

No. _____

IN THE
Supreme Court of the United States

AXA EQUITABLE LIFE INSURANCE COMPANY,

Applicant,

v.

RICHARD T. O'DONNELL,

Respondent.

**APPLICATION TO THE HONORABLE RUTH BADER GINSBURG
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant AXA Equitable Life Insurance Company ("AXA Equitable") respectfully requests an extension of time of 30 days, up to and including Wednesday, September 19, 2018, for the filing of a petition for a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit dated April 10, 2018, reported at 887 F.3d 124 (2d Cir. 2018) (attached as Appendix A). The Second Circuit denied a petition for rehearing and rehearing *en banc* on May 21, 2018 (attached as Appendix B). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1). Respondent has consented to the extension of time requested by this Application.

1. The date within which a petition for a writ of certiorari would be due, if not extended, is August 20, 2018 (the 90th day following the denial of the rehearing, August 19, 2018, is a Sunday). This application is being filed more than 10 days before that date.

2. This case presents an important and recurring question regarding the scope of the "in connection with" requirement under the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 78bb(f). In the decision below, the Second Circuit determined that SLUSA did not preclude a putative nationwide class action complaint alleging that AXA Equitable made misrepresentations or omissions to its state regulator, the New York State Department of Financial Services, concerning a new investment strategy that had been introduced into certain AXA Equitable variable annuity insurance contracts. The Second Circuit held that SLUSA's "in connection with" requirement was not met where AXA Equitable's alleged misrepresentation or omission was made to the state regulator and not to Respondent, because there could be "no link between the misrepresentation (to a regulator) and the inaction of a securities holder following misrepresentations of which the holder was unaware." O'Donnell v. AXA Equitable Life Ins. Co., 887 F.3d 124, 130 (2d Cir. 2018).

3. AXA Equitable's petition for writ of certiorari will submit that the Second Circuit's decision conflicts with the Court's holdings in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) and Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058 (2014), and with the objectives underlying federal

securities disclosure standards as explicated in those decisions. In particular, the Second Circuit's construction of the "in connection with" requirement conflicts with Dabit, in which this Court held that the party deceived by an alleged misrepresentation or omission need not be the party who bought, sold, or held the security: "it is enough that the fraud alleged 'coincide' with a securities transaction — whether by the plaintiff or by someone else." Dabit, 547 U.S. at 85 (citations omitted); see also Troice, 134 S. Ct. at 1077.

4. The Second Circuit's decision is also in direct conflict with a recent decision by a New Jersey appellate court in an action alleging the same purported misrepresentation or omission by AXA Equitable to that state regulator, in which that court reached the opposite conclusion regarding the application of SLUSA. Shuster v. AXA Equitable Life Ins. Co., No. A-3160-15T1, 2018 WL 1801249 (N.J. Super. Ct. App. Div. Apr. 17, 2018). Shuster correctly applied the Court's precedent in Dabit and Troice to find that SLUSA's "in connection with" had been met, reasoning that the plaintiff was alleged to have voluntarily held her investments in which the new strategy had been implemented as a consequence of AXA's Equitable's alleged omissions to its regulator.

5. The questions raised by the Second Circuit's decision are especially important because they directly affect the national securities markets. The Second Circuit's decision will have wide-ranging policy and practical consequences. SLUSA was designed to prevent investors harmed by allegedly fraudulent securities transactions from engaging in forum shopping and evading limits on abusive

securities suits. Dabit, 547 U.S. at 81-84. AXA Equitable will argue that the Second Circuit's decision conflicts with SLUSA's statutory text and undermines SLUSA's central purpose: it encourages investors to artfully plead around SLUSA and characterize securities fraud claims (which have a high pleading burden) as state law violations despite seeking damages for alleged investment losses involving nationally-traded securities. That outcome "squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" Dabit, 547 U.S. at 86-87; 15 U.S.C. § 78bb(f).

6. By way of further explanation: on March 17, 2014, AXA Equitable entered into a "consent order" regulatory settlement with the New York Department of Financial Services ("DFS"). In that Consent Order, DFS stated its findings that AXA Equitable had made misrepresentations or omissions in certain filings concerning the implementation of a new "volatility management" investment strategy in variable annuity accounts. DFS explained that, had it been aware of the impact of the strategy on certain variable annuity contracts, it "may have required that the existing policyholders affirmatively opt in" to the new strategy. O'Donnell v. AXA Equitable Life Ins. Co., No. 15-CV-9488 (VSB), 2017 WL 1194479, at *3 (S.D.N.Y. Mar. 30, 2017), rev'd, 887 F.3d 124 (2d Cir. 2018) (citation omitted; alterations in the original). AXA Equitable did not agree to those findings and the DFS did not revoke its prior grant of permission to AXA Equitable to offer investments using that strategy.

7. Following the issuance of that Consent Order, a series of putative nationwide class actions were filed against AXA Equitable by holders of AXA Equitable variable annuities and variable life insurance products whose accounts had been invested using the new strategy. On June 19, 2014, a putative nationwide class action was filed against AXA Equitable in New York state court. Zweiman v. AXA Equitable Life Ins. Co. (N.Y. Sup. Ct. Westchester Cty. Index No. 59638/2014). There, the named plaintiff, the holder of an AXA Equitable variable annuity, was represented by the same counsel who represent Respondent here. AXA Equitable removed Zweiman to the Southern District of New York under the removal provision of SLUSA, 15 U.S.C. § 78bb(f)(2), and moved to dismiss that action as precluded by SLUSA. On September 30, 2015, the District Court dismissed the Zweiman action as precluded by SLUSA. Zweiman v. AXA Equitable Life Ins. Co., 146 F. Supp. 3d 536 (S.D.N.Y. 2015). Zweiman and her counsel appealed that dismissal to the Second Circuit but subsequently abandoned that appeal and withdrew it with prejudice. (No. 15-3466-cv, ECF No. 26 (2d Cir.).)

8. In August 2015, while Zweiman was still pending in the Southern District of New York, Respondent filed this action against AXA Equitable in Connecticut state court making allegations nearly identical to those in Zweiman. See Complaint in O'Donnell v. AXA Equitable Life Ins. Co., No. NNH-CV15-6056844-S (Conn. Super. Ct., Judicial District of New Haven, Aug. 28, 2015). AXA Equitable removed the new action to the District of Connecticut under SLUSA.

That court transferred Respondent's action to the Southern District of New York where the Zweiman action was pending.

9. On March 30, 2017, the Southern District of New York ruled that Respondent's putative class action claim, like Zweiman's putative class action claim, was precluded by SLUSA because the success of Respondent's claim depended entirely on an allegation that AXA Equitable had made omissions to him and to DFS about the new investment strategy. The District Court also reasoned that the damages claimed by Respondent — *i.e.*, the difference between the gains that he might have received with and without the volatility management strategy — undermined any contention that his claim was not directly tied to those alleged omissions. O'Donnell, 2017 WL 1194479, at *3. The District Court therefore held that Respondent's decision to hold his investment after the new strategy was introduced was made "in connection with" AXA Equitable's alleged omissions to him and to DFS and that Respondent's claim was therefore precluded by SLUSA. Id.

10. The Second Circuit reversed. The Second Circuit acknowledged the Court's decisions in Dabit and Troice but nevertheless held that, because AXA Equitable's alleged misrepresentation or omission was made to DFS and not to Respondent, there could be "no link between the misrepresentation (to a regulator) and the inaction of a securities holder following misrepresentations of which the holder was unaware." O'Donnell, 887 F.3d at 130. The Court directed that the case be remanded and ordered the District Court to further remand the action to Connecticut state court.

11. One week after the Second Circuit rendered its decision in this action, a New Jersey appellate court reached precisely the opposite conclusion in a nearly-identical case filed in that state's courts in 2015. Shuster, 2018 WL 1801249, at *4. AXA Equitable had removed Shuster to the District of New Jersey pursuant to SLUSA in December 2015. The District of New Jersey remanded the action to New Jersey state court, holding that SLUSA did not preclude the action. Shuster, 2018 WL 1801249, at *2 n.1.

12. On remand, the Superior Court of New Jersey exercised its discretion under Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006), to perform its own analysis of the application of SLUSA and determined that SLUSA precluded Shuster's claim. Shuster appealed that dismissal to the Appellate Division of the Superior Court of New Jersey. The Appellate Division applied Dabit and Troice to hold that SLUSA precluded that plaintiff's putative class action claim. Shuster, 2018 WL 1801249, at *4.

13. On April 24, 2018, AXA Equitable timely sought rehearing of the Second Circuit's decision. The rehearing petition argued that the Court's decision was in conflict with Dabit and Troice and explained how the New Jersey appellate court's decision in Shuster supported that conclusion. The court denied the rehearing petition on May 21, 2018 (see Appendix B).

14. On April 27, 2018, the plaintiff-appellant in Shuster moved the New Jersey Appellate Division for reconsideration of its opinion, urging that court to adopt the rationale of the Second Circuit's decision in this action. On June 8, 2018,

the New Jersey Appellate Division court denied that motion, explaining that it had considered the Second Circuit's decision in this action and did not find its reasoning to be persuasive. See Order, No. A-003160-15T1, M-006176-17 (N.J. App. Div.).

15. On May 25, 2018, AXA Equitable moved in the Second Circuit to stay the issuance of that court's mandate pending the filing and disposition of AXA Equitable's forthcoming petition for writ of certiorari. The motion explained that the Second Circuit's decision was in conflict with this Court's SLUSA precedent and the New Jersey appellate court's holding in Shuster, thus raising a substantial question warranting the Court's review. On June 7, 2018, the Second Circuit granted that motion.

16. This case presents legal questions of substantial importance regarding the scope of SLUSA's "in connection with" requirement. Those questions implicate conflicts of authority among state and federal appellate courts and with this Court's precedents. Indeed, the Second Circuit's holding that SLUSA does not preclude a claim involving an alleged "misrepresentation to a regulator and the inaction of a securities holder following a misrepresentation of which the holder is unaware" squarely conflicts with Dabit's holding that the "in connection with" requirement does not require that the securities holder be the recipient of the alleged misrepresentation or omission. O'Donnell, 887 F.3d at 130. Under Dabit, "it is enough that the fraud alleged 'coincide' with a securities transaction — whether by the plaintiff or by someone else." Dabit, 547 U.S. at 85 (citations omitted). The Second Circuit's decision also directly contravenes Dabit's mandate that the "in

connection with" requirement be given a "broad interpretation" 547 U.S. at 85, and "construed not technically and restrictively, but flexibly." S.E.C. v. Zandford, 535 U.S. 813, 819 (2002) (internal quotation marks and citations omitted).

17. The New Jersey appellate court's decision in Shuster further demonstrates that the Second Circuit's decision conflicts with this Court's precedent. In Shuster, the plaintiff, like Respondent here, contended that her claim did not satisfy SLUSA's "in connection with" requirement on the theory that "AXA's non-public [DFS] filings did not induce her to make any investment decision." 2018 WL 1801249, at *4. The court disagreed, relying on Dabit to hold that "the Supreme Court has rejected such a cramped construction." Id. (citing Dabit, 547 U.S. at 85).

18. The Second Circuit's decision also runs afoul of this Court's SLUSA precedent in Troice. The Second Circuit sought to rely on Troice to support its holding, reasoning that SLUSA's "in connection with" requirement was not met because AXA Equitable's alleged misrepresentation could not have been "material to a decision by one or more individuals ... to buy or sell a covered security,' for the simple reason that it was unknown to [] them." O'Donnell, 887 F.3d at 130 (citing Troice). But Troice did not modify Dabit's broad "coincide" standard. Troice, 134 S. Ct. at 1066.

19. The Second Circuit's reliance on Troice to hold that the "in connection with" requirement is not met where an alleged misrepresentation is unknown to an investor also creates a conflict with the United States Court of Appeals for the

Seventh Circuit's recent holding in Holtz v. JPMorgan Chase Bank, N.A., 846 F.3d 928 (7th Cir. 2017). Holtz correctly applied Dabit to hold that the "in connection with" requirement of SLUSA was met where the alleged omission was made to someone other than the person who made an investment decision. Id. at 933.

20. In summary, then, this case presents complex and important issues concerning the scope of SLUSA's "in connection with" requirement. The 30-day extension sought by this Application is requested to enable undersigned counsel to adequately prepare a petition for writ of certiorari in this case.

21. In particular, counsel seeks 30 additional days in order to evaluate the issues that warrant this Court's consideration and prepare a petition for certiorari that fully addresses the important questions raised by the decision below and that will best assist the Court's review.

22. In addition, Applicant's counsel have substantial existing obligations near the current due date of the petition. Among other things, Mr. Kasner is preparing for three confidential mediations of significant matters, two of which have been scheduled for mid-August 2018, and the third of which will be scheduled for August 2018 or early September 2018: both matters will require significant advance preparation and client consultation in advance of the respective mediation dates. Mr. Kasner is also counsel of record for the respondent in Securitized Asset Funding 2011-2, Ltd. v. Canadian Imperial Bank Of Commerce, No. 2018-1582 in the New York Appellate Division, in which respondent's appellate brief is due September 5, 2018. Mr. Hemr is counsel of record for the appellant in Cognition

Financial Corporation v. Commissioner of Revenue, an action on appeal to the Massachusetts Appeals Court in which expedited briefing in August 2018 is anticipated. Mr. Hemr is also counsel of record in Carmack v. ZeniMax Media Inc., No. 17-cv-661 (N.D. Tex.), in which that court has very recently ordered significant discovery proceedings regarding a forensic expert which will require Mr. Hemr's direct involvement in August 2018.

23. An extension of time will not prejudice Respondent, who has consented to the relief sought by this application. There has been no previous application for an extension.

For the foregoing reasons, AXA Equitable hereby respectfully requests that an extension of time of thirty (30) days, up to and including September 19, 2018, be granted within which AXA Equitable may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Jay B. Kasner
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant AXA Equitable Life Insurance Company ("AXA Equitable") states as follows:

AXA Equitable is a wholly-owned indirect subsidiary of AXA Equitable Holdings, Inc. ("AEH"). The common stock of AEH is publicly traded on the New York Stock Exchange under the symbol "EQH."

A majority of the common stock of AEH is held by AXA S.A., a French corporation. To the best of AXA Equitable's knowledge, no publicly-traded corporation holds 10% or more of the stock of AXA S.A.

To the best of AXA Equitable's knowledge, no other publicly-traded corporation holds 10% or more of the common stock of AEH.