NO. 11-10932

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES ROLAND; MICHAEL J. GIAMBRONE; THOMAS BOWDEN,
Individually and On Behalf of Thomas E. Bowden S.E.P. I.R.A.; T.E. BOWDEN,
Sr., Ret. Trust; G. KENDALL FORBES, Individually and on Behalf of G. Kendall
Forbes I.R.A.; *ET AL.*,
Plaintiffs- Appellants,
v.
JASON GREEN; GRADY LAYFIELD; HANK MILLS; CHARLES JANTZI;
TIFFANY ANGELLE; *ET AL.*,
Defendants-Appellees
consolidated with

LEAH FARR; *ET AL.*,
Plaintiffs-Appellants,
v.
JASON GREEN; GRADY LAYFIELD; HANK MILLS; DIRK HARRIS;
TIMOTHY E. PARSONS; *ET AL.*,
Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Texas,
Dallas Division, Civil Action No. 3:10-CV-224 c/w/ 3:10-CV-225

AMICUS CURIAE* BRIEF OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF APPELLANTS, JAMES ROLAND, *ET AL.* AND LEAH FARR, *ET AL.

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons, not previously disclosed in the Appellant's brief, have an interest in the amicus brief. These representations are made, pursuant to Fifth Circuit Rule 29.2, in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Public Investors Arbitration Bar Association
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s/ Kirk Reasonover	November 21, 2011
Kirk Reasonover	Date

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Public Investors Arbitration Bar Association is a not-for-profit corporation and does not have any parent entities and there are no publicly held companies that own ten percent or more of its stock.

TABLE OF CONTENTS

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS iii

CORPORATE DISCLOSURE STATEMENT iv

TABLE OF AUTHORITIES vi

IDENTITY OF *AMICUS CURIAE,* PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, ITS INTEREST IN THE CASE AND AUTHORITY TO FILE THIS BRIEF 1

ARGUMENT 3

I. Background 3

II. Private Remedies under State Law Provide Vital Protection for Investors ..6

III. Applying SLUSA to Disputes Regarding Non-Covered Securities Would Not Further the Purpose of SLUSA or the PSLRA 10

IV. Non-Covered Securities, including Regulation D Private Placement Offerings are a Major Source of Securities Fraud 15

V. Conclusion 20

CERTIFICATE OF SERVICE 22

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS 30

TABLE OF AUTHORITIES

Cases

Brown v. Earthboard Sports USA, Inc., 481 F.3d 901, 905-06 (6th Cir. 2007)......15

Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S. Ct. 2608, 2618, 120 L. Ed. 2d 407 (1992). 11

Dupuy v. Dupuy, 551 F.2d 1005, 1015 (5th Cir.1977) 9

Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987 9

Gray v. Seaboard Sec., Inc., 126 F. App'x 14, 17 (2d Cir. 2005)..........................4, 9

Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990) 19

In re Beacon Associates Litig., 745 F. Supp. 2d 386, 429 (S.D.N.Y. 2010) 2

In re Enron Corp. Sec., 535 F.3d 325, 338 (5th Cir. 2008).....................................12

In re Mut. Funds Inv. Litig., 384 F. Supp. 2d 845, 871 (D. Md. 2005).................4, 9

Marvin v. Brooks, 94 N.Y. 71, 71 (1883) 9

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996 11

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 81, 126 S. Ct. 1503, 1510, 164 L. Ed. 2d 179 (2006)... 3, 5, 12

Newman v. Family Mgmt. Corp., 748 F. Supp. 2d 299, 313 (S.D.N.Y. 2010) 2

Sofonia v. Principal Life Ins. Co., 465 F.3d 873, 875 (8th Cir. 2006) 4, 9

Spehar v. Fuchs, 02-CIV.9352-CM, 2003 WL 23353308, at *9 (S.D.N.Y. June 18, 2003) 4

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321, 127 S. Ct. 2499, 2508, 168 L. Ed. 2d 179 (2007)... 8, 11

Thompson v. RelationServe Media, Inc., 610 F.3d 628, 642 n. 5 (11th Cir. 2010).16

Topalian v. Ehrman, 954 F.2d 1125, 1129 (5th Cir. 1992) 18

Statutes

14 U.S.C. § 77p(b) 4, 5

15 U.S.C. § 77r...5

15 U.S.C. § 78bb(f)..4, 5

15 U.S.C. §§ 24.001-24.013. 2

Pub. L. No. 104-67, 109 Stat. 737 (1995)..2

Other Authorities

2011 NASAA's Top Investor Traps, available at <http://www.nasaa.org/3752/top-investor-traps/>. 17

HOUSE CONFERENCE REPORT NO. 104-369, H.R. CONF. REP. 104-369, 31, 1995 U.S.C.C.A.N. 730, 0, 1995 WL 709276, 26... 8, 16

HOUSE CONFERENCE REPORT NO. 105-803, H.R. CONF. REP. 105-803, 13, 1998 WL 703964, 10 12

NASAA's Legislative Agenda Item No. 3 – Strengthen State/Federal Collaboration, available at <http://www.nasaa.org/issues-and-advocacy/legislative-agenda-3/>. 17, 18

Restatement (Second) of Agency § 425 9

SENATE REPORT NO. 104–98, S. REP. 104-98, 8, 1995 U.S.C.C.A.N. 679, 687, 1995 WL 372783, 7 8

SENATE REPORT NO. 105–182, S. REP. 105-182, 4, 1998 WL 226714, 3... 7, 13

Study on Investment Advisors and Broker-Dealers, Securities and Exchange Commission, United States Securities and Exchange Commission, January 2011 available at <http://sec.gov/news/studies/2011/913studyfinal.pdf> at p. 54. 10

Treatises

4 Law Sec. Reg. § 12.15 (6th ed.) 4

Christopher R. Lane, *Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators*, 39 New Eng. L. Rev. 317, 321 (2005) 6

Martin Fojas, Ay Dios Nsmia! Proof of A Private Offering Exemption Should Not Be A Precondition for Preempting Blue Sky Law Under the National Securities Markets Improvement Act, 74 Brook. L. Rev. 477, 481 (2009). 7

Seth E. Lipner, Joseph C. Long and William A. Jacobsen, *Securities Arbitration Desk Reference*, 2011-2012 Edition, West Publishing 19

IDENTITY OF *AMICUS CURIAE*, PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, ITS INTEREST IN THE CASE AND AUTHORITY TO FILE THIS BRIEF

Public Investors Arbitration Bar Association ("PIABA") respectfully submits this brief as *amicus curiae* in support of Plaintiffs-Appellants James Roland, *et al*. PIABA is an international bar association, which was established in 1990 as an organization to promote the interests of the public investor in securities and commodities arbitration and litigation by protecting public investors from abuses prevalent in the arbitration processes. PIABA members include numerous current and former state and federal securities regulators, securities professors, and experienced securities practitioners. PIABA furthers its goals by sponsoring educational programs, publishing journals, participating in regulatory activities, and, frequently, submitting briefs as *amicus curiae* in cases impacting public investors.

PIABA publishes books and reports on securities arbitrations, conducts regular CLE programs for its members, and communicates directly with governmental and quasi-governmental agencies, such as the Securities and Exchange Commission, the North American Securities Administrators' Association, and the Financial Industry Regulatory Authority (FINRA)[1] on issues

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[1] FINRA was created in July 2007 through the consolidation of the National Association of Securities Dealers and the member regulation, enforcement and arbitration functions of the New York Stock Exchange to establish a single self-regulatory authority for the securirties industry.

of interest to PIABA members and public investors. The United States Supreme Court, federal Circuit Courts of Appeal, and state supreme courts have permitted PIABA to appear as amicus curiae in cases involving issues of importance to public investors' claims against their stockbrokers and financial advisors.

PIABA submits its brief in this case to address an erroneous standard applied by the Court below and by other District Courts[2] to define the scope of the Securities Litigation Uniform Standards Act of 1998.[3]

Under Federal Rule of Appellate Procedure 29(a), an amicus curiae other than the government may file a brief only with leave of court or when all parties consent. PIABA has requested leave of court because all parties have not consented to PIABA filing an amicus brief. Appellants consented. Although counsel for PIABA contacted all other parties on two separate occasions to inquire of all parties whether they consented, not all of the Appellees responded.

No parties counsel has participated in the authoring of this brief. No party or a party's counsel has contributed money that was intended to fund preparing or submitting this brief. No persons, other than the *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting this brief.

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[2] *See e.g. Newman v. Family Mgmt. Corp.*, 748 F. Supp. 2d 299, 313 (S.D.N.Y. 2010); *In re Beacon Associates Litig.*, 745 F. Supp. 2d 386, 429 (S.D.N.Y. 2010).

[3] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in part at 15 U.S.C. §§ 24.001-24.013.

MAY IT PLEASE THE COURT:

Public Investors Arbitration Bar Association ("PIABA") respectfully submits this brief as *amicus curiae* in support of Plaintiffs-Appellants James Roland, *et al*.

ARGUMENT

I. Background

Congress enacted the Private Securities Litigation Reform Act ("PSLRA") to address "perceived abuses of the class-action vehicle in litigation involving nationally traded securities."[4] To avoid the obstacles presented by the PSLRA, plaintiffs began to avoid filing class actions in federal forums and such litigation began to shift to state court.[5] In response, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") "[t]o stem this shift 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]."[6]

SLUSA expressly preempts certain "covered class actions" brought exclusively under state law in which a plaintiff alleges an untrue statement or

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4 *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 126 S. Ct. 1503, 1510, 164 L. Ed. 2d 179 (2006).

5 *Id.* at 82, 126 S. Ct. at 1511.

6 *Id.*

omission of a material fact in connection with the purchase or sale of a "covered security."[7] "SLUSA was enacted by Congress so that certain specifically denominated securities fraud cases-actions involving registered securities (the traditional domain of the Federal securities laws) brought on behalf of more than fifty persons-would have to be prosecuted in federal court and governed by federal law."[8] When SLUSA preemption applies, it eliminates the availability of all state law remedies, not just those based on state securities statues.[9] Thus, even traditional state law causes of action such as breach of contract or breach of fiduciary duty may be preempted by SLUSA.[10] SLUSA does not apply, however, if the alleged misrepresentations are not made "in connection with the purchase or

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[7] 14 U.S.C. § 77p(b) and 15 U.S.C. § 78bb(f).

[8] *Spehar v. Fuchs*, 02-CIV.9352-CM, 2003 WL 23353308, at *9 (S.D.N.Y. June 18, 2003).

[9] 4 Law Sec. Reg. § 12.15 (6th ed.) ("Whether a complaint involves a covered class action to be preempted by SLUSA depends on if it is based on 'a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security' regardless of whether the complaint is based on fraud or some other basis for relief such as breach of contract or breach of fiduciary duty.").

[10] *Gray v. Seaboard Sec., Inc.*, 126 F. App'x 14, 17 (2d Cir. 2005) (finding claims for breach of contract and negligence preempted by SLUSA); *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 875 (8th Cir. 2006) (finding state law claims for fraud, breach of fiduciary duty and unjust enrichment preempted by SLUSA); *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 871 (D. Md. 2005) (finding claims for breach of fiduciary duty/constructive fraud, aiding and abetting breach of fiduciary duty, and unjust enrichment preempted by SLUSA).

sale of a covered security."[11] "A 'covered security' is one traded nationally and listed on a regulated national exchange."[12]

The District Court in this matter erroneously adopted what recognized was an "expansive interpretation of SLUSA's preclusive reach."[13] Under the erroneous standard SLUSA would cover claims where the defendants were supposed to purchase unspecified covered securities, but instead purchased fraudulent non-covered investments. The Court stretched the meaning of the "in connection with the purchase or sale of a covered security" to cover situations where there was no purchase or sale of covered securities at all. SLUSA was never intended to apply in cases where losses are sustained as a result of investment in securities which are not covered securities. The broad standard applied by the District Court would leave virtually no situation where state law claims could survive SLUSA preemption. All state law claims would be preempted where there was even the most attenuated connection to a covered security. As more fully stated below, the textually unsupported standard adopted by the District Court does not further the stated purposes of SLUSA, inhibits the ability of investors to recover upon

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[11] 14 U.S.C. § 77p(b) and 15 U.S.C. § 78bb(f).

[12] *Merrill Lynch, Pierce Fenner & Smith, Inc., v. Dabit*, 547 U.S. 71, 82-83 (2006); 15 U.S.C. § 77r.

[13] August, 31, 2011 Order of the United States District Court for the Southern District of Texas, United States District Judge David C. Godbey (R. Doc. 72) at p. 14.

meritorious claims, and infringes upon the rights of states to construct their own securities enforcement schemes as they see fit.

SLUSA preemption should be limited to situations where the complained of misrepresentations or omissions relate to the characteristics or qualities of a "covered security" or involve manipulation of a "covered security." This standard would achieve SLUSA's goal of creating uniform standards to be applied to nationally traded securities, while preserving states' authority in traditional areas of state regulation and preserving investors' ability to recover on meritorious claims.

II. Private Remedies under State Law Provide Vital Protection for Investors

Private securities litigation is a vital component to the enforcement schemes of state securities regulators. In 1911, Kansas became the first state to pass a modern "blue sky" law to regulate securities.[14] "[O]ther states were quick to follow suit, and within two years, twenty-three states had passed legislation regulating securities sales."[15] "By the time Congress passed the first federal

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[14] Christopher R. Lane, *Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators*, 39 New Eng. L. Rev. 317, 321 (2005).

[15] *Id.*

securities law in 1933, state legislatures had long assumed a role in securities regulation, some since the mid-19th century."[16]

As part of their enforcement scheme, state securities regulators rely heavily upon plaintiffs acting as private attorney generals, often with the benefit of fee shifting statutes, to enhance enforcement and ferret out fraud. Plaintiffs acting as private attorney generals are often better positioned than public regulators to discover and pursue private wrongdoing. Further, they provide states with an efficient means of increasing levels of enforcement without increasing the size of government or putting a strain on the public finances. When considering SLUSA, Congress acknowledged that the legislation had been criticized "as being an affront on Federalism and contrary to the recent trend towards reinforcing state rights."[17] Ultimately, Congress voted to pass SLUSA. However, it noted that in doing so it was "sensitive" to the importance of protecting individual states' decisions as to how to conduct their own securities regulation schemes.[18]

Both Congress and the Supreme Court have recognized that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can

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[16] Martin Fojas, *Ay Dios Nsmia! Proof of A Private Offering Exemption Should Not Be A Precondition for Preempting Blue Sky Law Under the National Securities Markets Improvement Act*, 74 Brook. L. Rev. 477, 481 (2009).

[17] SENATE REPORT NO. 105–182, S. REP. 105-182, 4, 1998 WL 226714, 3.

[18] SENATE REPORT NO. 105–182, S. REP. 105-182, 4, 1998 WL 226714, 3

recover their losses without having to rely upon government action."[19] The Supreme Court has reaffirmed that "[n]othing in the PSLRA…casts doubt on [this] conclusion."[20] Likewise, the Chairman of the SEC has testified to Congress that "private rights of action are not only fundamental to the success of our securities markets, they are an essential complement to the SEC's own enforcement program."[21] Congress has further found that "[s]uch private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs."[22]

State law-based private securities litigation is also important because it provides remedies for financial wrongs unavailable under federal securities statutes. Such state law securities litigation occurs not only under state "blue sky" laws, specifically enacted to regulate securities, but also under state common law

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[19] HOUSE CONFERENCE REPORT NO. 104-369, H.R. CONF. REP. 104-369, 31, 1995 U.S.C.C.A.N. 730, 0, 1995 WL 709276, 26; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321, 127 S. Ct. 2499, 2508, 168 L. Ed. 2d 179 (2007)

[20] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321, 127 S. Ct. 2499, 2508, 168 L. Ed. 2d 179 (2007).

[21] SENATE REPORT NO. 104–98, S. REP. 104-98, 8, 1995 U.S.C.C.A.N. 679, 687, 1995 WL 372783, 7

[22] HOUSE CONFERENCE REPORT NO. 104-369, H.R. CONF. REP. 104-369, 31, 1995 U.S.C.C.A.N. 730, 0, 1995 WL 709276, 26

for breach of fiduciary duty[23] and breach of contract. Fiduciary duties under state common law have played an important role in securities enforcement since at least a half a century before the federal government passed its first securities regulations.[24] However, even though such basic state law causes of action form the core of all business relationships and have been traditionally regulated by state common law, they may still be preempted by SLUSA.[25]

The courts should be reluctant to foreclose important remedies for investors that arise under state common law. State common law breach of fiduciary duty actions provide an important remedy not available under federal law. "The federal securities statutes were modeled after the common law actions of fraud and deceit."[26] "Fraud is not the same as breach of fiduciary duty."[27] The SEC has noted that "broker-dealers are generally not subject to a fiduciary duty under the

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23 The courts have recognized that under state common law it "is clear that a broker owes a fiduciary duty of care and loyalty to a securities investor."*Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987) (citing *Dupuy v. Dupuy,* 551 F.2d 1005, 1015 (5th Cir. 1977); *see also* Restatement (Second) of Agency § 425.

24 *See e.g. Marvin v. Brooks*, 94 N.Y. 71, 71 (1883).

25 *Gray v. Seaboard Sec., Inc.*, 126 F. App'x 14, 17 (2d Cir. 2005) (finding claims for breach of contract and negligence preempted by SLUSA); *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 875 (8th Cir. 2006) (finding state law claims for fraud, breach of fiduciary duty and unjust enrichment preempted by SLUSA); *In re Mut. Funds Inv. Litig.*, 384 F. Supp. 2d 845, 871 (D. Md. 2005) (finding claims for breach of fiduciary duty/constructive fraud, aiding and abetting breach of fiduciary duty, and unjust enrichment preempted by SLUSA).

26 *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987).

27 *Id.*

federal securities laws."[28] The Eleventh Circuit has explained that "[s]ince not every instance of financial unfairness or breach of fiduciary duty will constitute a fraudulent activity under § 10(b) or Rule 10b-5, federal courts should be wary of foreclosing common law breach of fiduciary duty actions which supplement existing federal or state statutes."[29]

The District Court's erroneous standard threatens to do just what the Eleventh Circuit warned against and foreclose the possibility of common law breach of fiduciary duty actions in many circumstances. Further, this erroneous standard forecloses these important common law causes of actions without furthering the goals of SLUSA and the PSLRA.

III. Applying SLUSA to Disputes Regarding Non-Covered Securities Would Not Further the Purpose of SLUSA or the PSLRA

SLUSA is a preemptive statute it should be narrowly construed in accordance with congressional intent to protect the interests of state sovereignty. The Supreme Court has explained that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not

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[28] *Study on Investment Advisors and Broker-Dealers, Securities and Exchange Commission*, United States Securities and Exchange Commission, January 2011 available at <http://sec.gov/news/studies/2011/913studyfinal.pdf> at p. 54.

[29] *Gochnauer*, 810 F.2d at 1049.

cavalierly pre-empt state-law causes of action."[30] The Court further explained that "the purpose of Congress is the ultimate touchstone in every pre-emption case."[31] "As a result, any understanding of the scope of a pre-emption statute must rest primarily on "a fair understanding of *congressional purpose.*"[32] "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."[33] Here, the District Court's expansive interpretation of SLUSA's preemptive reach fails to take into account Congress's stated purpose and impermissibly pre-empts matters beyond the scope of the statutory text.

The Supreme Court has explained that "the PSLRA's twin goals [are] to curb frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims."[34] Congress explained that "[SLUSA] is designed to protect the interests of shareholders and employees of *public companies* that are the target

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30 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996).

31 *Id.* (internal quotation marks omitted).

32 *Id.* at 485-86, 116 S. Ct. at 2250.

33 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S. Ct. 2608, 2618, 120 L. Ed. 2d 407 (1992).

34 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007).

of meritless 'strike' suits."[35] Likewise, this Court has noted that "SLUSA advances 'the congressional preference for national standards for securities class action lawsuits involving *nationally traded* securities.'"[36]

In explaining its rationale for this preference, Congress has explained:

> It is important to note that companies cannot control where their securities are traded after an initial public offering. As a result, companies with *publicly-traded* securities cannot choose to avoid jurisdictions which present unreasonable litigation costs. Thus, a single state can impose the risks and costs of its peculiar litigation system on all *national issuers*.
>
> The solution to this problem is to make Federal court the exclusive venue for most securities fraud class action litigation involving *nationally traded* securities.[37]

The foregoing concerns are only applicable to national issuers and publically traded securities, and the decision of the District Court to apply SLUSA based on securities that are sold, instead of the securities whose purchase resulted in the loss, does not promote those goals. Issuers of limited private placement offerings can, and often do, choose where their securities are traded and can choose to avoid jurisdictions which they perceive as presenting unreasonable litigation costs.

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[35] HOUSE CONFERENCE REPORT NO. 105-803, H.R. CONF. REP. 105-803, 13, 1998 WL 703964, 10 (emphasis added).

[36] *In re Enron Corp. Sec.*, 535 F.3d 325, 338 (5th Cir. 2008) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 87, 126 S. Ct. 1503, 1514, 164 L. Ed. 2d 179 (2006)).

[37] HOUSE CONFERENCE REPORT NO. 105-803, H.R. CONF. REP. 105-803, 15, 1998 WL 703964, 12 (emphasis added)

Limited private placement offerings also are a major source of fraud and are a primary concern of state securities regulators and state law private securities litigation. Such securities were intentionally left outside of the scope of SLUSA. Allowing issuers in these private placements the benefits of SLUSA preemption due to extremely attenuated connections to publically traded securities would not advance the concerns of SLUSA and would only serve to create additional obstacles for defrauded investors seeking to recover their losses. However, this is exactly what the District Court decision does.

While enacting SLUSA, Congress recognized the importance of maintaining the vital role of state law in regulating non-publically traded securities. Congress found "that in order to avoid…thwarting…the purpose of the Private Securities Litigation Reform Act of 1995, national standards for nationally traded securities must be enacted, *while preserving the appropriate enforcement powers of state regulators, and the right of individuals to bring suit*."[38] (emphasis added) Congress explained:

> In recognition of this dual [state-federal] system, this legislation uses the approach that the National Securities Markets Improvement Act of 1996 ("NSMIA") employed…The Committee strongly notes that this legislation only covers precisely those securities defined in the NSMIA, principally those securities that are traded on national exchanges."[39]

[38] SENATE REPORT NO. 105–182, S. REP. 105-182, 8, 1998 WL 226714, 7

[39] SENATE REPORT NO. 105–182, S. REP. 105-182, 5, 1998 WL 226714, 4

Congress' emphasis that the applicability of SLUSA should be limited to publically traded securities clearly indicates its recognition of the vital importance of state law regulation and remedies when dealing with non-publically traded securities, such as private placement offerings governed by Regulation D, Rule 506. The district court's broad interpretation of SLUSA preemption almost entirely eliminates the availability of state law remedies whenever a group of securities claims are filed. This erosion of state court jurisdiction and the availability of state law remedies is clearly contrary to the express intent of Congress to preserve state authority in certain specific areas. The District Court's erroneous standard would preempt state law causes of action where there was even the faintest connection to a covered security. Such an expansion of SLUSA preemption would do nothing to advance SLUSA's stated goal of protecting public companies from meritless 'strike' suits, particularly where, in the example cited, the case only affects private placements of securities.

Congress intended for SLUSA preemption to be limited to situations where the complained of misrepresentation or omissions relate to the characteristics or qualities of a "covered security" or involve manipulation of a "covered security." This standard would achieve SLUSA's goal of creating uniform standards to be applied to nationally traded securities, while preserving states' authority in traditional areas of state regulation and preserving investors' legitimate right to

recover under state laws. State common law and Blue Sky law remedies have played an important role in securities enforcement since well before the enactment of federal securities statutes. The District Court's attempt to dramatically expand the scope of SLUSA threatens to marginalize more than a century of jurisprudence and state remedies.

IV. Non-Covered Securities, including Regulation D Private Placement Offerings are a Major Source of Securities Fraud

Private placement offerings issued under Regulation D, Rule 506, do not fall within the ambit of "covered securities" under SLUSA. When enacting SLUSA, Congress intentionally crafted the scope of the statute to preserve the enforcement powers of state regulators, and the right of individuals to bring suit under state law with respect to these non-covered securities. The District Court's ruling eliminates remedies under state law that Congress specifically intended would remain available.

"Rule 506 permits a private issuer to sell unregistered securities to any 'accredited investor' and up to thirty-five other unaccredited purchasers, so long as certain requirements are met."[40] Regulation D imposes other limitations on such private offerings, including that "there must be no 'general solicitation' of purchasers of the securities; and…the securities must contain restrictions on their

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[40] *Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 905-06 (6th Cir. 2007).

resale."[41] Because of their limited offerings and restrictions on resale, issuers of Regulation D offerings can choose to avoid jurisdictions which they perceive as presenting unreasonable litigation costs.

Further, because private placements generally are to be sold to accredited investors and limited numbers of sophisticated, non-accredited investors, Regulation D offerings were not perceived to be associated with problems caused by "professional plaintiffs"[42] in the same manner as securities traded on the national exchanges. Rather, investors in Regulation D offerings generally were expected to be the very institutional investors whom Congress wished to control class action litigation under the PSLRA and SLUSA.[43] In enacting the PSLRA, Congress found that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions."[44] Thus, Regulation D offerings were not subject to the same concerns regarding "strike suits" against which SLUSA was

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[41] *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 642 n. 5 (11th Cir. 2010)

[42] "Professional plaintiffs who own a nominal number of shares in a wide array of public companies permit lawyers readily to file abusive securities class action lawsuits." HOUSE CONFERENCE REPORT NO. 104-369, H.R. CONF. REP. 104-369, 32, 1995 U.S.C.C.A.N. 730, 731, 1995 WL 709276, 27.

[43] "The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs…." HOUSE CONFERENCE REPORT NO. 104-369, H.R. CONF. REP. 104-369, 34, 1995 U.S.C.C.A.N. 730, 733, 1995 WL 709276, 28.

[44] HOUSE CONFERENCE REPORT NO. 104-369, H.R. CONF. REP. 104-369, 34, 1995 U.S.C.C.A.N. 730, 733, 1995 WL 709276, 28

intended to protect. However, such Regulation D offerings do implicate serious concerns regarding fraud.

The North American Securities Administrators Association[45] ("NASAA") lists private placements under Regulation D, Rule 506 as among its top ten investor traps.[46] NASAA explains:

> Investors should be aware that, even in the case of legitimate issuers, private placement offerings are highly illiquid, generally lack transparency and have little regulatory oversight. In the United States, the federal exemption for private placement offerings provided under Rule 506 of Regulation D continues to be abused by criminals. Although properly used by many legitimate issuers, unscrupulous promoters use Rule 506 to cloak an otherwise fraudulent offering in legitimacy.[47]

Further, despite the restrictions imposed on Regulation D offerings, they constitute a significant and growing portion of the market. "In 2009, 26,485 Regulation D, Rule 506 offerings were filed with the SEC with an estimated offering total of $609 billion. That compares to 11,000 such offerings in 1996."[48] However, states are preempted from reviewing such offerings before they are marketed to investors

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[45] NASAA is a voluntary association whose membership consists of 67 state, provincial, and territorial securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Canada, and Mexico.

[46] *See* 2011 NASAA's Top Investor Traps, available at <http://www.nasaa.org/3752/top-investor-traps/>.

[47] *See* 2011 NASAA's Top Investor Traps, available at <http://www.nasaa.org/3752/top-investor-traps/>.

[48] *See* NASAA's Legislative Agenda Item No. 3 – Strengthen State/Federal Collaboration, available at <http://www.nasaa.org/issues-and-advocacy/legislative-agenda-3/>.

and the SEC generally does not review them either.[49] Rule 506 offerings are also exempt from registration under federal securities laws.[50] As a result of this minimal regulatory scrutiny "Rule 506 offerings have become the favorite vehicle under Regulation D and many of them are fraudulent."[51]

Non-covered securities take many forms, and the impact of fraudulent scams associate with them is similarly diverse. By way of one example, public investors increasingly have suffered losses from an unlawful practice known by securities industry participants as "selling away." The practice occurs when registered representatives of brokerage firms, who are the brokers or financial advisors of those firms and are referred to in securities statutes and regulations as the firm's "associated persons," sell investments without the knowledge or approval of the firm. Such sales frequently are unlawful for many reasons, including the fact that the brokers' licenses to sell securities are subject to their "association" with the firm, and representatives are not, therefore, licensed to make sales "away from the firm." Moreover, such sales circumvent required supervisory and compliance oversight by the firms, which are designed to protect investors from abuse. Such

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[49] *See* NASAA's Legislative Agenda Item No. 3 – Strengthen State/Federal Collaboration, available at <http://www.nasaa.org/issues-and-advocacy/legislative-agenda-3/>.

[50] *Topalian v. Ehrman*, 954 F.2d 1125, 1129 (5th Cir. 1992)

[51] *See* NASAA's Legislative Agenda Item No. 3 – Strengthen State/Federal Collaboration, available at <http://www.nasaa.org/issues-and-advocacy/legislative-agenda-3/>.

sales usually take the form of securities offerings that purport to be exempted from registration requirements, based on being limited, local, private placements. "Broker-dealers are virtually always considered control persons, even in selling away cases because of the respondeat superior or inherent agency power relationship."[52]

PIABA members frequently pursue claims both in litigation and in arbitration on behalf of public investors against the securities firms involving private placements and issues such as "selling away." While the standards imposed by operation of SLUSA have no applicability in private arbitrations, SLUSA can greatly increase the burdens associated with contemporaneous, parallel proceedings in court and arbitration, and can thereby significantly impair the ability of investors to obtain a recovery in individual proceedings.

Congress intentionally declined to include litigation related to non-publicly traded securities in the scope of SLUSA preemption because of the often localized nature of such offerings and heightened risks of fraud. The District Court's erroneous standard seriously impairs the abilities of public investors to recover on meritorious claims related to these non-publically traded securities, while doing nothing to protect the issuers of nationally traded securities. Congress only

[52] Seth E. Lipner, Joseph C. Long and William A. Jacobsen, *Securities Arbitration Desk Reference*, 2011-2012 Edition, West Publishing at p. 592 (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990)(en banc)).

intended for SLUSA preemption to apply to situations where the focus of the misrepresentations or omissions complained of is on the characteristics or qualities of a "covered security."

V. Conclusion

The impact of the District Court's decision will extend much further than the resolution of the instant dispute. The District Court's decision virtually eliminates the limitation of SLUSA to misconduct that occurs "in connection with the sale or purchase of a covered security." The District Court's standard, if accepted as precedent, could deprive victims of fraud and other financial wrongdoings with the benefit of important state law remedies and would abrogate century-old legal standards. As a consequence, state securities enforcement schemes that rely heavily upon private attorney generals would be seriously compromised. States would thereby be forced to either unnecessarily expend resources on additional public regulators or to expose their investors to greater risks of fraud. Despite these great costs, the District Court's decision does nothing to advance the goals of SLUSA.

Congress intended to preserve state the applicability of state law in certain areas while providing a uniform standard applicable to nationally traded securities. The appropriate standard to achieve this goal would be to limit SLUSA preemption to situations where the focus of the misrepresentations or omissions complained of

is on the characteristics or qualities of a "covered security" or the misconduct involves manipulation of a "covered security." This would appropriately preserve the authority of individual states to regulate intrastate business transactions, while maintaining a uniform standard applicable to disputes related to publically traded securities.

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I hereby certify that a true and correct copy of the foregoing amicus curiae brief has been served upon all counsel of record who are CM/ECF participants electronically by filing in the Court's CM/ECF system on this 21st day of November, 2011 and by providing them copy via electronic mail. I hereby further certify that on this 21st day of November, 2011, I have emailed to foregoing amicus curiae brief, and notice of electronic filing to any non-CM/ECF participants.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4708 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

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NO. 11-10932

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES ROLAND; MICHAEL J. GIAMBRONE, THOMAS BOWDEN, Individually and On Behalf of Thomas E. Bowden S.E.P.I.R.A.; T.E. BOWDEN, Sr., Ret. Trust; G. KENDALL FORBES, Individually and On Behalf of G. Kendall Forbes I.R.A.; *ET AL.*, Plaintiffs-Appellants,

v.

JASON GREEN, GRADY LAYFIELD; HANK MILLS; CHARLES JANTZI; TIFFANY ANGELLE; ET AL.,
Defendants-Appellees

consolidated with

LEAH FARR; *ET AL.,*
Plaintiffs-Appellants,

v.

JASON GREEN; GRADY LAYFIELD; HANK MILLS; DIRK HARRIS; TIMOTHY E. PARSONS; *ET AL.*,
Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division, Civil Action No. 3:10-CV-224 c/w 3:10-CV-225

MOTION OF PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF SUPPORTING APPELLANTS

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS

The Public Investors Arbitration Bar Association, Inc. ("PIABA") respectfully moves for leave to file the Brief as Amicus Curiae submitted with this Motion.

I. IDENTITY AND INTERERST OF PIABA

PIABA is a national, not-for-profit, voluntary, public bar association established in 1990, with a membership of approximately 450 attorneys located in 44 states and Puerto Rico. In order to qualify for membership, attorneys must devote a significant portion of their practice to representing public investors in securities arbitrations. Collectively, PIABA members have represented tens of thousands of investors in securities arbitrations around the country.

PIABA's mission is

> to promote the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process, such as those associated with document production and discovery; making securities and commodities arbitration as just and fair as systematically possible; and creating a level playing field for the public investor in securities and commodities arbitration.

PIABA publishes books and reports on securities arbitrations, conducts regular CLE programs for its members, and communicates directly with governmental and quasi-governmental agencies, such as the Securities

and Exchange Commission, the North American Securities Administrators' Association, and the Financial Industry Regulatory Authority (FINRA)[1] on issues of interest to PIABA members and public investors. The United States Supreme Court, federal Circuit Courts of Appeal, and state supreme courts have permitted PIABA to appear as amicus curiae in cases involving issues of importance to public investors' claims against their stockbrokers and financial advisors.

II. PIABA'S FAMILIARITY WITH ISSUES AND SCOPE OF PARTIES' ARGUMENTS

PIABA and its counsel are familiar with the opinion of the District Court and the arguments of the parties.

III. ISSUES TO WHICH *AMICUS* BRIEF WILL BE DIRECTED

PIABA's *amicus* brief will demonstrate the importance of state law in protecting investors, and will show that applying SLUSA preemption to claims based on sales of non-covered securities would not advance the purposes of SLUSA or the PSLRA. The Brief also will demonstrate that private offerings, which should not be subject to SLUSA preemption, are

[1] FINRA was created in July 2007 through the consolidation of the National Association of Securities Dealers and the member regulation, enforcement and arbitration functions of the New York Stock Exchange to establish a single self-regulatory authority for the securirties industry.

major sources of securities fraud. The Brief also proposes a standard for deciding when SLUSA preemption would apply.

IV. ALL PARTIES DID NOT CONSENT

Under Federal Rule of Appellate Procedure 29(a), an amicus curiae other than the government may file a brief only with leave of court or when all parties consent. PIABA requests leave of court because all parties have not consented to PIABA filing an amicus brief. Appellants consented. Counsel for PIABA contacted all parties to obtain consent." Those that did respond, withheld consent pending review of the Brief, and upon receiving the brief, failed to respond.

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I hereby certify that a true and correct copy of the foregoing amicus curiae brief has been served upon all counsel of record who are CM/ECF participants electronically by filing in the Court's CM/ECF system on this 21st day of November, 2011 and by providing them copy via electronic mail. I hereby further certify that on this 21st day of November, 2011, I have emailed to foregoing amicus curiae brief, and notice of electronic filing to any non-CM/ECF participants.

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