No. 16-1541

IN THE

Supreme Court of the United States

MARGARET RICHEK GOLDBERG, AS TRUSTEE UNDER THE RESIDUARY TRUST, UNDER THE SEYMOUR RICHEK REVOCABLE TRUST, ON BEHALF OF THE TRUST AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

BANK OF AMERICA, N.A. AND LASALLE BANK N.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY TO THE BRIEF IN OPPOSITION

The petition for certiorari explains why the Court of Appeals' decision is an improper intrusion on areas that have been traditionally left to state common law, is inconsistent with Congress' purpose in adopting SLUSA, and strays far from the result that would obtain in other Circuits. Pet. at 11-12, 13-14. If the decision below stands, banks would be free to impose charges on their customers in breach of their contracts and their fiduciary duties, with impunity, as long as those charges were small enough that individual customers could not practically maintain an individual action against such breaches. Pet. at 10. SLUSA cannot reasonably be read so broadly as to eliminate state law protections against such abuses. Pet. at 10-11; *see also Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1068-69 (2014).

The Brief in Opposition does not directly engage any of this, but instead, seeks to avoid the issue by recasting the facts and the pleadings, to make it seem like this case arises from a misrepresentation or omission. All of this attempted evasion is flatly inconsistent with the facts of this case as set forth in the complaint. This case cries out for review by this Court, because it involves both an important question of federal law that has not yet been resolved by this Court and a conflict among the circuit courts of appeal. A brief return to the underlying facts helps to explain why SLUSA should not apply to class-wide claims that are not predicated on misrepresentations or omissions.

In the account agreement, the bank agreed to sweep balances from petitioner's bank account into an investment vehicle in her name, in exchange for quarterly management fees. Despite this agreement, the bank charged petitioner an additional sweep fee for making those transfers, and the bank collected that sweep fee from petitioner's funds, not from any investment companies with which the bank had side agreements. In 2009, the bank announced that it would stop charging petitioner for that fee. Pet. at 4-5. The bank sent a letter about its sweep fee to its account holders, informing them (Complaint, ¶ 16) :

> "The daily cash re-investment (sweep) fees ***that you currently pay*** will be eliminated beginning August 1, 2009, ***resulting in a decrease in fees charged against your account***." (Emphasis added.)

Petitioner further alleges that the fees were paid out of petitioner's property (Complaint, ¶¶ 29, 41), and the bank admitted that it "automatically deducted" the sweep fee (Complaint, ¶ 18). Petitioner alleges that, by charging the sweep fees, the bank breached its account contract and its duty of loyalty, among other state law claims. (Petitioner never alleged a fraud claim.) Based on her state law claims, petitioner asked the district court to order the bank to make "a full refund" of the sweep fees back to petitioner and the class (Complaint, pp. 10, 12, 13 and 15).

All of this matters, because petitioner and the class were injured, not by any fraudulent misrepresentation or omission, but by the bank's actions in collecting the unauthorized fees from their accounts. That injury did not depend on anything that the bank did or did not say. As explained in the petition, state law has traditionally protected consumers from banks unlawfully taking some of their funds under the guise of improper account fees.

Pet. at 10-11. Nothing in the plain language of SLUSA suggests that Congress intended to eliminate state law class action claims involving such improper banking fees. Pet. App. 30a-31a.

Ignoring the nature of the breach involved in this case, respondent attempts to recast the underlying facts into an entirely different set of transactions. In its characterization of the complaint, respondent says that "mutual funds allegedly paid [the bank] fees based on the transferred balances, which [the bank] kept without disclosing to account holders that it was doing so". Brief in Opp. at 2. *See also id.* at 11. Thus, respondent hints that this case turns on a secret side-payment that a third party sent to the bank. This is a significant reworking of the facts, designed to make this case seem like it turns on a deceptive "hidden commission" scheme. It is not a fair reading of the petitioner's complaint, and it cannot be reconciled with the language of the bank's letters. With this recasting, respondent unfairly tries to shoe-horn these facts into SLUSA's scope.

The *per curiam* opinion made the same error, describing the sweep fee as happening when "some mutual funds paid the bank a fee" that "the bank did not deposit" in custodial accounts. Pet. App. 5a. The concurring judge described the problem as happening when the bank "accepted reinvestment ('sweep') fees from mutual funds". Pet. App. 9a. Neither of these was an accurate description of the facts that petitioner pled.

Respondent also argues that two cases -- *Holtz v. JPMorgan Chase Bank, N.A.*, 846 F.3d 928 (7th Cir. 2017) and *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294 (3d Cir. 2005) -- stand for the proposition that SLUSA governs breach of contract class actions when a bank fails to disclose bias in its financial recommendations to customers. *See* Brief in Opp. at 15-16. But in both of those cases the plaintiff alleged that the defendant committed its breach by misrepresenting facts and engaging in deceptive securities transactions. *See Holtz*, 846 F.3d at 929; *Rowinski*, 398 F.3d at 299-300. That is nothing like the breach alleged here, where the bank charged an improper fee.

Once the facts are framed correctly, this case presents a compelling opportunity for the Court to review the scope of SLUSA under a writ of certiorari. To allege and prove her legal claim of breach of contract, petitioner would only need to show that the bank took funds from her account in excess of those which the bank was entitled to take under the account agreement. A breach of contract claim accrued -– for petitioner and for the class -– every time the bank charged the sweep fee against the custody accounts. *See, e.g., Grove Isle Ass'n. v. Grove Isle Assocs. LLLP*, 137 So.3d 1081, 1094-95 (Ct. App. Fla. 2014) (a breach of contract cause of action accrues with each improper monthly charge under a contract). *Cf. Peterson v. Highland Music,* 140 F.3d 1313, 1320-21 (9th Cir. 1998) (each violation of a monthly payment contract is a separate breach); *Beram v. Ceaco, Inc.,* 219 F. Supp. 3d 274, 280 (D. Mass. 2016) (same).

Respondent never comes to terms with the legal theory of petitioner's breach of contract claim. Instead, respondent argues that this case is a "secret intent" case, which would turn on whether the bank deceived its accountholders by intending all along that it would breach its account agreement. Brief in Opp. at 18-19. Thus, respondent seeks to transform this case into a "promissory fraud" cause of action, which arises when a defendant induces a plaintiff to sign a contract even though the defendant already knows that it will breach the contract. *See Bower v. Jones*, 978 F.2d 1004, 1011 (7th Cir. 1992). Promissory fraud is a type of "scheme to defraud" claim -- entirely different from a breach of contract claim -- and courts cannot properly transform every breach of contract into such a scheme to defraud. 978 F.2d at 1012. In this case, petitioner never pled a promissory fraud claim in her complaint, and she never alleged that the bank signed the contract under a "secret intent" to breach it. Nor can this be dismissed as artful pleading, because petitioner has no way of knowing what the bank had in mind.

Again, respondent's alchemy is significant, because SLUSA should not be broadened to preclude any class action where a defendant might argue that the plaintiff's claim is that defendant breached a contract and then hid its own breach. *Freeman Investments, L.P. v. Pacific Life Ins. Co.*, 704 F.3d 1110, 1116 (9th Cir. 2013). As Judge Hamilton noted in his dissent, such an approach would convert nearly every contract case into a fraud case, because the breaching party often does not disclose its own breach or that it has a different interpretation of the contract than the other contracting party. Pet. App. 21a-22a.

This case is not governed by *Wharf (Holdings) Ltd. v. United Int'l. Holdings, Inc.*, 532 U.S. 588 (2001), cited in respondent's brief. Brief in Opp. at 8, 18. Indeed, that case is the opposite of this one. In *Wharf Holdings*, the plaintiff sued under the federal securities laws, alleging that a defendant made an oral contract to sell a security while never intending to perform that contract. 532 U.S. at 589. This Court held that such a promissory fraud scheme, when used in connection with a security, can be actionable as a federal securities fraud. 532 U.S. at 596-97. By contrast, petitioner here is not alleging a promissory fraud scheme. For the same reason, petitioner's claim is not analogous to *SEC v. Zandford*, 535 U.S. 813 (2002), because the petitioner does not allege that the bank was "secretly intending from the very beginning to keep the proceeds", as respondent argues. Brief in Opp. at 19.

As explained in the petition, the plain language of SLUSA does not preclude state law breach of contract claims like this one, where the breach essentially amounts to a theft of money, not a deception. *See* Pet. at 10-11. SLUSA should not preclude all state law class actions where a security is somewhere in the picture. *Taksir v Vanguard Group Inc.*, No. 16-cv-5713, 2017 U.S. Dist. LEXIS 125574, at *19-*20 (E.D. Pa. Aug. 8, 2017).

As set forth in the petition, the approach in the Seventh Circuit -- where SLUSA precludes any state law class action claim that "could be" pled as a federal securities fraud claim (*see* Pet. 7a-8a; *see also Holtz*, 846 F.3d at 931-32) -- stands alone among the Courts of Appeals. No other Circuit goes that far *(see* Pet. 13-14). Although respondent argues at length that every other Circuit would have reached the same result, Brief in Opp. at 12-18, contending that there is no "meaningful conflict" among the Circuits, that argument is unsound. Petitioner's breach of contract claim here arises from a bank charge that was not authorized by the bank's account agreement with petitioner, and not from facts involving a misrepresentation or omission. This type of claim would not be barred under SLUSA if a court applied the "factual predicate" approach used in the Second, Third, or Ninth Circuits.

The Third Circuit's decision in *LaSala v. Bordier et Cie,* 519 F.3d 121 (3[d] Cir. 2008), underscores this conflict. In that case, the Third Circuit was faced with the issue of whether SLUSA barred a class-wide claim that a bank injured plaintiffs by failing to conduct due diligence investigations required by money-laundering rules, because a securities fraud scheme had preceded the money-laundering. The court held that the bank's failure to investigate and freeze assets in its customers' accounts did not rest upon a misrepresentation or omission, and SLUSA will bar a class claim "when an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim". 519 F.3d at 141. "To be a factual predicate, 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 filed with more information than is necessary." *Id.* Allegations of misrepresentations that "have no bearing" on whether conduct is actionable, but are "merely background details", do not require dismissal under SLUSA. *Id.*

The Third Circuit's *LaSala* holding is far different than the approach that the *per curiam* opinion used here. Pet. App. 3a-8a. Not surprisingly then, a district court in the Third Circuit has already declined to follow the Seventh Circuit's decision from this case. *See Taksir v. Vanguard Group, Inc.*, No. 16-cv-5713, 2017 U.S. Dist. LEXIS 80969, at *11, n.36 (E.D. Pa. May 26, 2017), and *Taksir,* 2017 U.S. Dist. LEXIS 125574, at * *9-*10.

The split in the circuit courts on this issue is significant, especially for petitioner. The Seventh Circuit's decision upholding the dismissal of the complaint is based upon an overly-broad reading of the SLUSA preclusion. At least three other courts of appeals would have reversed the dismissal of the complaint. Because the split is outcome-determinative for petitioner, this case is an excellent vehicle to resolve this important issue.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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