No. 11-__

IN THE

Supreme Court of the United States

CHRISTOPHER BROWN,

Petitioner,

v.

JOHN P. CALAMOS ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. § 78bb(f), require dismissing with prejudice a class action complaint that contains no claim for relief "alleging a misrepresentation or omission of a material fact"?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner here is Christopher Brown, plaintiff-appellant below, on behalf of himself and all others similarly situated.

The respondents, defendant-appellees below, include John P. Calamos, Weston W. Marsh, Joe F. Hanauer, John E. Neal, William R. Rybak, Stephen B. Timbers, David D. Tripple, Calamos Advisors, LLC, Calamos Asset Management, Inc., Calamos Convertible Opportunities and Income Fund, and John and Jane Does 1–100.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-19a) is published at 664 F.3d 123. The opinion of the district court (Pet. App. 60a-69a) is published at 777 F. Supp. 2d 1128.

JURISDICTION

The Seventh Circuit issued its decision on November 10, 2011. Pet. App. 2a. Justice Kagan subsequently extended the time to file this petition to and including March 23, 2012. No. 11A719. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 101(b) of the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, codified at 15 U.S.C. § 78bb(f), 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 . . .

. . . .

(2) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

STATEMENT OF THE CASE

Petitioner's complaint alleges that respondents breached their state law fiduciary duties by disfavoring the interests of the common shareholders in an investment fund. The Seventh Circuit held that the complaint must be dismissed under the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which prohibits certain state law securities class actions "alleging a misrepresentation or omission of a material fact." 15 U.S.C. § 78bb(f)(1). The Seventh Circuit recognized that petitioner's claims neither assert nor rely on any misrepresentation or omission. But the court reasoned that those claims "might not be plausible," and that if the claims in fact fail petitioner "may" later try to add a fraud claim based on a background statement in the complaint that "might" "insinuate[]" that respondents made a misrepresentation. The court of appeals also barred petitioner from proceeding without including any such insinuation in the complaint. The court acknowledged that its holding squarely conflicts with the precedent of the Third, Sixth, Ninth, and Eleventh Circuits.

I. Legal Background

Traditionally, suits for securities fraud have been brought under federal law, based on the implied right of action to sue over a "manipulative or deceptive device," or a material false statement or omission, "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b) (Section 10(b)); 17 C.F.R. § 240.10b-5(b) (Rule 10b-5); *see Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (recognizing implied private right of action); *see also, e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317 (2011) (analyzing such a claim). In 1995, Congress sought to limit vexatious securities fraud suits by imposing substantial restrictions in the Private Securities Litigation Reform Act (PSLRA). Pub. L. No. 104-67, 109 Stat. 737 (1995). *See generally Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (PSLRA, *inter alia*, "insists that securities fraud complaints 'specify' each misleading statement; that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind'") (alteration in original) (quoting 15 U.S.C. §§ 78u-4(b)(1), (2)).

To evade the PSLRA, some plaintiffs began filing their securities fraud claims instead as state law securities fraud suits in state court. Congress responded again. "To stem this 'shif[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA], Congress enacted SLUSA." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 82 (2006) (alterations in original) (quoting SLUSA, Pub. L. No. 105-353, §§ 2(2), (5), 112 Stat. 3227 (1998)). SLUSA provides for the removal and dismissal of certain state law class actions. Tracking the implied federal right of action under the securities laws, SLUSA applies *only* to covered class actions "alleging a misrepresentation or omission of a material fact," or use of a manipulative device, "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1); *see also id.* §§ 78bb(f)(5)(B), (C) ("covered class action" is a non-derivative suit seeking damages on behalf of fifty or more persons). (Although SLUSA enacted parallel provisions at 15 U.S.C. § 77p(b) as well, this petition consistently cites Section 78bb(f) for ease of reference.)

SLUSA thus leaves unaffected state law class actions that are related to securities but that do not allege misrepresentations or omissions. To illustrate the point, compare two lawsuits. The first alleges that an investment fund trustee breached his fiduciary duty to treat all classes of shareholders fairly, by repurchasing the shares of one class at an above-market price to the detriment of the other shareholders. To prevail, the plaintiff need not prove that the defendant made any representation or omission regarding its duties or conduct. Instead, the plaintiff must prove that "a fiduciary duty exists, that the fiduciary duty was breached, and that such breach proximately caused the injury of which the plaintiff complains." *Neade v. Portes*, 739 N.E.2d 496, 502 (Ill. 2000).

The second suit alleges that the defendant falsely *promised* to treat all shareholders equally. That is a "significantly different" claim. *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 499 (Del. 1982). Because this second suit alleges that the defendant violated a fiduciary's duty to be truthful, the plaintiff need not establish the central element of the first suit: that state law itself imposed on the defendant a fiduciary duty to treat the shareholders fairly. Instead, the plaintiff must prove "a false representation of a material fact knowingly made with intent to be believed to one who . . . relies thereon." *Id*. Only the second action could be brought as a federal securities lawsuit that would be subject to the PSLRA. And of the two, only that suit "alleg[es] a misrepresentation or omission of a material fact," 15 U.S.C. § 78bb(f)(1), that makes it subject to dismissal under SLUSA.

II. Factual Background

Petitioner Christopher Brown owns common stock in the Calamos Convertible Opportunities and Income Fund (the CCOI Fund), which is one of a family of roughly twenty funds sponsored by Calamos Investments, LLC ("Calamos"). Respondents are the CCOI Fund, its seven trustees, and related Calamos companies.

Calamos's business model is to sponsor funds (including the CCOI Fund), which it manages for a fee. The CCOI Fund's business model is to invest in securities. It raises capital by issuing common and preferred stock. That capital is always available to invest because the CCOI Fund is a "closed-end fund": in contrast to a "mutual fund," shareholders cannot redeem (*i.e.*, cash out) their shares.

From the investment returns, the CCOI Fund deducts fees and expenses. It pays the preferred shareholders a dividend that corresponds to a low, short-term interest rate. The common shareholders receive the remaining profits.

The preferred shares are known as auction market preferred shares (AMPS). The name reflects the fact that, although the shares cannot be redeemed from the Fund, they historically could be sold to other investors in frequent reverse auctions. The winning auction bids were those of investors willing to accept the lowest rate of return from the CCOI Fund – a rate that could not exceed a maximum return specified by the Fund.

The AMPS were central to the return of common shareholders like petitioner. The CCOI Fund "leveraged" the capital it acquired by its initial sale of the AMPS, because it made more on its investments than it paid out in the low dividends.

During the financial crisis of 2008, the AMPS market failed for lack of willing purchasers. That market failure did not harm the CCOI Fund and its common shareholders, because the dividend paid to the AMPS holders was set by a formula at a below-market rate. So the CCOI Fund retained the leverage generated by the non-redeemable AMPS.

But the owners of billions of dollars in AMPS in numerous closed-ends funds (including the CCOI Fund) found themselves trapped in their investments. They began losing money because the asset produced a low, short-term return, but there was no functioning market to sell the shares. They complained bitterly that they had been misled by the intermediaries – various banks and brokers – that had marketed the AMPS.

As a result of civil suits and governmental investigations, those banks and brokers repurchased many of the AMPS, incurring massive losses of their own. They sought to minimize those losses by pressuring the issuing funds (including the CCOI Fund) to redeem the AMPS.

The banks and brokers had no right of redemption. Nor could they threaten the profitability of the CCOI Fund, which had already issued all of its shares. But they could refuse to market *other* funds sponsored by Calamos (including those that Calamos would create in the future), seriously undermining the overall profitability of Calamos.

The individual trustee respondents were responsive to that threat. They served as trustees of not only the CCOI Fund, but nearly twenty other Calamos-sponsored funds. Six of the seven trustees were compensated for between \$138,000 and \$186,000 per year. If Calamos were unable to successfully create and market additional funds, the trustee respondents would not receive additional appointments – and additional compensation.

In response to that threat, the trustee respondents voted to redeem the CCOI Fund's AMPS shares at above-market prices, despite the absence of any obligation to do so and notwithstanding that the redemption obviously would cause the CCOI Fund's common shareholders significant financial harm while benefitting the preferred shareholders. The redemption deprived the common shareholders of the substantial leverage (and thus the profits) generated by the AMPS, which respondents had to replace with much more expensive and uncertain capital. The result was to sacrifice the returns of the common shareholders to benefit the preferred shareholders.

III. Petitioner's Complaint

In 2010, petitioner filed this suit in Illinois state court. It is a class action under Illinois law. The putative class is composed of the CCOI Fund's common shareholders. Respondents are the defendants. The Complaint is reproduced in the Appendix. Pet. App. 20a-59a.

The "Facts" section of the complaint details the events described above. It explains that "[t]he term of the AMPS financing was very favorable to the Fund in that it was perpetual. AMPS need not ever be repaid." Pet. App. 29a (¶ 12(b)). The complaint further explains, on the basis of information that respondents annually "filed with the SEC," that the trustee respondents "served in similar capacities on behalf of a large number of the other [Calamos] funds." *Id.* 31a (¶ 16). Respondents redeemed the AMPS "not to further the interests of the Fund or of the holders of its common stock," but "to placate their investment banks and brokers . . . so as to further the business objectives of" Calamos as a whole in "market[ing] new funds and earn[ing] fees for the management of those funds." *Id.* 37a-38a (¶ 27).

The "Causes of Action" section of the complaint then asserts three claims under Illinois law. Count I alleges that the individual respondents committed a

"Breach of Fiduciary Duty" by "unfairly favor[ing] the preferred AMPS shareholders over the common shareholders by enabling the former to redeem their shares at their share of net asset value, at the expense of the common shareholders." *Id.* 51a-53a (¶¶ 41-47). Count II alleges that the corporate respondents "[a]id[ed] and [a]bett[ed]" the individual respondents' "[b]reach of [f]iduciary [d]uty." *Id.* 53a-54a (¶¶ 48-53). Count III alleges "[u]njust [e]nrichment" by the corporate respondents "in the form of fees and other revenues received by them from the Fund and from other Calamos Sister Funds as a result of the inequitable conduct complained of herein, including their encouragement of the Individual Defendants' breaches of fiduciary duty." *Id.* 54a-56a (¶¶ 54-61). (Because Counts II and III are derivative of Count I, this petition refers to them collectively as "fiduciary duty claims" for ease of reference.)

No part of the complaint alleges that any respondent ever made any misrepresentation or omission. The complaint does not assert that respondents misrepresented the nature of the CCOI Fund, the AMPS, or their fiduciary responsibilities. Nor does it allege that respondents omitted to disclose their roles as trustees to multiple funds sponsored by Calamos. In fact, the complaint does the opposite: it cites those roles based on public "information filed with the SEC." *Id.* 31a-32a (¶ 16). To avoid any doubt, the complaint expressly states that petitioner "does not assert by this action any claim arising from a misstatement or omission in connection with the purchase or sale of a security, nor does [he] allege that [respondents] engaged in fraud in connection with the purchase or sale of a security." *Id.* 24a (¶ 4).

IV. The District Court's Decision

Invoking SLUSA, respondents removed petitioner's suit to federal court and moved to dismiss. Respondents did not seriously allege that petitioner's three claims relied on proof of any misrepresentation or omission. Instead, they principally argued that the following background sentence in the complaint implied that they had made a misrepresentation: "The Fund's public statements indicated that the holders of its common stock could realize, as one of the significant benefits of this investment, leverage that would continue indefinitely, because, as described above, the term of the AMPS was perpetual." Pet. App. 30a (¶ 13). Respondents also asserted that the complaint implicitly suggested that the trustees had made a fraudulent omission, by not acknowledging that their duties to the multiple funds created a conflict of interest. But respondents took care to deny that they had ever made the misrepresentation or omission that they argued should be read into petitioner's complaint.

Petitioner countered that respondents' invocation of SLUSA depended on fraud claims that his complaint does not allege – indeed, that it disavows. The complaint alleges that respondents violated their fiduciary duty not to favor the CCOI Fund's preferred shareholders over its common shareholders. It does not assert the distinct claims – which rely on proof of different facts, *see supra* at 4-5 – that respondents either misrepresented how they would treat the common shareholders or omitted to disclose that they owed duties to multiple funds.

Petitioner further argued that the isolated background sentence quoted by respondents merely shows that respondents *admitted* a fact that supported petitioner's claim for breach of fiduciary duty: that because the AMPS were "perpetual," they would provide "leverage" that was "indefinite[]." Pet. App. 30a (¶ 13). The statement is a true acknowledgment of the value of the AMPS to the CCOI Fund, not a false misrepresentation. Under federal law, "[p]erpetual preferred stock means preferred stock that does not have a stated maturity date and cannot be redeemed at the option of the holder." 12 C.F.R. § 3.100(e)(8); *see also id.* §§ 325.2(r), 567.1, 615.5301(g). The resulting leverage was "indefinite[]" because there was no predetermined end date.

But the district court dismissed the complaint. Pet. App. 60a-69a. The court recognized that petitioner's actual *claims* do not rely on proof of a misrepresentation or omission. Instead, the court recounted, petitioner alleges that respondents "breached their fiduciary duty to the Fund's common shareholders, and were unjustly enriched, by causing the Fund to redeem certain preferred shares in a manner that unfairly benefited the preferred shareholders at the expense of the common shareholders." *Id.* 61a.

The district court held that SLUSA's application was not limited to petitioner's claims, however. It instead adopted the Sixth Circuit's holding that SLUSA requires dismissing a complaint containing any assertion that the defendant made a misrepresentation, even if it plays no role in the plaintiff's claims. *Id.* 66a-67a (citing *Daniels v. Morgan Asset Mgmt., Inc.*, 743 F. Supp. 2d 730, 738 (W.D. Tenn. 2010) (applying *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009))). That standard rests on the view that the "goal of the PSLRA was to curb nuisance suits and other perceived abuses of securities class actions," Pet. App. 63a, not more modestly to enforce restrictions on securities *fraud* suits.

On that view, "regardless of how a plaintiff characterizes his or her claims, if they include the 'covered concepts' of misrepresentations or material omissions, they must be dismissed," *id.* 66a-67a, even if "the alleged misrepresentations are merely background facts, rather than the basis for his claim," *id.* 68a. Citing the background sentence invoked by respondents and petitioner's general reliance on "conflicts of interests," the court agreed with respondents that petitioner's complaint "include[s] the 'covered concepts,' alleging both misrepresentations (that the AMPS were 'perpetual') and omissions (defendants' undisclosed conflict of interest)." *Id.* 67a.

V. The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1a-19a. Preliminarily, like the district court, the court of appeals recognized that petitioner's claims themselves neither allege nor implicitly rely on any allegation or proof of any misrepresentation or omission by any of the respondents. Petitioner alleges only that the failure of the AMPS market "should not have made a difference to the defendant fund's common shareholders," but "the fund, though it had no duty to do so, redeemed their shares—and indeed at a price above market value." *Id.* 6a. Framed as such, petitioner brings "a straightforward suit for a breach of the duty of loyalty," which "would not be barred by SLUSA." *Id.* 14a.

The court of appeals also addressed respondents' contention that the complaint implicitly alleges either a misrepresentation through the one background sentence, or an omission by alleging that respondents acted under a conflict of interest. Regarding the former, the court seemingly recognized that the sentence was accurate, not allegedly false. *See id.* 5a ("Although as we said preferred stock despite the name is a form of debt, *it is perpetual debt* in the sense of not having a maturity date, that is, a date on which the lender is entitled to be repaid.") (emphasis added); *id.* (when "the fund was borrowing on the cheap and using the borrowed money to buy investments that generated a much higher return than the AMPS interest rates," "[t]his was *leverage* in operation") (emphasis added).

But the court believed that the background sentence still is "interpreted most naturally as alleging a misrepresentation: that the AMPS would never be redeemed." *Id.* 8a. In turn, although the complaint "doesn't say this in so many words," "a reasonable jury *might* find that the passage *insinuated* that a significant benefit of investing in the fund was that the investor would obtain leverage indefinitely because the AMPS had no maturity date." *Id.* (emphases added).

The Seventh Circuit also recognized that any failure by the trustees to acknowledge a conflict of interest would have been irrelevant as a matter of law to petitioner's actual breach of fiduciary duty claim. Respondents' admission of that conflict would be "ineffectual against a claim of breach of the duty of loyalty because that duty is not dissolved by disclosure ('we are disloyal—*caveat emptor*!')." *Id.* 13a-14a (citing *Shock v. Nash*, 732 A.2d 217, 225 n.21 (Del. 1999)). But the court agreed with respondents that *every* allegation of a conflict of interest by its nature also "implicitly" asserts a fraudulent failure to disclose that conflict – here, the failure to "state that the fund might at any time redeem AMPS on terms unfavorable to the common shareholders because motivated by the broader concerns of the entire family of 20 Calamos mutual funds." *Id.* 9a.

The Seventh Circuit then turned to SLUSA's application to a case in which the plaintiff's actual claims do not rely on any alleged misrepresentation, but the complaint nonetheless suggests such a misrepresentation occurred. The court recognized that other circuits had adopted two conflicting rules, neither of which it accepted. The court declined to adopt the Sixth Circuit's broad "literalist" interpretation of SLUSA, which the district court had applied, and which deems any reference to a misrepresentation to be an allegation requiring dismissal. *Id.* 8a (citing *Atkinson v. Morgan Asset Mgmt., Inc.*, 658 F.3d 549, 555 (6th Cir. 2011); *Segal*, 581 F.3d at 311). On the other hand, the Seventh Circuit also rejected the Third Circuit's holding that SLUSA narrowly requires dismissal only when the assertion of fraud is a basis for the claim for relief set forth in the plaintiff's complaint. *Id.* 9a (citing *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir.

2008); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005)).

Instead, the Seventh Circuit adopted its own intermediate standard. It held that SLUSA requires dismissal of a covered class action complaint if "the allegations of the complaint make it likely that an issue of fraud will arise in the course of the litigation," because the complaint's non-fraud claim "might not" be plausible, tempting the plaintiff to later pursue a claim of fraud that the complaint could be read to imply. *Id.* 13a, 17a.

In this case, the Seventh Circuit opined that petitioner's fiduciary duty claim might not be plausible. *Id.* 16a-17a. As discussed, petitioner alleges that the trustee respondents owed the common shareholders of the CCOI Fund a fiduciary duty that is not diluted by their service as trustees to other existing Calamos funds. *Id.* 24a, 51a (¶¶ 6, 42). According to the complaint, they violated that duty by favoring the Fund's preferred shareholders to benefit the interests of other Calamos funds that might be created in the future, for which they are not trustees. *Id.* 37a (¶ 27).

The Seventh Circuit identified a potential defense to that claim that respondents themselves had never articulated. The court suggested that respondents' "pecuniary interest in protecting the entire Calamos family of funds . . . . is not a breach of loyalty," *id.* 16a, because each trustee arguably is "responsible to the entire family of funds, including *future* funds," which "may require the board to make tradeoffs to the disadvantage of investors in one of the funds for the sake of the welfare of the family as a whole," *id.* 17a (emphasis added). The Seventh

Circuit did not identify any decision of any court adopting its interpretation of state law fiduciary duties, including by holding that an individual owes a duty to a trust that has not been created and for which he has not been named a trustee.

Based on this never-asserted and never-before-recognized potential defense to petitioner's fiduciary duty claim, the Seventh Circuit concluded that SLUSA required dismissing petitioner's complaint. It reasoned that petitioner, faced with the possible loss of the claims actually set forth in his complaint, might only prevail against respondents by pursuing a new claim of fraud. "So without the allegation that the Calamos Convertible Opportunities and Income Fund misrepresented the characteristics of its capital structure, a charge of breach of loyalty *might* not be plausible. The fraud allegations *may* be central to the case." *Id.* 17a-18a. (emphases added).

The Seventh Circuit next recognized that the Ninth and Eleventh Circuits would hold that, even assuming petitioner's complaint sufficiently alleged a misrepresentation to trigger SLUSA, the complaint was properly "saved by amending the complaint to delete the passage that injected fraud into the case." *Id.* 18a (citing *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 842-43 (9th Cir. 2007); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095-96 (11th Cir. 2002)). But the Seventh Circuit rejected those decisions, reasoning that such an amendment amounts to forbidden "forum manipulation" by "seeking to prevent the defendant from defending in the court that obtained jurisdiction of the case on his initiative." *Id.* In addition, the court believed that any amendment "would not be credible, if we are correct that the allegation may well be central to the plaintiff's case." *Id.* 19a.

In dictum, the Seventh Circuit opined that if petitioner's suit did go forward in state court, Delaware law would require that it "be brought as a derivative suit." *Id.* 14a. "Thus the present case would have to be dismissed in any event, but it could be refiled as a derivative suit, rather than being forever barred, which [is] the effect of our affirming the district court's judgment." *Id.* 15a.

The Seventh Circuit accordingly held that SLUSA required dismissing petitioner's suit with prejudice. *Id.* 19a.

REASONS FOR GRANTING THE WRIT

As the court of appeals recognized, the ruling below squarely conflicts with five other circuits' construction of SLUSA, which are themselves irreconcilable. *Accord Jorling v. Anthem, Inc.*, No. 1:09-cv-798-TWP-TAB, 2011 WL 6755157, at *13 (S.D. Ind. Dec. 23, 2011) ("After examining the varied approaches taken by three other circuits when reviewing claims for potential SLUSA preemption, Judge Posner applied a hybrid standard . . . ."). That conflict is an invitation to forum shopping in these nationwide class actions.

The ruling below also conflicts with this Court's precedents, which hold that the scope of SLUSA parallels that of Section 10(b) and Rule 10b-5, which are limited to claims of misrepresentations or omissions and which do not reach ordinary claims for breach of fiduciary duty like those stated in petitioner's complaint.

The importance of the question presented is indisputable. Defendants routinely invoke SLUSA against state law complaints that allege conflicts of interest or that recount statements that could be recharacterized as alleged misrepresentations.[1]

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[1] *See, e.g.*, *Stephens v. Gentilello*, Civil Action No. 11-5766, 2012 WL 503756, at *4-*7 (D.N.J. Feb. 14, 2012) (no SLUSA removal because plaintiffs' deposition testimony regarding misrepresentations "are the sort of background details that need not have been alleged, and need not be proved"); *Jorling*, 2011 WL 6755157, at *12-*13 (SLUSA applies because it is "impossible to 'disentangle'" the plaintiff's breach of contract and fiduciary duty claims from issues of fraud) (quoting Pet. App. 13a); *In re Herald, Primeo, & Thema Sec. Litig.*, No. 09 Civ. 289(RMB), 2011 WL 5928952, at *7 (S.D.N.Y. Nov. 29, 2011) (removal authorized because "the gravamen of [plaintiffs'] allegations . . . is that th[e] Defendants misrepresented or omitted material facts"); *Grund v. Del. Charter Guar. & Trust Co.*, 788 F. Supp. 2d 226, 240-43 (S.D.N.Y. 2011) (no SLUSA removal because a "determination of whether SLUSA applies may only be made by reference to what a party has alleged, and not what it could have alleged," and complaint did not allege misrepresentation or omission), *on reconsideration*, Nos. 09 Civ. 8025, 10 Civ. 4534, 2011 WL 3837146 (S.D.N.Y. Aug. 30, 2011); *Backus v. Conn. Cmty. Bank, N.A.*, 789 F. Supp. 2d 292, 307 (D. Conn. 2011) (SLUSA applies where plaintiffs' state law breach of contract and negligence claims "are based on the same conduct as the fraud-based counts"); *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226, 1248 (D. Colo. 2011) (dismissing claims without prejudice under SLUSA because plaintiffs' allegations "implicit[ly] assert[ed] that Defendants . . . made material misrepresentations"); *Montoya v. N.Y. State United Teachers*, 754 F. Supp. 2d 466, 473 (E.D.N.Y. 2010) (fiduciary duty claims barred by SLUSA where they are "based upon the alleged existence of a fraudulent scheme, as well as the failure to disclose"); *Daniels v. Morgan Asset Mgmt., Inc.*, 743 F. Supp. 2d 730, 737 (W.D. Tenn. 2010) (dismissing under SLUSA

This case is the ideal vehicle to resolve that recurring question. The Seventh Circuit acknowledged that petitioner's complaint alleges a straightforward claim for breach of fiduciary duty that does not explicitly or implicitly rely on any claimed misrepresentation. Pet. App. 14a. It further recognized that petitioner's claim is unaffected by any omission by respondents to disclose any conflict of interest. *Id.* 13a-14a. By contrast, many other cases giving rise to the question presented will be clouded by antecedent disputes over whether the claims set forth in the complaint rely on an alleged misrepresentation.

Further, this Court should seize the opportunity to resolve this vital issue. Many other cases presenting this question will never reach this Court. If a district court reads SLUSA narrowly and holds that the statute is inapplicable, the case is remanded to state court; that order is unappealable, and the case in turn would be exceedingly unlikely to reach this Court. *See Kircher v. Putnam Funds Trust*, 547

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because the "substance" of plaintiffs' claims is that defendants "misrepresented how investments would be determined and omitted a material fact"); *Simon v. Stang*, No. C 10-00262 JF, 2010 WL 1460430, at *6 (N.D. Cal. Apr. 12, 2010) (claim precluded by SLUSA because "the complaint expressly alleges misrepresentations and omissions" and "'[m]isrepresentation need not be a specific element of the claim to fall within [SLUSA's] preclusion'") (quoting *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1222 (9th Cir. 2009)); *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 551 (N.D. Cal. 2009) (no SLUSA preclusion because the plaintiffs' "state claims are not, in substance, predicated on misrepresentations or omissions").

U.S. 633, 641-43 (2006) (applying 28 U.S.C. § 1447(d)).

Certiorari accordingly should be granted.

I. This Is An Ideal Vehicle To Resolve The Acknowledged Circuit Split Over SLUSA's Application To A Complaint That Does Not Seek Relief Based On Any Misrepresentation.

A. The Sixth Circuit Holds That SLUSA Requires The Dismissal Of A Complaint Containing Any Reference To An Alleged Misrepresentation.

The Seventh Circuit acknowledged, but did not adopt, the Sixth Circuit's "literalist" interpretation of SLUSA. *See* Pet. App. 8a. In *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009), the Sixth Circuit held that a complaint's mere assertion that the defendant made a material misrepresentation constitutes an "alleg[ation]," 15 U.S.C. § 78bb(f)(1), that triggers removal and dismissal under SLUSA. In *Segal*, the background section of the plaintiff's complaint asserted that the defendant bank had made misrepresentations to investors. The plaintiff's claims then alleged that the defendant had "breached its [state law] fiduciary and contractual duties in three ways": (i) investing the class's money in its own products rather than competitors' superior products; (ii) failing to provide "individualized" financial management; and (iii) improperly investing the plaintiffs' funds in low-yielding investments. *Segal*, 581 F.3d at 308.

The Sixth Circuit did not doubt the plaintiff's assertion that his "state-law claims do not depend upon allegations or misrepresentation or manipulation," *id*. at 311, and indeed recognized that the plaintiffs could have proceeded at least on their breach of contract claim without alleging any misrepresentation, *id*. at 312. But it found those facts irrelevant because, in its view, that "is not how SLUSA works. The Act does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple." *Id*. at 311. The court's holding reflects its position that SLUSA broadly targets "state-law securities-related claims," as opposed to more narrowly targeting plaintiffs' evasion of the PSLRA's limits on federal securities-fraud litigation. *Id*. at 308 (internal quotation marks omitted); *see also Atkinson v. Morgan Asset Mgmt., Inc.*, 658 F.3d 549, 555 (6th Cir. 2011) (applying *Segal*).

Assuming that the Sixth Circuit agreed that petitioner's complaint contained an assertion of a misrepresentation, that court would have held that SLUSA requires dismissal. As the Sixth Circuit explained in *Segal*, "where, as here, a complaint meets the relatively straightforward requirements of [SLUSA], we must dismiss the action." *Id*. at 312.

B. The Third Circuit Holds That SLUSA Applies Only If The Plaintiff's Claim For Relief Relies On The Alleged Misrepresentation.

The Seventh Circuit also rejected the Third Circuit's substantially more restrained interpretation of SLUSA. *See* Pet. App. 9a, 13a. In *LaSala v.*

Bordier et Cie, 519 F.3d 121 (3d Cir. 2008), the Third Circuit held that SLUSA requires dismissing the plaintiff's complaint only "when an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim." *Id.* at 141. The relevant inquiry is thus whether "one of a plaintiff's necessary facts is a misrepresentation." *Id.* Applying that standard, the Third Circuit held that, although the complaint before it did include assertions of fraud, SLUSA did not require dismissal because those allegations "appear to be extraneous . . . . The [defendants'] prior alleged misrepresentations are not factual predicates to these claims," but rather "are merely background details that need not have been alleged, and need not be proved." *Id.* The court reasoned that SLUSA applies to complaints that "in essence allege securities fraud," as opposed to "other wrongs." *Id.* at 128.

In this case, assuming that the Third Circuit accepted that petitioner's complaint asserted a misrepresentation, it would hold that SLUSA does not require dismissal. That court would instead recognize that the background statement on which the Seventh Circuit rested its decision is irrelevant because, "[t]o be a factual predicate [triggering dismissal], the fact of a misrepresentation must be *one that gives rise to liability*, not merely an extraneous detail. This distinction is important because complaints are often filled with more information than is necessary." *LaSala*, 519 F.3d at 141 (emphasis added). The Third Circuit would find dispositive that, on its reading of the statute, "the inclusion of such extraneous allegations does not operate to require that the complaint must be dismissed under SLUSA." *Id*.

The Third Circuit's precedent specifically conflicts with the Seventh Circuit's holding that SLUSA requires considering whether the claims in the plaintiff's complaint might not be plausible, so that he might later be tempted to pursue a claim of fraud that the complaint implies. The Third Circuit expressly declined to "decid[e] whether these claims are adequately pleaded." *Id.* at 130. Instead, it specified that if the plaintiff did later pursue a claim of misrepresentation, the district court "may reconsider [SLUSA's applicability] at that time." *Id.* at 151 n.25.

The Sixth Circuit has acknowledged that its interpretation of SLUSA cannot be reconciled with the Third Circuit's decision in *LaSala*. *See Segal*, 581 F.3d at 311-12. In direct conflict with the Sixth Circuit's "literalist" standard, *see supra* at 20-21, the Third Circuit rejects the argument "that any time a misrepresentation is alleged, the misrepresentation-in-connection-with-a-securities-trade ingredient is present." *LaSala*, 519 F.3d at 141.

As the Seventh Circuit correctly recognized, Pet. App. 9a, there is no merit to the Sixth Circuit's suggestion that the Third Circuit's decision in *LaSala* is in tension with that court's previous opinion in *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005). *LaSala* addresses this precise issue and expressly reconciles that court's prior precedent. 519 F.3d at 141. It correctly recognizes *Rowinski*'s holding that, although SLUSA is not limited to claims that have a misrepresentation as an essential "*legal element* of the claim," the statute nonetheless applies only where an "allegation of a misrepresentation" serves as the "factual predicate" of a state law claim. *LaSala*, 519 F.3d at 141 (emphasis added); *Rowinski*, 398 F.3d at 300.

Further, *Rowinski* recognizes and relies on the targeted purpose of SLUSA, which "mirrors existing federal securities law under § 10(b) and Rule 10b-5 of the 1934 Act," which "prohibit[] fraud 'in connection with the purchase or sale of any security.'" 398 F.3d at 299 (quoting 15 U.S.C. § 78j(b)). Because the statute conspicuously uses "terms with settled meaning under existing federal securities law," *Rowinski* recognizes that Congress enacted SLUSA "to preempt those actions sufficiently 'connected' to a securities transaction to be actionable under § 10(b) and Rule 10b-5." *Id.*

C. The Second, Third, Ninth, And Eleventh Circuits Would Have Permitted Petitioner To Pursue His Claims After Removing Any Allegation Of Fraud.

The Seventh Circuit also recognized but refused to follow the holding of other circuits that a complaint asserting a misrepresentation is "saved" from dismissal under SLUSA "by amending the complaint to delete the passage that injected fraud into the case." Pet. App. 18a (citing *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 842-43 (9th Cir. 2007); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095-96 (11th Cir. 2002)); *see also id*. 9a-10a (recognizing that the Ninth Circuit "allows the removed suit to be dismissed without prejudice, thus permitting the plaintiff to file an amended complaint that contains no allegation of a misrepresentation or misleading omission" (citing

Stoody-Broser v. Bank of Am., 442 Fed. Appx. 247, 247 (9th Cir. 2011)).

The Ninth Circuit has thus "join[ed] the Second and Third Circuits in holding that SLUSA does not require the dismissal of all nonprecluded claims appearing in the same complaint as a precluded claim." *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226-28 (9th Cir. 2009) (citing *In re Lord Abbett Mut. Funds Fee Litig.*, 553 F.3d 248, 255-56 (3d Cir. 2009); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 47 (2d Cir. 2005) (Sotomayor, J.) ("Ordinarily such dismissal should be without prejudice in order to allow the plaintiff to plead a claim sounding only in state law if possible."), *rev'd on other grounds*, 547 U.S. 71 (2006)). (This is in addition to the Third Circuit's separate holding that SLUSA requires the dismissal of only complaints containing claims that rely on a misrepresentation or omission – as opposed to including background statements that could creatively be read to suggest the defendants engaged in fraud. *See supra* at 22-24.).

Assuming the Second, Third, Ninth, and Eleventh Circuits were to read petitioner's complaint to allege a misrepresentation, they would permit petitioner to amend or refile his complaint without it and proceed on his state law fiduciary duty claims. Those courts straightforwardly "hold that SLUSA does not prohibit amendment of the complaint after removal," given "the inequity of dismissing otherwise valid and viable state law claims on the ground that plaintiff pled – perhaps inadvertently – a cause of action that" requires dismissal under SLUSA. *U.S. Mortg.*, 494 F.3d at 843. For example, in *Proctor*, the

Ninth Circuit held that SLUSA barred the plaintiff's claim for a breach of fiduciary duty alleging misrepresentations by the defendants, but it further held that the plaintiff could delete that claim and proceed on a separate state law claim that "lack[ed] any reference to material omissions and misrepresentations." 584 F.3d at 1223, 1229; *accord Green v. Ameritrade*, 279 F.3d 590, 599-600 (8th Cir. 2002) (SLUSA does not apply to amended complaint that deletes assertions that misrepresentations related to purchases or sales of securities, even if amendment amounted to artful pleading), *overruled in other part by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87 (2006) (holding that SLUSA extends to allegation that plaintiff held securities, rather than only purchasing or selling).

The Seventh Circuit's recognition of this circuit conflict is not obviated by its statement that it would not regard an amendment by petitioner to "be credible, if we are correct" that petitioner might lose his breach of fiduciary duty claim and then bring an allegation of fraud. Pet. App. 19a. In assessing a proposed amendment, the Second, Third, Ninth, and Eleventh Circuits consider the claims actually stated in the plaintiff's complaint, not hypothetical claims that the plaintiff might otherwise bring. The very point of their rule is that it is the plaintiff who chooses the claims on which he will proceed. They do not assess the merits of those claims but instead read SLUSA "to require the dismissal of those state law securities claims that are *clearly pre-empted* by the statute." *In re Lord Abbett*, 553 F.3d at 255 (emphasis added).

Certiorari should be granted to resolve the acknowledged conflict between the ruling below and the precedent of the Second, Third, Sixth, Ninth, and Eleventh Circuits.

II. The Seventh Circuit's Decision Conflicts With This Court's Precedents.

This Court's intervention is also warranted because the Seventh Circuit's decision conflicts with *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), and with this Court's precedents interpreting Section 10(b) and Rule 10b-5.

1. This Court held in *Dabit* that the scope of SLUSA parallels that of Section 10(b) and Rule 10b-5. Both sets of provisions apply to a misrepresentation or omission in connection with the purchase or sale of securities. "[N]ot only did Congress [in SLUSA] use the same words as are used in § 10(b) and Rule 10b-5, but it used them in a provision that appears in the same statute as § 10(b)." *Dabit*, 547 U.S. at 86. The Court's interpretation was also guided by "the particular concerns that culminated in SLUSA's enactment" – in particular, "SLUSA's stated purpose, *viz*., 'to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]." *Id*. (quoting SLUSA, Pub. L. No. 105-353, § 2(5), 112 Stat. 3227 (1998)). Congress thus enacted SLUSA to prevent private plaintiffs from filing securities fraud suits in state court to evade the "special burdens" imposed by the PSLRA "on plaintiffs seeking to bring federal securities fraud class actions." 547 U.S. at 82. The Court's interpretation respected principles of

federalism, it explained, because "federal law, not state law, has long been the principal vehicle for asserting class-action securities fraud claims." *Id*. at 88; *accord* Br. for the U.S. as *Amicus Curiae* Supporting Petitioner at 7, *Dabit*, 547 U.S. 71 (No. 04-1371) (Because SLUSA's text "clearly and manifestly t[ies] its preemptive effect to the scope of Rule 10b-5's substantive prohibition against securities fraud," "[p]reemption under SLUSA turns on whether the defendant allegedly committed fraud in connection with the purchase or sale of securities.").

By contrast, the Court held in *Dabit* that SLUSA does not import the prudential principle that only purchasers and sellers of securities may bring a private securities fraud suit. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). That limitation on private plaintiffs' standing was based on "policy considerations" about the appropriate scope of the implied private remedy, not the text of Section 10(b) or Rule 10b-5. *Dabit*, 547 U.S. at 84.

This Court settled in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1997), that Section 10(b) and Rule 10b-(5) do not reach breaches of fiduciary duty that do not involve fraudulent activity. "[T]o bring within the ambit of the Rule all breaches of fiduciary duty in connection with a securities transaction" would "'add a gloss to the operative language of the statute quite different from its commonly accepted meaning,'" *id*. at 472 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)), given that there is "no indication that Congress meant to prohibit any conduct not involving manipulation or deception," *id*. at 473. Further, reading the statute to reach ordinary breaches of fiduciary duty "could not easily be contained," and would "bring within the Rule a wide variety of corporate conduct traditionally left to state regulation." *Id*. at 478. "Absent a clear indication of congressional intent," the Court refused "to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden." *Id*. at 479.

On that basis, the Court has rigorously enforced the requirement that every 10(b) claim must expressly allege "a deceptive device or fraud," in order to "not transform every breach of fiduciary duty into a federal securities violation," *SEC v. Zanford*, 535 U.S. 813, 825 n.4 (2002), or "permit numerous plaintiffs to bring federal securities claims that are in reality no more than ordinary state breach-of-contract claims," *The Wharf (Holdings) Ltd. v. United Int'l Holdings*, 532 U.S. 588, 596 (2001). The Court has never deviated from that bedrock principle. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 655 (1997) ("§ 10(b) is not an all-purpose breach of fiduciary duty ban; rather, it trains on conduct involving manipulation or deception," such that a party not subject to suit under federal law "may remain liable under state law for breach of a duty of loyalty"); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 174 (1994) (citing *Santa Fe Industries*, 430 U.S. at 464, 473); *Dirks v. SEC*, 463 U.S. 646, 654 (1983) ("Not all breaches of fiduciary duty in connection with a securities transaction, however, come within the ambit of Rule 10b-5. There must also be manipulation or deception.") (quoting *Santa Fe Industries*, 430 U.S. at 472) (internal quotation marks omitted); *Chiarella v. United States*, 445 U.S. 222, 232 (1980) ("[N]ot every instance of financial unfairness constitutes fraudulent activity under § 10(b).").

2. The ruling below cannot be reconciled with those precedents. Petitioner's complaint alleges only that respondents breached their state-law fiduciary duties by favoring preferred shareholders over common shareholders in redeeming the AMPS. As the Seventh Circuit recognized, that claim is unrelated to any misrepresentation or omission by respondents. Pet. App. 13a-14a. A suit by petitioner against respondents for a misrepresentation or omission would be a "significantly different" claim. *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 499 (Del. 1982). If respondents proved at trial that they had acted truthfully and disclosed every material fact, the claims in petitioner's complaint would be utterly unaffected.

Petitioner's allegations unquestionably could not have been brought under Section 10(b) and Rule 10b-5. But, despite the fact that "[n]othing in SLUSA's text or the legislative history suggests that Congress intended to place roadblocks in the way of . . . *non-precluded* state law claims," *Proctor*, 584 F.3d at 1228, the Seventh Circuit construed the statute to require the very different result that SLUSA reaches complaints that merely state ordinary claims for breach of fiduciary duty that could never have been brought under the federal securities laws. That result cannot be reconciled with this Court's precedents: "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." *Chiarella*, 445 U.S. at 234-35.

The Seventh Circuit nonetheless found sufficient to trigger dismissal under SLUSA that petitioner hypothetically could later abandon his fiduciary duty claim and assert instead that respondents committed a misrepresentation by falsely promising not to violate that same duty. Pet. App. 13a, 17a-18a. It also held that merely by alleging a conflict of interest petitioner's complaint "implicitly" suggested a "misleading omission" by respondents to disclose that conflict. *Id*. 8a. In other words, the Seventh Circuit held that the complaint must be dismissed on the basis of the mere fact that petitioner alleged a breach of fiduciary duty and the existence of a conflict of interest, which automatically alleged by implication a promise not to breach that fiduciary duty and a failure to disclose the conflict.

That ruling has no stopping point. Contrary to the principles of federalism that this Court's decisions protect, the ruling below converts almost every permissible state law suit for breach of fiduciary duty into a claim of fraud forbidden by federal law. Any allegation of a breach of fiduciary duty can equally be said to impliedly allege a further breach of a promise not to violate that duty, and any allegation of a conflict of interest can be said to contain an implied allegation of a failure to disclose that conflict. But "[t]he fact that the actions underlying the alleged breach could also form the factual predicate for a securities fraud action by different plaintiffs cannot magically transform every dispute between broker-dealers and their customers into a federal securities fraud claim" that is subject to dismissal under SLUSA. *Norman v. Salomon Smith Barney Inc.*, 350 F. Supp. 2d 382, 387 (S.D.N.Y. 2004).

The Seventh Circuit did not (and could not) identify any textual basis for its holding that SLUSA requires dismissing a complaint on the basis of what the plaintiff might assert if his actual claims failed. If a plaintiff's non-fraud claims are meritless, the case can of course be dismissed on the merits by the state court in which it was filed. But the court of appeals contemplated that federal district courts applying SLUSA would be diverted into a separate, preliminary inquiry into whether the plaintiff's non-fraud, state law claims "might" be subject to dismissal, as a predicate to speculating whether a plaintiff then might attempt to raise a fraud claim at some later point in the case, despite his complaint's express disavowal of that very claim. SLUSA does not provide a back-door mechanism to remove state law fiduciary duty claims to federal courts for an assessment of the claims' merits. Certainly, nothing in SLUSA authorizes the dismissal of a state law claim on the basis of such a hypothetical on a hypothetical. "If the action is precluded [by SLUSA], neither the district court nor the state court may entertain it, and the proper course is to dismiss. If the action is not precluded, the federal court likewise has no jurisdiction to touch the case on the merits, and the proper course is to remand to the state court that can deal with it." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 644 (2006).[2]

If the plaintiff does add an allegation of fraud, the court can apply SLUSA at that time. *See MDCM Holdings, Inc. v. Credit Suisse First Bos. Corp.*, 216 F. Supp. 2d 251, 257 n.12 (S.D.N.Y. 2002) ("Because the determination of whether SLUSA applies may only be made by reference to what a party has alleged, and not what it *could* have alleged, courts should be wary of a defendant's attempt to recast the plaintiff's complaint as a securities lawsuit in order to have it preempted by SLUSA.").

The Seventh Circuit nonetheless sua sponte identified a supposed defense to the merits of petitioner's claim that respondents themselves had never articulated. The court's novel theory that the trustees of a fund may make decisions that harm the fund in order to benefit other funds, including those that may be created in the future for which they are not fiduciaries, is simply wrong. *See, e.g.*, *In re Binder's Estate*, 27 N.E.2d 939, 946 (Ohio 1940) ("[T]he handling of multiple trusts, of necessity, calls for a high degree of care and a sense of extreme loyalty upon the part of a trustee as to each of his various trusts. . . . undivided loyalty [is owed] to each trust . . . [where] there [exists] a temptation and the

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[2] Indeed, the Seventh Circuit's reading of SLUSA raises a serious question regarding the statute's constitutionality under Article III, given the complete absence of *any* ripe dispute over the claim the court of appeals held was the basis for dismissing petitioner's complaint.

urge of special circumstances to favor one trust over another."). But more relevant here, that theory is not a basis for dismissal under SLUSA.

The Seventh Circuit also failed to account for the impossibility of the scenario it hypothesized, given that the court read into the complaint allegations that contradict petitioner's actual pleadings. The complaint both expressly disclaims any claim of fraud and states that respondents publicly disclosed their trustee relationship in multiple Calamos funds. But the Seventh Circuit afforded no weight to the fact that, as a result, no court would ever permit petitioner to pursue a fraud claim. No less absurd, respondents steadfastly argue that the very allegations they would imply into petitioner's complaint are utterly meritless and could never be brought in good faith.

The Seventh Circuit's dictum that, even if SLUSA did not apply, petitioner's complaint would fail in state court under state law because it would have to be filed as a derivative action, Pet. App. 14a-15a, is yet another example of the court's overreaching. If petitioner's complaint is precluded by SLUSA, the federal courts have no jurisdiction to consider the merits. By contrast, if SLUSA does not apply, then removal was improper and the case is within the exclusive jurisdiction of the state courts. Yet the Seventh Circuit opined on a question of state law that is properly the province of the state courts.

3. At the very least, petitioner should have been permitted to proceed without the single offending sentence that respondents contend implicitly alleges a misrepresentation. As the Third Circuit has recognized, *In re Lord Abbett Mut. Funds Fee Litig.*,

553 F.3d 248, 257 (3d Cir. 2009), that result is supported by this Court's interpretation of the Prison Litigation Reform Act's prohibition on any "action" relating to prison conditions until the plaintiff exhausts his administrative remedies. 42 U.S.C. § 1997e(a). This Court held in *Jones v. Bock*, 549 U.S. 199 (2007), that the statute did not require the dismissal of exhausted claims, reasoning: "As a general matter, if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad. [O]nly the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none." *Id*. at 221 (alteration in original) (internal quotation marks omitted). The same reasoning applies to SLUSA's prohibition on maintaining a covered "action" alleging a material misrepresentation or omission. 15 U.S.C. § 78bb(f)(1).

The Seventh Circuit's contrary conclusion that such an amendment is categorically forbidden by the "forum manipulation" rule, Pet. App. 18a, lacks merit. The court of appeals misunderstood the significance of this Court's recognition that "when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not *defeat jurisdiction*." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 n.6 (2007) (emphasis added). Here it is undisputed that petitioner's complaint does not allege "a federal claim." But in any event, the principle that a federal court retains "jurisdiction" after an amendment says nothing about the propriety of permitting the amendment in this first place. As the first case cited by this Court in *Rockwell* squarely holds, a plaintiff may amend a removed complaint to delete the claim that formed the basis for federal jurisdiction; if that occurs "at an early stage," the district court will have "a powerful reason to choose not to continue to exercise jurisdiction" and instead to remand the case to state court. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988). This is such a case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 23, 2012