is the "action" as a whole, not an individual claim within the action.

of damage to the over 6000 Purchasers, but also the fact that those Purchasers are the only persons who will benefit from the corporate-originated claims. Even though AremisSoft had long since assigned away all of its legal and beneficial interests in its corporate claims, the court concluded that these claims were on behalf of only one "person," AremisSoft, and that SLUSA did not apply.[16]

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[16] A further problem with the Third Circuit's holding that the Trust, as an assignee, was suing on behalf of the AremisSoft bankruptcy estate is that it erroneously accorded to the Trust the special status of a bankruptcy trust as a *representative* of the corporation (one "person" under SLUSA) while failing to impose the concomitant restrictions on the kinds of claims that a bankruptcy trust may bring. The court lauded the Trust as a flexible "hybrid" under the bankruptcy laws and relied on the treatment of bankruptcy trusts as one person under SLUSA to justify looking to AremisSoft (the debtor) as the party on whose behalf the Trust sought damages. App. A4 n. 1, A19-A20. But the court failed to acknowledge that, as a matter of law, a bankruptcy trust cannot bring *any* claims on behalf of *creditors*, as the Trust purports to do, at a minimum, in Counts III and IV. *See, e.g.*, *Caplin* v. *Marine Midland Grace Trust Co.*, 406 U.S. 416, 428, 434 (1972), (bankruptcy trust has no standing to assert creditor claims); *Boston Trading Group, Inc.* v. *Burnazos,* 835 F.2d 1504, 1514-16 (CA1 1987) (same); *Shearson Lehman Hutton, Inc.* v. *Wagoner,* 944 F.2d 114, 118-21 (CA2 1991) (same); *SEC* v. *Sharpe Capital, Inc.*, 315 F.3d 541, 544 (CA5 2003) (same); *Williams* v. *California 1st Bank,* 859 F.2d 664, 666-67 (CA9 1988) (bankruptcy trust may not pursue, on behalf of creditors, claims assigned by creditors). The inability of a bankruptcy trust to pursue both sorts of claims, as the Trust purports to do, demonstrates that the Trust here must be a litigation trust acting on behalf of its beneficiaries, not a bankruptcy trust (or an impossible "hybrid" trust) acting on behalf of AremisSoft in Counts I and II. The Third Circuit's decision thus is either in conflict with this Court's decision in *Caplin* and numerous circuit decisions regarding the limits of bankruptcy

The inherent soundness of looking to the legal or beneficial owners of a claim, rather than looking to any assignments that may have preceded the action (subject to SLUSA's specific exceptions), is corroborated by this Court's recent decision on standing in *Sprint Communications Co., L.P.* v. *APCC Services, Inc.*, -- U.S. --, 128 S. Ct. 2531 (2008), which explained that where a complete assignment is made, legal injury for standing purposes is suffered by the *assignees* of the claim, not by the *originally* injured party. Here, the legally injured parties are the Trust and its beneficiaries, and it is the beneficiaries on whose behalf the Trust seeks damages. The Third Circuit's contrary construction of SLUSA is wrong, undermines the text and the purpose of the statute, and should be reviewed by this Court.

III. The Questions Presented Involve Important National Issues That Congress Deemed Essential to the Efficient Operation of the National Securities Markets.

This case involves a new and easily repeated means of circumventing SLUSA's and the PSLRA's limitations on class actions by having class-action plaintiffs essentially trade their own securities-related claims, which would be subject to the PSLRA, SLUSA, and other federal restrictions, for the corporation's securities-related claims against third parties, thereby allowing the class to avoid such restrictions. Such a glaring means for class-action plaintiffs to circumvent federal securities law raises a question

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trusts or would require dismissal of Counts III and IV for lack of standing to bring Purchaser/creditor claims.

of tremendous national importance, as recognized by this Court in *Dabit* and as reflected in Congress's intent and purpose in enacting SLUSA.

Congress enacted SLUSA in 1998 to prohibit the use of class actions to assert various state law claims in connection with the purchase or sale of covered securities. *Dabit*, 547 U.S. at 80-82. As this Court pointed out in *Dabit*, the "magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Id.* at 78. In considering the scope of SLUSA's limitation to suits that are "in connection with the purchase or sale" of securities, 15 U.S.C. § 78bb(f)(1), this Court adopted a broad interpretation of SLUSA's coverage, both as a matter of statutory construction of the particular language, and as a matter of the "particular concerns that culminated in SLUSA's enactment." 547 U.S. at 86. This Court held that a "narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose." *Id.*[17]

But for the Third Circuit's characterization of the aiding and abetting claims in Counts I and II as being solely "corporate" in nature, these claims would fall squarely within SLUSA's definition of a covered class action. By allowing the more than 6000 Purchasers to proceed with these claims and benefit from any recovery thereon, the court below is opening the

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[17] *See also* S. REP. 105-182 at 8 (May 4, 1998) (Senate Committee Report on SLUSA: "it remains the Committee's intent that the bill be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition.").

door to state-law class action aiding and abetting claims involving misrepresentations in connection with the purchase or sale of securities – even though this Court held in *Central Bank of Denver* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) that private civil claims for aiding and abetting are not actionable under the federal securities laws. *See Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, -- U.S. --, --, 128 S. Ct. 761, 772 (2008) (reaffirming *Central Bank* and noting "the established principle" that federal court jurisdiction "is carefully guarded against expansion by judicial interpretation") (citations and internal quotation marks omitted).

This case thus is similar to *Dabit* in that *Central Bank* and *Stoneridge* deny the Purchasers a federal claim against the Banks for aiding and abetting a securities fraud yet they seek damages for such aiding and abetting by turning to state law. *See* App. B10-B11 (comparing the Purchasers' efforts to get around *Central Bank* with the attempt in *Dabit* to get around *Blue Chip Stamps*). In addition, SLUSA denies the Purchasers *collectively* the ability to bring securities-related claims based on state law because, as a group, they are too numerous. Now, however, according to the court below, having acquired beneficial ownership from AremisSoft of the very sort of claims they themselves could not bring, the Purchasers may, as a class and in a single action through the Trust, seek damages for securities-related claims without the limits imposed by the PSLRA, SLUSA, and other federal securities law. Indeed, under the Third Circuit's rule, the Purchasers could bring an action with over 6000 *named plaintiffs* alleging the claims the court perceived in Counts I and II and they would still be

counted as only one person and not barred by SLUSA.

This is exactly the type of "procedural device[]" that the Senate Report was referring to when it admonished that SLUSA must be "interpreted broadly" to prevent evasion of the class action definition. And it is likewise precisely the type of implied exception that this Court rejected and cautioned against in *Dabit*. 547 U.S. at 87-88 (it is "inappropriate for courts to create additional, implied exceptions" to SLUSA). The Third Circuit's decision, in essence, upends the entire federal framework of legislation and case law by permitting the far more than 50 Purchasers to seek damages for securities-related claims based upon state law. Such a result, so at odds with the legislative intent of SLUSA, as plainly expressed in *Dabit*, creates a dangerous precedent that should not be permitted to stand.

Although SLUSA is still a relatively recent statute, it and the PSLRA were enacted to address longstanding problems surrounding securities litigation. It, as well as the PSLRA, expresses a strong Congressional concern – a concern that has been reaffirmed by this Court in *Dabit.* It is important that the policies Congress deemed essential in passing these statutes be followed and that lower courts properly construe SLUSA to effectuate its broad remedial purposes. Where they do not, as is the case here, this Court should promptly give guidance as to the proper interpretation.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 7, 2008