No. 22-

IN THE

Supreme Court of the United States

JEFFREY A. COCHRAN,

Petitioner,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY AND HORNOR, TOWNSEND & KENT, LLC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Securities Litigation Uniform Standards Act ("SLUSA") precludes most state-law class actions "alleging a misrepresentation or omission of a material fact." 15 U.S.C. § 78bb(f)(1)(A). The circuits, however, are split over how to determine whether a complaint is "alleging a misrepresentation or omission of a material fact." The Eleventh Circuit's opinion has deepened that rift by entering new territory, holding that SLUSA bars this state law class action as one "alleging a misrepresentation or omission of a material fact" even though all parties have agreed that all material facts were disclosed.

The questions presented are:

1. Whether SLUSA bars a state-law class action "alleging a misrepresentation or omission of a material fact" when the complaint contains no such allegations.

2. Whether SLUSA bars a state-law class action "alleging a misrepresentation or omission of a material fact" when it is unlikely that an issue of fraud will arise in the course of the litigation.

3. Whether SLUSA bars a state-law class action "alleging a misrepresentation or omission of a material fact" when the claim requires no such proof.

4. Whether SLUSA bars a state-law class action "alleging a misrepresentation or omission of a material fact" when all parties have agreed that all material facts were disclosed.

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff below, is Jeffrey A. Cochran, individually and on behalf of all others similarly situated.

Respondents, defendants below, are The Penn Mutual Life Insurance Company and Hornor, Townsend & Kent, LLC.

RULE 29.6 DISCLOSURE

Respondent The Penn Mutual Life Insurance Company has stated in earlier filings that it has no parent company and that no publicly held corporation owns 10% or more of its stock. Respondent Hornor, Townsend & Kent, LLC has stated in earlier filings that it is a wholly owned subsidiary of The Penn Mutual Life Insurance Company.

RELATED PROCEEDINGS

- *Jeffrey A. Cochran, Individually and on Behalf of All Others Similarly Situated v. The Penn Mutual Life Insurance Company and Horner, Townsend & Kent, LLC,* No.: 1:19-CV-00564-JPB, U.S. District Court for the Northern District of Georgia. Order entered Aug.12, 2020. App. 15a.

- *Jeffrey A. Cochran v. The Penn Mutual Life Insurance Company, and Hornor, Townsend & Kent, LLC,* No.: 20-13477-JJ, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Sept 26, 2022. App. 1a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 35 F.4th 1310 (11th Cir. 2022) and is reprinted in the Appendix to the Petition ("App.") at 1a-14a. The opinion of the district court is unreported and is reprinted at App. 15a-31a.

JURISDICTION

The court of appeals issued its decision on May 31, 2022 (revised on June 13), App. 1a, and denied a petition for rehearing on September 16, 2022, App. 32a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The Securities Litigation Uniform Standards Act ("SLUSA") contains two slightly different formulations of the relevant statutory language, the first found in the Securities Act of 1933 and the second in the Securities Exchange Act of 1934:

> 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 misrepresentation or omission of a material fact* in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1)(A) (emphasis added).

> 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 an untrue statement or omission of a material fact* in connection with the purchase or sale of a covered security.

15 U.S.C. § 77(p)(b)(1) (emphasis added).

Petitioner uses the language from the Securities Act of 1933 for simplicity's sake.

STATEMENT OF THE CASE

A. Nature of the Case and Statement of Facts

This is a case about a self-dealing fiduciary. Respondent Hornor, Townsend & Kent, LLC ("HTK") is a "captive" brokerage firm, wholly owned and controlled by Respondent The Penn Mutual Life Insurance Company ("Penn Mutual"). Doc. 27 at 10-11, ¶¶ 17, 22. In November 2012, Penn Mutual made the strategic decision to focus on the captive broker-dealer model for its variable annuity business (Doc. 27 at 11, ¶ 22), reducing the number of selling agreements with independent broker-dealers from 80 to 30. *Id.* Penn Mutual's new plan was to distribute Penn Mutual's proprietary variable annuity products through HTK, its wholly-owned broker-dealer. *Id.* This captive structure creates many opportunities for self-dealing and other conflicts of interest, *id.*, and it has resulted in HTK

selling expensive Penn Mutual annuities in lieu of more appropriate investments. Doc. 27 at 9, ¶ 16.[1]

Petitioner Jeffrey Cochran was a customer of HTK; his account was a rollover IRA, which consisted entirely of tax-qualified funds. Doc. 27 at 2, 4-6, ¶¶ 2, 6-8. Unlike most SLUSA cases (which tend to be filed in state court), Mr. Cochran initiated this case by suing HTK and Penn Mutual in the Northern District of Georgia, asserting breach of fiduciary duty and other state law claims and diversity jurisdiction under 28 U.S.C. § 1332(a) and (d)(2). Doc. 27 at 8, ¶ 12. His complaint alleges that HTK breached its fiduciary duties by selling him a Penn Mutual variable annuity that pays extraordinarily high fees to both HTK and Penn Mutual in exchange for tax treatment that cannot benefit Mr. Cochran, depriving him of significant investment returns. Doc. 27 at 5-7, 29, ¶¶ 8, 10, 62.[2]

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1. Variable annuities are complex investment products; their defining features are tax advantages and high fees. Doc. 27 at 2, 4, ¶¶ 2, 6. The tax advantages are useless for persons funding retirement plans (rollover IRAs, for example). Doc. 27 at 2, ¶ 2. Under the Internal Revenue Code, such retirement plans are already automatically tax deferred (also referred to as "tax-qualified") regardless of the investments placed in the plan. *Id.* Thus, Mr. Cochran and all other Class Members get no tax advantage and are left with unnecessarily high fees.

2. For example, the typical client who is sold an annuity by HTK pays approximately 3.5% per year in fees. Doc. 27 at 13, ¶ 28. In most cases, 90% or more of these fees are ultimately paid to Penn Mutual and/or Penn Mutual subsidiaries. *Id.*; *see also* Doc. 27 at 14-16, ¶¶ 29-37 (describing various fees) and at 5-7, ¶¶ 8 and 10 (describing benefits inuring to Defendants to the detriment of Mr. Cochran). In Mr. Cochran's account alone, these higher fees would likely have cost him approximately $575,000 over a 20-year

The complaint *expressly states* that it is *not* challenging Defendants' disclosures. Doc. 27 at 3, ¶ 3 ("The *Cooper* case focused on disclosure failures, but this case takes a different approach. Plaintiff does not challenge the disclosures at issue here, but instead alleges that this practice is a breach of the fiduciary duties that brokerage firms owe to their customers under Georgia law."). Mr. Cochran's complaint alleged that HTK had an inherent, unwaivable conflict of interest and that its sale of the Penn Mutual variable annuity in a tax-qualified account was a form of self-dealing that favored HTK's interests over Mr. Cochran's, thereby breaching HTK's fiduciary duty as set out in *Holmes v. Grubman*, 286 Ga. 636, 643 (2010). Doc. 27 at 4, ¶¶ 5-6.[3]

In *Holmes,* the Georgia Supreme Court held that a brokerage firm owes fiduciary duties to its customers, meaning HTK had and has a duty to put the interests of its clients above its own interest. *See Holmes*, 286 Ga. at 643.[4] The *Holmes* court answered a certified question

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period relative to a garden-variety mutual fund portfolio. Doc. 27 at 21-22, ¶ 47.

3. It is well established that a fiduciary has a duty to refrain from self-dealing. *See, e.g., Holmes*, 286 Ga. at 643 (fiduciary duties specifically include refraining from self-dealing); *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich., Oct. 30, 1978) (same). The Amended Complaint charges Penn Mutual with procuring (or aiding and abetting) this self-dealing breach of its wholly-owned subsidiary's fiduciary duties. Doc. 27 at 33-34, ¶¶ 76-81.

4. *See* Restatement (3rd) of Agency § 8.01 ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."). Like the Eleventh Circuit and many other jurisdictions, Georgia courts regularly rely on the Restatement of Agency. *See, e.g., Remediation Servs.*,

from the Second Circuit Court of Appeals, to wit: whether "a brokerage firm owe[s] a fiduciary duty to the holder of a non-discretionary account" under Georgia law. A unanimous Georgia Supreme Court answered in the affirmative, concluding that "[t]he broker will generally have a heightened duty, even to the holder of a non-discretionary account, when recommending an investment which the holder has previously rejected or *as to which the broker has a conflict of interest*." 286 Ga. at 643 (emphasis added).

Mr. Cochran alleges that HTK's practice of selling its corporate parent's expensive variable annuities to clients who are investing tax-qualified funds constitutes just such a conflict of interest,[5] and its practice of favoring its own interests over those of its customers amounts to self-

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Inc. v. Georgia-Pacific Corp., 209 Ga. App. 427 (1993).

5. Not only are Respondents self-dealing in the classic sense (*i.e.,* the fiduciary compromised its duty so that it could line its own pockets at the beneficiary's expense) but also in the sense that the captive broker-dealer structure results in HTK/Penn Mutual being on both the recommendation side and the product side of the transaction. This is a conflict that no amount of disclosure can cure. When you have a self-dealing fiduciary, disclosure of the conflict and consent are simply not good enough. The transaction must be fair to the beneficiary, and the burden is on the fiduciary to prove that it is. *See Mathis v. Hammond*, 268 Ga. 158, 161 (1997) ("in every transaction between them, by which the superior party obtains a possible benefit, equity raises a presumption of undue influence, and casts upon that party the burden of proof to show affirmatively his compliance with equitable requisites and of entire fairness on his part") (quoting *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 191 Ga. 821, 841 (1941)); Restatement (3rd) of Agency § 8.06(2) ("An agent who acts for more than one principal in a transaction between or among them has a duty . . . to deal fairly with each principal."). *See generally* Doc. 53-4 at 4-5 (discussing mechanics of fairness test).

dealing, a breach of the fiduciary standard. Significantly, the *Holmes* court makes clear that these fiduciary duties reside at the brokerage firm level, which means HTK cannot escape its responsibilities to its customers by raising questions about individual conversations and individual circumstances that are not germane to the claim. Mr. Cochran filed this case on behalf of a class of Georgia residents who (1) were HTK customers, (2) purchased a Penn Mutual variable annuity through HTK, and (3) did so using already tax-qualified funds. (Doc. 27 at 29, ¶ 63.) These three limiting factors are built into the class definition by design to limit class membership to only those individuals who have experienced the most egregious self-dealing in response to the types of conflicts discussed by the *Holmes* court.

Mr. Cochran is thus trying to invoke the protections afforded to him by Georgia law: trying to hold a state-law fiduciary to a fiduciary standard. Respondent HTK targets sales of variable annuities to persons like Mr. Cochran seeking to invest tax-qualified retirement funds for one simple reason: HTK makes more money selling variable annuities than it makes selling other products. Doc. 27 at 2, 4, ¶¶ 2, 6. The total recurring annual expenses for Mr. Cochran's annuity are 3.56%. Doc. 27 at 14, ¶ 29. As a result, huge amounts of money that should have been deployed for Mr. Cochran's benefit have instead been siphoned off – by his fiduciary – in the form of inappropriate fees. These fees make a huge difference in investment returns over the course of many years of saving and investing for retirement. Doc. 27 at 5-7, ¶¶ 8-10.[6]

6. The Rule of 72 provides a useful illustration of the devastating impact these fees have over time. The Rule of 72 is a shorthand mathematical formula that calculates approximately

This case seeks to recover damages caused by HTK's breach of its fiduciary duties by selling expensive, proprietary variable annuity contracts -- specifically those issued by its corporate parent, Penn Mutual -- to customers like Mr. Cochran and the other members of the class with tax-qualified accounts, who cannot benefit from them. Significantly, the claim is not based on disclosure failures; as set forth in more detail below, every material point was disclosed, fully and repeatedly. It is the product itself – and its high fees -- that are the problem. No fiduciary has any business offering this product as an investment option within the confines of this narrowly defined Georgia class – that is to say, (1) in this captive brokerage firm structure, (2) offering this proprietary, high fee product as an investment option, (3) for an already tax-qualified account. HTK breached its duty by selling it, and without a showing of fairness, no amount of disclosure can cure that.[7]

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how long it will take for money to double at a given compounding rate of return. Take the rate of return, divide that number into 72, and the result is the number of years it will take for money to double. *See* Doc. 34, at 5, n.6 (citing Joshua M. Brown, The Reformed Broker, "Double Your Money," available at https://thereformedbroker.com/2019/03/07/double-your-money-2/.) The S&P 500's average rate of return over the past fifty years, if dividends are reinvested, is approximately 10%. Adjusting that figure to account for cost-of-living increases (of, say, 3%) leaves a real return of approximately 7%. At that rate, retirement investments would double (in real, inflation-adjusted terms) roughly every ten years. But if fees are consuming approximately 3.5% each year, as they are in this case, the 7% return gets cut in half, and instead of doubling every ten years, it takes twenty years for money to double. *See* Doc. 27 at 13-14, ¶¶ 28-29; Doc. 34, at 5, n.6.

7. It is good faith and fairness that are lacking here. As noted in Restatement (3rd) of Agency § 8.06(1), a self-dealing fiduciary

In this way, Mr. Cochran's claim is akin to the ERISA 401(k) fee cases, which also challenged high, *fully disclosed* fees as a breach of fiduciary duty.[8] While ERISA

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must "act[ ] in good faith . . . and otherwise deal[ ] fairly" with its beneficiary. *See also Brown v. Calamos*, 664 F.3d 123, 129 (7th Cir. 2011) (defendants whose conduct is fully disclosed can avoid claims for fraud but not claims for breach of fiduciary duty: "These disclosures would be ineffectual against a claim of breach of the duty of loyalty because that duty is not dissolved by disclosure[.]").

8. *See generally* July 14, 2020 Transcript of [District Court] Oral Argument Proceedings at 33-36 (discussing comparison to ERISA 401(k) fee litigation):

> Exhibit 1 [Doc. 53-1] is an article that talks about some of these 401(k) fee cases, the history of them. . . . [T]he thrust of what they're doing in these fee cases is to say that to a large private employer and the individual[s] that make[ ] up the 401(k) committee, because those are the actual fiduciaries under the ERISA statute, and the thrust of the case is you're the plan fiduciaries, your job is to protect your people from high fees, the fees in your plan are too high, so you're not doing your job, which means you've got to pay your people.
>
> And when they were first filed that was -- people were amused by that, this notion that high fees all alone, all by themselves could constitute a breach of fiduciary duty. . . .
>
> The remarkable thing about the ERISA 401(k) fee cases, from my point of view, has always been that they've had the success they've had in the absence of a financial motive. The fiduciaries at issue in those cases are not getting the benefit of the high fees at issue. They just allowed a predator into their plan because they were lazy or careless or just didn't know any better. It doesn't excuse it. But here the fiduciary and the predator are one and the same.

fiduciary duties do not apply to rollover IRAs (and many other tax-qualified accounts), state law fiduciary standards do. That is what this case seeks to do: uphold a state law fiduciary's duty to protect its people.

The remarkable thing about this case is that all parties have agreed that there was no disclosure failure. Every material point Mr. Cochran is complaining about was disclosed: redundant tax treatment, high fees, large commissions to the broker, and the captive broker-dealer structure. *See generally* Brief of Appellees at 8-10 (filed Feb. 26, 2021). *See also* Doc. 33-1 at 8-11 (Defendants' Memo in Support of Motion to Strike, referencing standard disclosure language in the Prospectus and the form Annuity Application, Docs. 33-2 and 33-3); *id.* at 13 ("Tellingly, the Prospectus here contains exactly the disclosure claimed to be missing from the prospectus in *Cooper*."); Doc. 34 at 5-6 (Plaintiff's Opposition to Motion to Strike) ("Everyone agrees that there was no disclosure failure."). A complaint cannot be "alleging a misrepresentation or omission of a material fact" when all material facts are disclosed. 15 U.S.C. § 78bb(f)(1)(A). *See also Brink v. Raymond James & Assocs., Inc.*, 892 F.3d 1142, 1148-50 (11th Cir. 2018).

B. Procedural History

The District Court granted Defendants' Motion to Dismiss the claims of all absent class members, denied as moot Defendants' Motion to Strike those class allegations, granted Defendants' Motion to Compel Arbitration, and directed the Clerk to close the case. App. 15a; August 12, 2020 Order (Doc. 57). Despite the fact that Mr. Cochran did not allege (and need not prove) any misrepresentations or

omissions (Doc. 27 at 2, ¶ 1), the District Court nonetheless found that Mr. Cochran's fiduciary duty claim is actually a disguised fraud claim that is precluded by SLUSA. App. 25a, 28a; Doc. 57 at 11, 14.[9]

Mr. Cochran appealed the District Court's Order to the Eleventh Circuit, where it was affirmed. App. 1a; 35 F.4th 1310 (11th Cir. 2022). The Eleventh Circuit concluded that "[t]he essence of Cochran's complaint is that through its investment advice and recommendations, *HTK affirmatively made false statements, or failed to disclose material facts, about the suitability of the variable annuity investment for the type of account that the plaintiff had,* and in that way made misrepresentations to the plaintiff." App. 10a; 35 F.4th at 1315 (emphasis added). As discussed in more detail below, this cannot be the complaint's true "essence" because it is factually impossible. Respondents *did* disclose that the tax treatment was redundant for Mr. Cochran's tax-qualified account, fully and repeatedly. Brief of Appellees at 8 (filed Feb. 26, 2021); Doc. 33-2 at 15; Doc. 27-1 at 15; Doc. 33-3 at 19. All parties agree that these disclosures actually were made. Mr. Cochran has certainly never disputed this, and

9. Because the District Court applied SLUSA preclusion, the claims of all absent Class Members have been dismissed, while Mr. Cochran's individual claims survive. There is no dispute that Mr. Cochran's claims, if brought individually, would be subject to a FINRA arbitration clause. But there is also no dispute that the class claims must be brought in court. FINRA rules prohibit filing a class claim as a FINRA arbitration; that can only be done in court. FINRA Rule 12204 (available here: https://www.finra.org/arbitration-mediation/printable-code-arbitration-procedure-12000#12204); *see generally* Doc. 34 at 8-9 (discussing arbitration clause and Rule 12204); Doc. 33-1 at 11 (same).

he specifically pointed this out to the Eleventh Circuit again after its Order had issued. June 21, 2022 Petition for Rehearing at 7, n.1. In spite of these undisputed facts of the case, however, his petition for rehearing was denied on September 16, 2022. App. 32a. This petition followed.

REASONS FOR GRANTING THE PETITION

This Court has instructed that the text of SLUSA should be broadly construed: "A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to 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 1995 Act." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (citing SLUSA § 2(5), 112 Stat. 3227). Absent limits, however, some circuits will inevitably go farther than others. This Court has previously built on *Dabit's* guidance by limiting application of the "in connection with" piece of the SLUSA statute.[10] But no such guidance has yet been provided as to SLUSA's "alleging a misrepresentation or omission of a material fact" requirement, and the circuits have split as a result.

As noted above, absent limitations, some circuits will inevitably go farther than others, and there is presently a wide and constantly expanding circuit split, resulting in

10. *See Chadbourne & Parke LLP v. Troice,* 571 U.S. 377, 398 (Thomas, J., concurring) ("As I understand it, the opinion of the Court resolves this case by applying a limiting principle to the phrase 'in connection with' that is consistent with the statutory framework and design of the Securities Litigation Uniform Standards Act of 1998.")(some internal quotation marks omitted).

outcome-determinative differences in how SLUSA's bar is applied. This case is the perfect vehicle for this Court to utilize to resolve that split, because it illustrates the perils of judges departing from the plain language of the statute. The Eleventh Circuit has now come to the absurd conclusion that the complaint in this case is "alleging a misrepresentation or omission of a material fact" when no one can identify a material fact that was not disclosed.

This Court should grant certiorari to consider the scope of SLUSA's "alleging a misrepresentation or omission of a material fact" requirement and its intrusion into state law.

I. The Securities Litigation Uniform Standards Act is Not Being Applied Uniformly

A state-law claim will be precluded if it is "alleging a misrepresentation or omission of a material fact[.]" 15 U.S.C. § 78bb(f)(i)(A). How is a district court to determine whether a complaint alleges a material misrepresentation or omission? Prior to this case, six different circuits were split three or four different ways on this surprisingly tricky question. These Circuit divisions were surveyed and explained in *Brown v. Calamos,* 664 F.3d 123 (7th Cir. 2011), in both the concurring and dissenting opinions in *Goldberg v. Bank of America, N.A.,* 846 F.3d 913, 918, 923 (7th Cir. 2017), and in Chief Judge Thomas's opinion concurring in part and dissenting in part in *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 904 F.3d 821, 835 n.1 (9th Cir. 2018). *See also* Samuel Wolff, *Securities Litigation Update--Part 2: Securities Litigation Uniform Standards Act*, 35 No. 1 Sec. and Fed. Corp. Law Rep. 1 (2013) (providing a detailed analysis of the circuit split

as it existed in 2013); Cecilia Glass, Note, SWORD OR SHIELD? SETTING LIMITS ON SLUSA'S EVER-GROWING REACH, 63 Duke L.J. 1337, 1356-60; 1372-80 (2014) (describing split as of 2014 and arguing that some appellate court decisions have stretched SLUSA's reach too far, leaving plaintiffs incapable of bringing many state-law fiduciary duty claims essential to proper policing of corporate law).[11]

Mr. Cochran's complaint seeks to accomplish a seemingly simple goal: to hold a state-law fiduciary to a fiduciary standard. Depending on where one lives, however, that may or may not be possible by means of a class action,[12] because of outcome-determinative differences among the circuits in deciding just how far SLUSA reaches into state law.

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11. The PSLRA and SLUSA "do not, and cannot, create an opportunity for defendants to evade liability for illegal behavior that is not covered by the [federal] statutes, in particular for violation of entrenched state laws such as fiduciary obligations.") 63 Duke L.J. at 1379.

12. Respondents have emphasized the survival of an individual claim, and point to FINRA, a private arbitration forum where claims can proceed only on an individual basis and, more significantly for their purposes, no binding precedent can ever be created. HTK and other brokerage firms like it make billions of dollars every year by selling variable annuities to tax-qualified accounts – *i.e.*, by breaching their fiduciary duties. Brokerage firms are going to keep right on breaching their fiduciary duties as long as the worst possible consequence is that they might have to pay off an individual claim for individual damages in a private setting. *See generally* Doc. 27 at 34-36, ¶¶ 84-89. *See also Miley v. Oppenheimer & Co., Inc.,* 637 F.2d 318, 332 (5th Cir. 1981) (discussing brokerage firms' incentives for "low risk larceny").

A. In the Fifth and Sixth Circuits, SLUSA does not bar a state-law class action "alleging a misrepresentation or omission of a material fact" when the complaint contains no such allegations.

The first group of circuit courts takes a "literalist" approach, looking at the plain language of the complaint; if a complaint alleges a misrepresentation, the claim is precluded. This was the approach of the Fifth Circuit in *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004) ("The issue of preemption thus hinges on the content of the allegations."), and the Sixth Circuit in *Atkinson v. Morgan Asset Management, Inc.*, 658 F.3d 549, 554-55 (6th Cir. 2011) ("[SLUSA] asks whether the complaint includes [allegations of misrepresentation] pure and simple[,]" *citing Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 311 (6th Cir. 2009), *cert. denied* 560 U.S 925, 130 S. Ct. 3326, 176 L. Ed. 2d 1221 (2010)).

Had this case been filed in the Fifth or Sixth Circuit, Mr. Cochran's claim would not have been precluded. There, SLUSA only bars state law class actions "alleging a misrepresentation or omission of a material fact," and his complaint contains no such allegations. 15 U.S.C. § 78bb(f)(i)(A).

B. In the Seventh Circuit, SLUSA does not bar a state-law class action "alleging a misrepresentation or omission of a material fact" when it is unlikely that an issue of fraud will arise in the course of the litigation.

The Seventh Circuit has adopted another framework, albeit one that is less in line with the plain language of

the statute and that requires judges to be "prophets."[13] In *Brown v. Calamos*, 664 F.3d 123, 128-29 (7th Cir. 2011), the Seventh Circuit required a court to review the complaint and predict whether "it is likely that an issue of fraud will arise in the course of the litigation." This has been described as an "intermediate approach," and expanded on by that Circuit in two more recent decisions, *Goldberg v. Bank of America, N.A.,* 846 F. 3d 913, 918, 923 (7th Cir. 2017), and *Holtz v. JPMorgan Chase Bank, N.A.*, 846 F. 3d 928, 930 (7th Cir. 2017).

Had this case been filed in the Seventh Circuit, Mr. Cochran's claim would not have been precluded. All parties have agreed that all material facts have been disclosed, so it is not likely that an issue of fraud would arise in the litigation, and his complaint would not be considered one "alleging a misrepresentation or omission of a material fact." 15 U.S.C. § 78bb(f)(i)(A). *See Brown v. Calamos*, 664 F.3d 123, 129 (7th Cir. 2011) (defendants whose conduct is fully disclosed can avoid claims for fraud but not claims for breach of fiduciary duty: "These disclosures 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* !').").

13. *Goldberg v. Bank of America, N.A.,* 846 F. 3d 913, 927 (7th Cir. 2017) (Hamilton, J., dissenting).

C. In the Second, Third, and Ninth Circuits, SLUSA does not bar a state-law class action "alleging a misrepresentation or omission of a material fact" when the claim requires no such proof.

Under the third approach, according to the Second, Third and Ninth Circuits, a class action claim is precluded and barred only if the claim requires proof of a misrepresentation or omission of a material fact. *See In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 151-52 (2d Cir. 2015); *Freeman Investments, L.P. v. Pacific Life Ins. Co.*, 704 F.3d 1110 (9th Cir. 2013); and *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008).

In *Freeman*, then-Chief Judge Kozinski explained the court's reasoning that preclusion should turn on what the plaintiffs would be required to show to prove their claims:

> To succeed on this claim, plaintiffs need not show that Pacific misrepresented the cost of insurance or omitted critical details. They need only persuade the court that theirs is the better reading of the contract term. . . .
>
> Just as plaintiffs cannot avoid SLUSA through crafty pleading, defendants may not recast contract claims as fraud claims by arguing that they "really" involve deception or misrepresentation. *Id.; see also Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973) ("Not every breach of a stock sale agreement adds up to a violation of the securities law.").

704 F.3d at 1115-16.

Similarly, in *Kingate,* the Second Circuit ruled that SLUSA did not preclude claims for breaches of fiduciary duty because those claims did not require the plaintiffs to prove that the defendants had misrepresented or omitted material facts. 784 F.3d at 151–52.

In *LaSala,* the Third Circuit held that preclusion under SLUSA would not apply to breach of fiduciary duty claims unless the allegation of misrepresentation was a "factual predicate" for the claim. 519 F.3d at 141. "When one of a plaintiff's necessary facts is a misrepresentation, the plaintiff cannot avoid SLUSA by merely altering the legal theory that makes the misrepresentation actionable." *Id.* The Third Circuit was reiterating a principle laid out in *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 300 (3d Cir. 2005).

Judge Hamilton in dissent in *Goldberg* advocated that the Seventh Circuit adopt this approach, arguing that it is consistent with the statutory text, is consistent with Congress's intent in SLUSA to protect federalism interests, and sets an easy to administer standard that would not produce arbitrary results. 846 F.3d at 921.

> Finally, the rule of the Second, Ninth, and Third Circuits also has the benefit of being easier to administer fairly. As noted, our earlier *Brown* opinion requires judges to be prophets, looking at complaints and predicting whether fraud is likely to be an issue. The more expansive approach taken in this case and *Holtz* will likely produce results that are unpredictable, unfair, or both. When the defendants in *Manning* suggested a similar approach, the Supreme Court said it had "no idea how a court would

> make that judgment" and said that avoiding this "tortuous inquiry into artful pleading is one more good reason to reject" the approach.

Goldberg v. Bank of America, N.A., 846 F.3d 913, 927-28 (7th Cir. 2017) (Hamilton, J. dissenting) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 136 S.Ct. 1562, 1575, 194 L.Ed.2d 671 (2016)).

Had Cochran's suit been brought in the Second, Third, or Ninth Circuit, his claim would not have been precluded, as it requires no proof of "a misrepresentation or omission of a material fact." 15 U.S.C. § 78bb(f)(i)(A).[14]

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14. Perhaps in an effort to align itself with this group, the Eleventh Circuit's opinion mistakenly states that a misrepresentation or omission is a required element of a claim for breach of fiduciary duty. *Slip op.* at 15 ("Without *that element* [of misrepresentation or omission], there is no cause of action.") (emphasis added). The opinion is wrong. "It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." *Griffin v. Fowler*, 260 Ga. App. 443, 445 (2003) (citing *Conner v. Hart,* 252 Ga. App. 92, 94(1)(a), 555 S.E.2d 783 (2001); *Willett v. Russell M. Stookey, P.C.,* 256 Ga. App. 403, 411-412(7), 568 S.E.2d 520 (2002); *Tante v. Herring,* 264 Ga. 694(1), 453 S.E.2d 686 (1994)). *See also SunTrust Bank v. Merritt*, 272 Ga. App. 485, 489 (2005) ("Establishing a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.") (internal quotation marks omitted). To say a fiduciary cannot breach its duty absent a showing of fraud is simply incorrect.

D. In the Eleventh Circuit, SLUSA bars a state-law class action "alleging a misrepresentation or omission of a material fact" when the complaint contains no such allegations, when it is unlikely that an issue of fraud will arise in the course of the litigation, when the claim requires no such proof, and when all parties have agreed that all material facts were disclosed.

Because Mr. Cochran lives in Georgia, his suit was before the Eleventh Circuit and was dismissed according to the Eleventh Circuit's approach, which opens up a new category all to itself. As noted above, the Eleventh Circuit here took the unprecedented step of holding that a state law class action can be "alleging a misrepresentation or omission of a material fact" even when all parties have agreed that all material facts have been disclosed.[15] Other circuits may have exceeded the authority Congress

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15. The Eleventh Circuit understood Mr. Cochran's claim perfectly:

> Cochran sees it differently. His position is that the conflict of interest HTK had cannot *ever* be consented to because no amount of disclosure can *ever* cure the breach of the duty caused by the conflict. If he's right, the duty could be breached and the claim established without any false statement or failure to disclose a material fact.

App. 13a; 35 F.4th 1310, 1317 (emphases in original). The panel also understood that its finding with regard to the "essence" of his complaint would be outcome-determinative: "The only disputed issue in this case is whether Cochran's complaint alleges a misrepresentation or omission. If it does, then it is barred; if it doesn't, then it isn't barred." App. 8a; 35 F.4th at 1315.

granted in SLUSA, but the Eleventh Circuit's approach goes far beyond. Not only does this approach disregard the plain language of the statute, it disregards the undisputed facts of the case, as well.

In light of the circuits' split over how to apply SLUSA preclusion, meaningful guidance from this Court is needed to resolve how broadly the "alleging a misrepresentation or omission of a material fact" requirement of the statute should be construed, just as it did for the "in connection with" piece in *Troice*. 571 U.S. at 398 (Thomas, J., concurring). The lower courts are hopelessly split, and without this Court's guidance, that split will widen with each new case. *See Dabit*, 547 U.S. at 87 (noting "congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'")(citing SLUSA § 2(5), 112 Stat. 3227). If that guidance is that judges are required to look beyond the four corners of the complaint to determine whether it is "alleging a misrepresentation or omission of a material fact," then there need to be rules about how that works.

This Court has not previously had occasion to address this issue directly. *Dabit*, for example, involved a claim for fraudulent manipulation of stock prices, so the complaint in *Dabit actually* alleged manipulation. *See, e.g.*, 547 U.S. at 75, n.2. Similarly, all of the early circuit court cases that established the SLUSA "artful pleading" precedent involved initial complaints – filed in state court -- that *actually* alleged misrepresentations and omissions that counsel tried to walk back through "artful" amendments.[16]

16. In *Behlen v. Merrill Lynch*, 311 F.3d 1087 (11th Cir. 2002), for example, counsel tried to evade scrutiny of a claim that involved

This Court has not considered when, if ever, courts may depart from the plain language of a complaint without also departing from the plain language of the statute.

II. Instructing District Courts to Police for "Artful Pleading" is Unworkable and Contrary to the Plain Language of SLUSA

The pertinent section of SLUSA is 15 U.S.C. § 78bb(f)(1), which provides as follows:

> 15 U.S.C. § 78bb
>
> (f) Limitations on Remedies
>
> (1) Class Action Limitations No covered class

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misrepresentations, which counsel first acknowledged and then tried to hide. *Id.* at 1095 ("Behlen admits that he amended the complaint to delete all claims and allegations that might be deemed to fall within the scope of the SLUSA."). Similarly, in *Dudek v. Prudential Securities, Inc.*, 295 F. 3d 875 (8th Cir. 2002), the plaintiffs filed an initial complaint alleging that defendants affirmatively misled them and engaged in deceptive and abusive practices. *Id.* at 879. The plaintiffs then filed a second complaint that their own attorneys characterized as "essentially the same action" with the allegations of fraud, misrepresentation, and non-disclosure removed. *Id.* The court held that in substance both complaints alleged misstatements or omissions. *Id.* at 880. *See also Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 103-04 (2d Cir. 2001)(plaintiff alleged that the defendants violated state statutory and common law through fraudulent representations); *Patenaude v. Equitable Life Assurance Society of the United States*, 290 F.3d 1020, 1024 (9th Cir. 2002), *abrogated on other grounds by Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 637 n.1 (2006))(plaintiff did not dispute that he alleged the defendant made misrepresentations).

> action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.[17]

---

17. This language that Congress chose for SLUSA subsections (A) and (B) roughly tracks the language it used in Section 10(b) of the Securities Exchange Act of 1934:

> 15 U.S.C. § 78j - Manipulative and deceptive devices
>
> It shall be unlawful . . .
>
> (b)To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

This legislative decision is significant because Section 10(b) is, of course, a fraud statute; it has nothing to do with state law fiduciary duty claims. In contrast to the federal securities laws, which are built around the law of fraud and deceit, the fiduciary duties at issue here have as their foundation the law of agency and trusts. *See Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185,

Thus, for a case to be a "covered class action" subject to preclusion, SLUSA expressly requires allegations of fraud: "a misrepresentation or omission of a material fact," or a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a covered security. 15 U.S.C. § 78bb(f)(i)(A) and (B). Courts must give these words and that requirement their plain meaning. *See, e.g.*, *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (the "first canon" of statutory construction is to apply the unambiguous meaning of a statute). And, at the motion to dismiss stage, courts must accept the allegations in the complaint as true. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007); *Wilchombe v. TeeVee Toons, Inc.,* 555 F.3d 949, 959 (11th Cir. 2009).

Throughout this case, Petitioner has posed a very simple question: if this is so clearly a case "alleging a misrepresentation or omission of a material fact," then what is the disclosure failure? No one has been able to answer. The Eleventh Circuit tried to answer that question, but what it came up with is not a disclosure failure at all: "[t]he essence of Cochran's complaint is that through its investment advice and recommendations, *HTK affirmatively made false statements, or failed to disclose material facts, about the suitability of the variable annuity investment for the type of account that the plaintiff had*, and in that way made misrepresentations to the plaintiff." App. 10a; 35 F.4th at 1315 (emphasis added). But Respondents *did* disclose that the tax treatment was redundant for Mr. Cochran's tax-qualified account, fully

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193-215 (1976) and Restatement (2d) of Agency §§ 387-398, *inter alia*).

and repeatedly. Brief of Appellees at 8 (filed Feb. 26, 2021); Doc. 33-2 at 15; Doc. 27-1 at 15; Doc. 33-3 at 19. All parties are in agreement that these disclosures actually were made. The gravamen of the complaint is in reality HTK's unwaivable conflict of interest in offering the product for sale at all, notwithstanding the disclosures, a question wholly committed to state fiduciary law.

As the Eleventh Circuit panel put it at oral argument, Mr. Cochran's investment decision was "fully informed." Which again begs the question: how can a fully-informed plaintiff be "alleging a misrepresentation or omission of a material fact"? What happened here was that the disclosures revealed -- truthfully -- this Penn Mutual variable annuity to be an inappropriate investment, and Respondents sold it anyway, because they wanted the fully-disclosed, high fees.[18]

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18. It is an unlikely situation but one this Court seems to have anticipated in a case analyzing the scope of § 10(b):

> [O]ur analysis does not transform every breach of fiduciary duty into a federal securities violation. If, for example, a broker . . . told his client he was stealing the client's assets, that breach of fiduciary duty might be in connection with a sale of securities, but it would not involve a deceptive device or fraud.

S.E.C. v. Zandford, 535 U.S. 813, 825, n.4 (citing *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 474-476 (1977)). *See also Brown v. Calamos*, 664 F.3d 123, 129 (7th Cir. 2011) (defendants whose conduct is fully disclosed can avoid claims for fraud but not claims for breach of fiduciary duty: "These disclosures 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* !').").

Mr. Cochran is not "alleging a misrepresentation or omission of a material fact," and the District Court specifically noted that reality. App. 25a; Doc. 57 at 11 (recognizing that Mr. Cochran does "not use the terms misrepresentation or omission . . ."). Instead of looking to Mr. Cochran's actual allegations and accepting them, the Eleventh Circuit claims to be analyzing the complaint to find its "gravamen," its "essence," its "substance," or its "content," all purportedly in the service of combatting "artful pleading." App. 8-10a; 35 F.4th at 1315. These terms are not meaningful, not helpful to district courts, and most importantly, not found anywhere in the SLUSA statute.

Mr. Cochran's claim is very simple: HTK breached its fiduciary duty by self-dealing, selling him an inappropriate, expensive, proprietary investment product so that HTK (and its parent, Penn Mutual) could make more money, even though it fully disclosed the material facts. As theories of liability go, it is about as straightforward as they come. Significantly, it is a claim he can prove without proving any misrepresentation or omission of material fact.[19] All parties have agreed that there was no disclosure failure; Respondents' conduct was disclosed, fully and repeatedly. Here the fiduciary disclosed that this was a terrible investment, and then they sold it anyway, because they made more money that way. Mr. Cochran contends that is self-dealing, which by definition is a breach of a fiduciary's duties. Whether the theory of liability is viable or not is a matter solely of state law. Neither SLUSA nor the federal securities laws have anything at all to do with it.

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19. "It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." *Griffin v. Fowler*, 260 Ga. App. 443, 445 (2003).

Mr. Cochran intentionally and carefully pled a state law breach of fiduciary duty claim as that claim is set out in *Holmes v. Grubman*. *See generally* Initial Brief of Appellant, Section D (filed Dec. 7, 2020). The "essence" of Petitioner's claim is not a misrepresentation or omission; none is required to show that HTK breached its fiduciary duty to Mr. Cochran. It is the self-dealing that HTK and Penn Mutual engaged in by selling a product that placed their financial interests above those of clients like Mr. Cochran that breached the duty. It is HTK's actions putting its interests above those of its client, not what it said or did not say, that is the gravamen of the claim.

Congress in enacting SLUSA did not eviscerate enforcement of state-law fiduciary duties, nor did it authorize district courts to rewrite complaints to create an allegation of a misrepresentation or omission when none exists, and neither has this Court. Nothing in SLUSA's text or purpose, or in this Court's precedents, requires—or permits—that result. The lower courts here should have read the complaint and accepted as true the allegations stating a breach of fiduciary claim under state law, a claim which does not depend on a misrepresentation or omission.[20] Instead, they went far beyond what Congress

20. *Cf. Bilal v. Geo Care, LLC*, No. 16-11722, 2020 WL 6864637, at *5 (11th Cir. Nov. 23, 2020) (noting that the court's role is not to rewrite a plaintiff's complaint; even in *pro se* cases, the court "cannot act as *de facto* counsel or rewrite an otherwise deficient pleading to sustain an action."). *See also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 and n.7 (1987)(discussing the "well-pleaded complaint rule" for jurisdictional purposes and citing *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913) ("Of course, the party who brings a suit is master to decide what law he will rely upon") (Holmes, J.); *Merrell Dow Pharmaceuticals,*

authorized (and beyond the scope of Rule 12) to reach the absurd conclusion that the complaint is "alleging a misrepresentation or omission of a material fact" when no one can identify a material fact that was not disclosed.

III. State Law Still Has a Critical Role to Play in This Country's Securities Regulatory Framework

This Court has noted in other contexts that federal preemption is an "extraordinary" thing not to be undertaken lightly. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 and n.8 (1987). In contrast to the federal securities laws, which are built around the law of fraud and deceit, the state law fiduciary duties at issue here have as their foundation the law of agency and trusts. Not only are there important differences between the federal and state securities regulatory schemes, but the two were always meant to complement one another:

> The [*Santa Fe*] Court was reluctant to "federalize" fiduciary principles in the securities field "[a]bsent a clear indication of congressional intent." Since not every instance of financial unfairness or breach of fiduciary duty will constitute a fraudulent activity under Sec. 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.

Inc. v. Thompson, 478 U.S. 804, 809, n. 6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced"); *Great North R. Co. v. Alexander,* 246 U.S. 276, 282 (1918) ("[T] he plaintiff may by the allegations of his complaint determine the status with respect to removability of a case")).

Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987) (citing *Santa Fe Indus. v. Green*, 430 U.S. 462, 479, 97 S. Ct. 1292, 1304 (1977)). "As the Supreme Court's decision in *Santa Fe* made clear, the securities fraud statutes do not co-opt the existence of separate claims under state fiduciary principles. The common law of fiduciary obligation is still intact, and appellees' case law arguments based on fraud are simply inapposite here." *Gochnauer,* 810 F.2d at 1050.

This case presents the question of whether this is still true – whether the "common law of fiduciary obligation is still intact" and *Gochnauer* and *Santa Fe* are still good law, or whether those cases stand for an antiquated notion: that state law still has a role to play in this country's system of securities regulation. The Eleventh Circuit's sweeping holding threatens to do precisely what these two cases took pains to avoid: to "federalize" state law claims for breach of fiduciary duty (and also to prevent their meaningful enforement in class actions). As noted above, Congress has done no such thing. SLUSA applies to preclude state law claims only in cases "alleging a misrepresentation or omission of a material fact[.]" 15 U.S.C. § 78bb(f)(i)(A).

The practice of selling variable annuities to customers with tax-qualified accounts is an abuse, the type of conduct that fiduciary duties are designed to police. This dark corner of the securities industry has only managed to persist until now because fraud-based federal securities law offers no tools to stop it.[21]

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21. *See Marine Bank* v. *Weaver,* 455 U. S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide

But Georgia law does. There is a state law claim here covering an area that federal law does not cover (and was never meant to cover). This is not a fraud claim in disguise. The Georgia Supreme Court has specifically held that there is a fiduciary duty and a claim under Georgia law. Mr. Cochran is simply stating that claim, because if HTK is a fiduciary—as it unquestionably is under Georgia law—it needs to act like one.

CONCLUSION

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

Respectfully submitted,

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DECEMBER 2022.

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a broad federal remedy for all fraud").

APPENDIX

TABLE OF APPENDICES

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 31, 2022

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13477

JEFFREY A. COCHRAN, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff-Appellant,

versus

THE PENN MUTUAL LIFE INSURANCE
COMPANY, HORNOR, TOWNSEND & KENT, LLC,

Defendants-Appellees.

May 31, 2022, Decided

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:19-cv-00564-JPB

Before WILSON, LAGOA, And ED CARNES, Circuit Judges.

ED CARNES, Circuit Judge:

Jeffrey Cochran appeals the district court's dismissal of his putative class action claims against the brokerage

firm Hornor, Townsend & Kent (HTK) and its parent company The Penn Mutual Life Insurance Company.[1] The complaint alleges that HTK breached its fiduciary duties under Georgia law and that Penn Mutual aided and abetted that breach. The district court concluded that the Securities Litigation Uniform Standards Act barred Cochran from using a class action to bring those state law claims. And the court was right.

I.

The district court dismissed Cochran's class allegations under Rule 12(b)(1), accepting as true the facts alleged in Cochran's amended complaint, which is the operative one and which we will refer to simply as the complaint. *See Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1205 (11th Cir. 2012). We accept the facts as alleged, just as the district court did. *See id.*

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1. The court granted the defendants' motion to compel arbitration on Cochran's individual claims, but he does not challenge that part of the judgment. The court's Rule 12(b)(1) dismissal of the remaining claims had the practical effect of ending the litigation on the merits, making the judgment final. *See* 9 U.S.C. § 16(a)(3); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) ("We therefore conclude that where, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is 'final' within the meaning of § 16(a)(3), and therefore appealable."); *see also Martinez v. Carnival Corp.*, 744 F.3d 1240, 1243-44 (11th Cir. 2014) ("The Supreme Court has adopted a functional test for finality, examining what the district court has done, and has reiterated that a decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.") (quotation marks omitted).

Appendix A

After the company where Jeffrey Cochran worked was acquired and his 401(k) plan was terminated, he transferred his 401(k) funds into a rollover individual retirement account. He opened that account with HTK, a brokerage firm and investment adviser that is a wholly owned subsidiary of Penn Mutual. The account was a "tax-qualified" or "tax deferred" one, meaning it had the tax advantage of allowing for deferral of taxes on the earnings made by investments held in the account. After Cochran opened the account, an HTK advisor "urged and directed" him "to invest his retirement funds in a Penn Mutual variable annuity." He followed that advice and did so.

A variable annuity is a "hybrid insurance and investment product." One benefit of a variable annuity is that it offers the same kind of tax deferral as an individual retirement account. But those tax benefits are "unnecessary and redundant" when the variable annuity is held within an account that is itself already tax advantaged. According to the complaint, a variable annuity is not a suitable investment choice for a tax advantaged account because it causes the investor to pay high fees without getting an extra tax benefit. An account that is tax deferred in two different ways is no better than an account that is tax deferred in only one way.

Cochran's choice to invest in a variable annuity has not caused him to lose any of his investment, but he alleges that he has not gained as much as he might have if he had invested in something else. According to the complaint, Cochran's initial investment in February 2013 of $365,274.83 had grown to $498,313.63 by September

2018. Based on Cochran's estimation, if he had invested in something different during that time period, like a low-cost S&P 500 index, he could have avoided paying HTK fees and grown his investment to $712,435.99.

II.

Cochran filed a putative class action lawsuit alleging that HTK breached its fiduciary duties to him and its other Georgia clients who invested in Penn Mutual's variable annuity. He also alleged that Penn Mutual, HTK's parent company, aided and abetted the breach. Those claims are based solely on Georgia state law.

The complaint alleges that "brokerage firms make more money selling variable annuities than they make selling other products," giving them a "true conflict of interest" that leads them to "target sales of variable annuities to persons seeking to invest [in] tax-qualified retirement funds." The complaint asserts that the asserted cause of action derives from Georgia state law. It points specifically to *Holmes v. Grubman*, 286 Ga. 636, 691 S.E.2d 196 (Ga. 2010), as setting out the "applicable standard." According to the complaint, *Holmes* holds that a brokerage firm owes a duty to holders of nondiscretionary accounts, like the one Cochran had, which are accounts that require the broker to get the client's authorization before making any transaction. The complaint quotes *Holmes* as stating that the fiduciary duty is "heightened" when a broker is "recommending an investment which the holder has previously rejected or as to which the broker has a conflict of interest."

Also according to the complaint, "HTK's uniform practice of recommending that its clients use tax-qualified funds to purchase variable annuities constitutes just such a conflict of interest" because it ensured that higher fees will be paid to the firm out of the client's pocket (or account). The complaint alleges that the brokerage account agreement assures clients that HTK will make recommendations based on product suitability and the client's investment objectives and needs. But "[i]nstead of recommending appropriate investments for [Cochran's] IRA, HTK steered that money to variable annuities that would generate larger fees for HTK and Penn Mutual." The complaint further alleges that "brokers are paid more for selling annuities than other products" which is "the conflict that is at the heart of this case." It insists that the lawsuit "does not challenge the disclosures at issue here, but instead that this practice is a breach of the fiduciary duties that brokerage firms owe to their customers under Georgia law."

The complaint defines the members of the putative class as having all four of these characteristics: (1) Georgia residents, (2) who were HTK customers, and (3) who purchased a variable deferred annuity issued by Penn Mutual (4) for use in a tax qualified account.

HTK moved to dismiss Cochran's class action allegations, arguing among other things that the use of a class action is barred by federal law.[2] The district court

2. HTK also moved to compel arbitration on Cochran's individual claims, which Cochran did not challenge. As we've already noted, the district court granted the motion, which Cochran does not challenge.

granted the motion, concluding that federal law did bar the class action. It pointed to the Securities Litigation Uniform Standards Act, commonly called SLUSA, which generally prohibits class actions based on state law claims that allege material misrepresentations or omissions in connection with the purchase or sale of a security.

The district court concluded that SLUSA applies because Cochran alleges that HTK misrepresented or omitted a material fact when selling him the variable annuity. It reached that conclusion because "the essence of the Complaint is HTK's overall fraudulent practice of recommending variable annuities in order to make more money on fees and commissions." The court emphasized that the complaint "repeatedly references HTK's advice, assistance and recommendations," and that it alleges Cochran bought the variable annuity "*because* of what HTK represented when providing its advice and recommendations." That made the essence of the complaint "the unlawful marketing of tax-deferred annuities, either by misrepresenting their suitability for tax-deferred retirement plans, or by failing to disclose their unsuitability for such accounts." It was on that basis the court dismissed Cochran's class action allegations.

III.

We review *de novo* the court's conclusion that SLUSA's bar applies. *See Brink v. Raymond James & Assocs., Inc.*, 892 F.3d 1142, 1145 (11th Cir. 2018).

Appendix A

SLUSA's background and purpose are well-trod territory. The first steps start with the Private Securities Litigation Reform Act, or PSLRA. That act "institut[es] heightened pleading requirements for class actions alleging fraud in the sale or purchase of national securities" and requires a "mandatory stay of discovery until the district court [can] determine the legal sufficiency of the class action claims." *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1091 (11th Cir. 2002). Congress passed the PSLRA to deal with strike suits, which are meritless lawsuits filed to justify burdensome discovery and extort nuisance settlements. *See id.* Many plaintiffs responded by seeking to circumvent the PSLRA by abandoning federal law altogether and basing their securities fraud class actions solely on state law. *Id.; see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006). Apparently displeased with the attempts to undermine its objectives, Congress reacted by enacting SLUSA. That legislation provides in relevant part:

> (b) 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 —
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b).

The Supreme Court has instructed us that SLUSA's text is to be broadly construed. *See Dabit*, 547 U.S. at 84-86.[3]

SLUSA's bar applies when "(1) the suit is a 'covered class action,' (2) the plaintiffs' claims are based on state law, (3) one or more 'covered securities' has been purchased or sold, and (4) the defendant [allegedly] misrepresented or omitted a material fact 'in connection with the purchase or sale of such security.'" *Behlen*, 311 F.3d at 1092. The only disputed issue in this case is whether Cochran's complaint alleges a misrepresentation or omission. If it does, then it is barred; if it doesn't, then it isn't barred.

To determine whether a complaint alleges a misrepresentation or omission, we look to its "gravamen" or the essence of it. *See, e.g.*, *id. at 1094*. Our focus is

3. SLUSA's effect is sometimes called "preemption," but "SLUSA does not actually pre-empt any state cause of action" and it "does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist." *Dabit*, 547 U.S. at 87. Instead, it "simply denies plaintiffs the right to use the class-action device to vindicate certain claims." *Id.* For that reason we will refer to SLUSA's effect as "barring" instead of "preempting." *Cf. Hampton v. Pacific Investment Mgmt. Co.*, 869 F.3d 844, 845-46 (9th Cir. 2017) (explaining reasons for doing the same).

on the substance of the complaint, not on the labels the plaintiff chooses to give his claims, and not on the artful way a plaintiff words his allegations. Because substance is what counts, SLUSA's bar might apply even if a complaint doesn't label a claim as "fraud" or "misrepresentation" and even if it studiously avoids referring to misrepresentations, omissions, deception, fraud, and so on. As the Sixth Circuit has put it, the SLUSA determination is not "a formalistic search through the pages of the complaint for magic words" but a search to see "whether the complaint covers the prohibited theories, no matter what words are used (or disclaimed) in explaining them." *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310-11 (6th Cir. 2009).

Although we have not previously articulated all those principles explicitly, several other circuits have. In addition to the Sixth Circuit's *Segal* decision, there are these: *Northstar Financial Advisors, Inc. v. Schwab Investments*, 904 F.3d 821, 829 (9th Cir. 2018) (noting that "[c]ourts must look to the substance of the allegations, so that plaintiffs cannot avoid [SLUSA] through artful pleading that removes the covered words but leaves in the covered concepts") (quotation marks and ellipsis omitted); *Freeman Investments, L.P. v. Pacific Life Ins. Co.*, 704 F.3d 1110, 1115 (9th Cir. 2013) ("As our sister circuits have recognized, [SLUSA] operates wherever deceptive statements or conduct form the gravamen or essence of the claim."); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 301 (3d Cir. 2005) ("Other courts have similarly scrutinized the pleadings to arrive at the 'essence' of a state law claim, in order to prevent artful drafting from circumventing SLUSA['s bar]."); *Miller v. Nationwide*

Life Ins. Co., 391 F.3d 698, 702 (5th Cir. 2004) ("The issue of [SLUSA's bar] thus hinges on the content of the allegations — not on the label affixed to the cause of action."); *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875, 879-80 (8th Cir. 2002) (agreeing that the "gravamen" of the complaint is what matters and holding that "the essence of both complaints is the unlawful marketing of tax-deferred annuities, either by misrepresenting their suitability for tax-deferred retirement plans, or by failing to disclose their unsuitability for such accounts").

The essence of Cochran's complaint is that through its investment advice and recommendations, HTK affirmatively made false statements, or failed to disclose material facts, about the suitability of the variable annuity investment for the type of account that the plaintiff had, and in that way made misrepresentations to the plaintiff. The complaint makes at least 11 references to recommendations, advice, or other communications:

- "This is a class action seeking to challenge Defendant HTK's self-serving practice of *recommending* . . . ." Doc. 27 at ¶ 1 (emphasis added).

- "[T]he Justices [of the Supreme Court of Georgia] answered in the affirmative, concluding that '[t]he broker will generally have a heightened duty, even to the holder of a non-discretionary account, *when recommending an investment* which the holder has previously rejected or *as to which the broker has a conflict of interest*.'" *Id.* at ¶ 4 (emphasis and third bracket in original).

- "HTK's uniform practice of *recommending* that its client use tax-qualified funds to purchase variable annuities constitutes just such a conflict of interest . . . ." *Id.* at ¶ 5 (emphasis added).

- "Mr. Cochran was *urged and directed* by his HTK retirement advisor/fiduciary to invest his retirement funds in a Penn Mutual variable annuity, which he did on February 4, 2013. *Because* Mr. Cochran *followed that advice*, his fiduciary has raked significant unnecessary fees . . . ." *Id.* at ¶ 8 (emphasis added).

- "He was sold a Penn Mutual deferred variable annuity *based on the recommendation* of his HTK advisor . . . ." *Id.* at ¶ 16 (emphasis added).

- "Mr. Rowell *convinced* Mr. Cochran . . . to invest those tax-qualified IRA funds in a Penn Mutual deferred variable annuity." *Id.* (emphasis added).

- "At all times relevant hereto, HTK was and is in the *business of offering investment advice* in exchange for fees. Plaintiff and the Class members entered into a contractual relationship with HTK whereby *HTK would advise* and assist Plaintiff in *making appropriate investments*, and Plaintiff would pay a fee for such advice and assistance. Plaintiff and the Class members carried out their end of that arrangement, but HTK did not. *Instead of recommending appropriate investments* for Plaintiff's IRA, *HTK steered* that money to variable annuities . . . ." *Id.* at ¶ 27 (emphasis added and citation omitted).

- "HTK knew that Plaintiff and the Class members *trusted HTK to recommend appropriate investments* and to put its customers' interests ahead of its own." *Id.* at ¶ 56 (emphasis added).

- "Under the terms of the HTK account contract and Georgia law, HTK owed to Plaintiff and the Class members a duty *to recommend* appropriate investments for funds they entrusted to HTK." *Id.* at ¶ 60 (emphasis added).

- Listing as a question of law and fact common to the class: "whether Defendants have favored their own interests over those of Plaintiff and the Class members *by recommending* that customers' tax-qualified accounts be used to fund high-fee variable annuities[.]" *Id.* at ¶ 67 (emphasis added).

- "HTK has violated its fiduciary duties to the Class members by *providing investment advice* that was not in customers' best interests in an effort to steer Class members' money into variable annuities . . . ." *Id.* at ¶ 72 (emphasis added); *see also id.* at ¶ 79.

The substance of Cochran's complaint is that variable annuities were unsuitable investments for tax deferred accounts, but HTK recommended that clients invest in them anyway. And the complaint alleges that Cochran bought the variable annuity *because* of HTK's recommendations. If those recommendations had fully disclosed all material facts, including that a variable annuity would not have tax benefits and would be an unsuitable investment, Cochran would have no cause of

action. If there were no false statement or omission, there is no cause of action unless HTK breached its fiduciary duty simply by selling the Penn Mutual variable annuity, regardless of disclosure, regardless of consent, and even regardless of the client's own desire and direction to the fiduciary to make the purchase.

Cochran sees it differently. His position is that the conflict of interest HTK had cannot *ever* be consented to because no amount of disclosure can *ever* cure the breach of the duty caused by the conflict. If he's right, the duty could be breached and the claim established without any false statement or failure to disclose a material fact. But Cochran is not right. Georgia law does not recognize the cause of action that his position posits. Instead, the Georgia Supreme Court's *Holmes* decision rejects Cochran's position and in doing so scuttles his attempt to slip the grip of SLUSA. *See Holmes*, 691 S.E.2d at 201-02.

In *Holmes* the court held that under Georgia law a brokerage firm owes a fiduciary duty to the holder of a non-discretionary account. *See id.* at 198, 201-02. That type of account, which is what Cochran had, allows the broker to carry out only transactions that the client authorizes. *See id.* at 201. The *Holmes* court also held that the duty a broker owes to a client who has a nondiscretionary account includes "the duty to transact business only after receiving prior authorization from the client *and the duty not to misrepresent any fact material to the transaction.*" *Id.* (quotation marks omitted and emphasis added). Not only that, the court explained, but the "broker will generally have a heightened duty" to a nondiscretionary account holder "*when recommending an investment . . . as to which the broker has a conflict of interest.*" *Id.* at 201-02 (emphasis added).

That a broker with a conflict of interest has a heightened duty not to misrepresent by statement or omission any material fact necessarily means that a conflicted broker can nonetheless advise and recommend with full disclosure and without misrepresentation. Which necessarily means that a conflict of interest alone is not enough for a cause of action under Georgia law. There must be both a conflict of interest *and* a material misrepresentation or omission.

While the conflict of interest heightens the amount of disclosure and accuracy required, and thereby lessens a plaintiff's burden, it does not dispense entirely with the element of misrepresentation or omission. Without that element, there is no cause of action. And that is Cochran's central problem. To be viable under Georgia law, his claims against HTK must and do involve allegations of misrepresentation or omission, and because they do, his class action allegations are SLUSA-barred. Persuading us that he is not claiming that HTK made any misrepresentation or omission would earn Cochran only the right to have his entire complaint dismissed for failure to state a claim.

Because the complaint does allege "an untrue statement or omission of material fact in connection with the purchase or sale of a covered security," 15 U.S.C. § 77p(b), the district court correctly dismissed the class action allegations of it.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED AUGUST 12, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:19-CV-00564-JPB

JEFFREY A. COCHRAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY and HORNOR, TOWNSEND & KENT, LLC,

Defendants.

August 12, 2020, Decided
August 12, 2020, Filed

ORDER

This matter is before the Court on Defendants' Motion to Strike Class Action Allegations and Compel Arbitration or, in the alternative, Dismiss Plaintiff's Amended Class Action Complaint [Doc. 33]. The Court held a hearing

on the matter on July 14, 2020. [Doc. 55, p. 1]. After due consideration, this Court finds as follows:

BACKGROUND

Plaintiff Jeffrey Cochran ("Cochran") is an individual who has filed a class action complaint on behalf of himself and all others similarly situated against Penn Mutual Life Insurance Company ("Penn Mutual") and Hornor, Townsend & Kent, LLC ("HTK"). [Doc. 27, p. 1]. Penn Mutual is an insurance company and is also HTK's parent company. *Id.* at 11. HTK is a brokerage and investment adviser firm that sells mutual funds, stocks, bonds, variable life insurance products and annuities. *Id.* at 10.

In January 2013, Cochran opened a rollover individual retirement account ("IRA") with HTK. *Id.* at 5. Cochran alleges that he was thereafter "urged and directed by his HTK retirement advisor/fiduciary to invest his retirement funds in a Penn Mutual variable annuity." *Id.* On February 4, 2013, Cochran allegedly purchased "a Penn Mutual deferred variable annuity based on the recommendation of his HTK advisor, and through his HTK advisor . . . and suffered damages as a result." *Id.* at 9. Cochran maintains that because he followed his advisor's "advice, his fiduciary has raked significant unnecessary fees throughout the six-year period since he purchased the annuity," and "[a]s a result, huge amounts of money that should have been deployed for . . . Cochran's benefit have instead been siphoned off—by his fiduciary—in the form of inappropriate fees." *Id.* at 5-6.

Cochran asserts that

> [b]rokerage firms sell variable annuities because of their relatively high fees and the large commissions that come with them. The insurance and surrender fees charged to annuity owners (which are in addition to excessive investment management fees, excessive contract administration fees, and excessive add-on rider fees) yield much greater income to Defendants than would be realized from the sale of straight mutual funds providing the same investment options. This greater income provides additional profits to Defendants and additional compensation to the selling agents, who receive higher commissions on variable annuity sales than they would on sales of mutual funds. But the high fees associated with variable annuities can only be justified from the customer's standpoint by their tax-deferred growth, a benefit that is useless in an IRA like [Cochran's], which consisted entirely of already tax-qualified funds.

Id. at 4-5. Because a brokerage firm owes a fiduciary duty to its customers, "HTK's uniform practice of recommending that its clients use tax-qualified funds to purchase variable annuities constitutes . . . [allegedly constitutes] a conflict of interest" that "cannot pass muster when held up to a fiduciary standard." *Id.* at 4. Thus, Cochran seeks to challenge HTK's "practice of recommending that customers' tax-qualified accounts,

such as IRAs, be used to fund variable annuity contracts, specifically those issued by its parent, Defendant Penn Mutual." *Id.* at 2.

The Amended Complaint "alleges that [the above] practice is a breach of the fiduciary duties that brokerage firms owe to their customers under Georgia law." *Id.* at 3. As such, Cochran brings a claim for breach of fiduciary duties against HTK and a claim for procuring (or aiding and abetting) the breach of fiduciary duties against Penn Mutual. *Id.* at 32-33. The Amended Complaint also includes a request for attorney's fees and punitive damages against all defendants. *Id.* at 34-35.

In response to the Amended Complaint, Defendants filed this Motion to Strike the Class Action Allegations and Compel Arbitration or, in the alternative, Dismiss Plaintiff's Amended Class Action Complaint. Defendants request that the Court strike Cochran's class action claims because Cochran cannot meet class action certification requirements and that the Court compel Cochran's individual claims to arbitration pursuant to the terms of the parties' Account Agreement. [Doc. 33-1, p. 11]. In the alternative, Defendants request that the Court dismiss Cochran's entire Amended Complaint because Cochran is precluded under the Securities Litigation Uniform Standards Act ("SLUSA") from bringing a breach of fiduciary duties claim and because the breach of fiduciary duties claim is time-barred. *Id.* at 13-14. Defendants also argue the Amended Complaint should be dismissed because Cochran fails to state a claim against HTK for breach of fiduciary duties or against Penn Mutual for

procuring (or aiding and abetting) the breach of fiduciary duties. *Id.* at 14.

DISCUSSION

A. Preliminary Matters

As a preliminary issue, this Court must address which of the Federal Rules of Civil Procedure is the proper vehicle for challenging a complaint under SLUSA. Although Defendants move to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), Cochran argues that Rule 12(b)(1)—lack of subject matter jurisdiction—is the proper vehicle for challenging a complaint under SLUSA. [Doc. 34, p. 18 n.17].

The "[c]ourts have not achieved consensus on which subsection of Rule 12 is the right vehicle to raise a motion seeking SLUSA preclusion—which seeks a ruling, in the statutory language, that the lawsuit may not be maintained as a covered class action." *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017) (citation and punctuation omitted). The Third and Ninth Circuits have held that SLUSA dismissals are jurisdictional, while the Seventh Circuit has held that there is no merit to the suggestion that SLUSA dismissals are jurisdictional. *Compare LaSala v. Bordier et Cie*, 519 F.3d 121, 129 n.7 (3d Cir. 2008), *and Hampton*, 869 F.3d at 847, *with Brown v. Calamos*, 664 F.3d 123, 127-28 (7th Cir. 2011). The Second Circuit has indicated that, if presented the question, it would hold SLUSA dismissals jurisdictional. *In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 135 n.9 (2d

Cir. 2015). The Eleventh Circuit, however, has not directly addressed this issue.

"The dismissal for failure to state a claim under [Rule] 12(b)(6) is a 'judgment on the merits.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). Therefore, such dismissals are with prejudice. *See Woodson v. Eleventh Jud. Cir. in & for Miami Dade Cty.*, 791 F. App'x 116, 119 (11th Cir. 2019). The dismissal for lack of subject matter jurisdiction under Rule 12(b)(1), however, is not a judgment on the merits. *See Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 891 (11th Cir. 2013) ("Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case."). Therefore, such dismissals are without prejudice. *See Woodson*, 791 F. App'x at 119. Because a dismissal under Rule 12(b)(6) has a claim-preclusive effect while a dismissal under Rule 12(b)(1) does not, the distinction between the two Rules is important.

Claim preclusion prevents the future assertion of claims "[arising] out of the same 'nucleus of operative fact.'" *Sealey v. Branch Banking & Tr. Co.*, 693 F. App'x 830, 833 (11th Cir. 2017) (citation omitted). However, as noted below, SLUSA only bars a plaintiff from bringing certain state law claims as a *class action*. Therefore, in the event claims are dismissed as precluded by SLUSA, a plaintiff should not be prevented from repleading *all* claims "arising out of the same nucleus of operative fact." Although SLUSA prevents the state-law claims brought on a class-wide basis, SLUSA does not prevent the plaintiff from "return[ing] to the district court (or depart[ing] for

an appropriate state court) to replead . . . state-law claims on an individual basis, or to plead new federal securities claims either as an individual or as a class representative." *Hampton*, 869 F.3d at 848; *see also Behlen v. Merrill Lynch*, 311 F.3d 1087, 1089, 1096 (11th Cir. 2002) (affirming the district court's decision to dismiss the class-wide claims with prejudice, but the individual claims without prejudice). For this reason, the Court finds that SLUSA dismissals are jurisdictional such that the proper vehicle for challenging a complaint under SLUSA is Rule 12(b)(1).

Because this Court finds that SLUSA dismissals present a jurisdictional question, it will proceed by first analyzing Defendants' alternative Motion to Dismiss.

B. Motion to Dismiss Cochran's Class Action Claims

a. Allegations Against HTK: Whether the Securities Litigation Uniform Standards Act precludes Count 1—the breach of fiduciary duties

Congress passed the Private Securities Litigation Reform Act of 1995 (the "PSLRA") to establish "uniform standards for class actions alleging securities fraud" and to institute "heightened pleading requirements for class actions alleging fraud in the sale or purchase of national securities." *Behlen*, 311 F.3d at 1090-91. Shortly thereafter, it became apparent to Congress that claimants had started bringing suit in state court rather than federal court to evade the PSLRA's heightened pleading requirements, thereby frustrating the objectives of the PSLRA. *Id.* at 1091.

To remedy this issue, Congress passed SLUSA. *Id.* SLUSA made "federal court, with limited exceptions, the sole venue for class actions alleging fraud in the purchase and sale of covered securities." *Id.* at 1091-92. Congress also "mandated that such class actions would be governed by federal law rather than state law." *Id.* at 1092. SLUSA, therefore, "preempts certain state law claims" and "requires immediate dismissal of covered lawsuits." *Id.*

Claims are precluded under SLUSA if: "(1) the suit is a covered class action, (2) the plaintiffs' claims are based on state law, (3) one or more covered securities has been purchased or sold, and (4) *the defendant misrepresented or omitted a material fact* in connection with the purchase or sale of such security." *Herndon v. Equitable Variable Life Ins. Co.*, 325 F.3d 1252, 1253 (11th Cir. 2003) (citation and punctuation omitted) (emphasis added). Cochran concedes that "[t]he only one of these four requirements at issue here is whether [Cochran] is alleging a misrepresentation or omission." [Doc. 34, p. 19]. The Court therefore limits its analysis to this factor.

SLUSA expressly preempts claims "that defendants 'used or employed a deceptive device or contrivance in connection with the purchase or sale of a covered security.'" *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 880 (8th Cir. 2002) (affirming the district court's dismissal based on a finding that SLUSA preempted the plaintiffs' class action complaint "alleging improper marketing of tax-deferred annuities to accounts that already enjoyed tax-deferred status"); *see also Behlen*, 311 F.3d at 1089, 1096 (affirming the district court's dismissal based on a

finding that SLUSA preempted the plaintiffs' class action complaint alleging breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment and negligence and/or wantonness).

Regarding the material misrepresentation or omission required by the fourth factor,

> a claim alleges "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," . . . which subjects it to SLUSA preemption, when an allegation of a misrepresentation in connection with a securities trade is a "factual predicate" of the claim, even if misrepresentation is not a legal element of the claim In other words, when one of a plaintiff's necessary facts is a misrepresentation, the plaintiff cannot avoid SLUSA by merely altering the legal theory that makes that misrepresentation actionable [W]hen an allegation of misrepresentation in connection with a securities trade, *implicit or explicit*, operates as a factual predicate to a legal claim, that ingredient is met. To be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail.

LaSala, 519 F.3d at 141 (emphasis added). Importantly, the "mere avoidance of magic language" is not enough to avoid SLUSA preclusion. *Feitelberg v. Merrill Lynch & Co.*, 234 F. Supp. 2d 1043, 1051 (N.D. Cal. 2002).

> If in fact the claims allege misrepresentations or omissions or use of manipulative or deceptive devices in connection with the purchase or sale of securities and otherwise come within the purview of SLUSA, artful avoidance of those terms or scienter language will not save them from preemption. In other words, if it looks like a securities fraud claim, sounds like a securities fraud claim and acts like a securities fraud claim, it is a securities fraud claim, no matter how you dress it up.

Id.

Here, Cochran contends that the breach of fiduciary duties claim does not satisfy the fourth factor required for SLUSA preclusion because the claim does not rely on whether HTK misrepresented or omitted a material fact regarding the purchase. [Doc. 34, pp. 18-26]. Cochran argues that HTK as a firm, not just the individual advisors, owes a fiduciary duty to clients, and whether HTK breached its fiduciary duties by offering variable annuities to people seeking to invest tax-qualified retirement funds does not rely on specific representations made by advisors to individual clients. [Doc. 89, pp. 19-20].

However, in the Complaint, Cochran repeatedly references HTK's advice, assistance and recommendations. [*See* Doc. 27, pp. 2, 4-5, 13, 27] (describing HTK's general "practice of recommending" tax-qualified accounts be used to fund variable annuity contract, HTK's "investment advice" and HTK's process for "mak[ing]

their recommendations"); *see also id.* at 5, 9-10 (describing how Cochran's specific HTK advisor "urged and directed" Cochran to invest in a Penn Mutual variable annuity, how Cochran "followed that advice," how the HTK advisor "convinced" Cochran and others to invest in a variable annuity and how Cochran was sold a deferred variable annuity "based on the recommendation of his HTK advisor, and through his HTK advisor"); *id.* at 13, 26 (explaining how HTK's job was to "advise and assist [Cochran] in making appropriate investments," how Cochran "would pay a fee for such advice and assistance," how Cochran and others "trusted HTK to recommend appropriate investments" and how HTK failed to "recommend[] appropriate investments"); *id.* at 28, 32-33 (noting HTK's "duty to recommend appropriate investments" and describing how HTK "violated its fiduciary duties . . . by providing investment advice that was not in [the] customers' best interests"). Although Cochran is careful not to use the terms misrepresentation or omission, his references to HTK's advice and recommendations reveal the core of his Complaint: some type of misrepresentation or omission related to what HTK stated or did not state when providing recommendations and advice. The artful avoidance of these terms cannot save Cochran from preemption. Furthermore, when the Court asked Cochran's counsel to explain how Cochran's breach of fiduciary duties claim is not, in substance, based upon an omission, counsel conceded that it is. [*See* Doc. 89, p. 20] ("The Court: HTK in each instance should have told their client this is inappropriate for you, you should not buy this. Is that correct? Mr. Bain: This should never have happened, yes. Yes.").

Additionally, the essence of the Complaint is HTK's overall fraudulent practice of recommending variable annuities in order to make more money on fees and commissions. The Eighth Circuit analyzed similar arguments in *Dudek*. In *Dudek*, the plaintiffs asserted "five state law causes of action—breach of fiduciary duty by selling 'inherently unsuitable and inappropriate' tax-deferred annuities, unjust enrichment, declaratory and injunctive relief, reformation, and conspiracy to breach fiduciary duties." 295 F.3d at 879. The plaintiffs alleged that the defendants improperly marketed tax-deferred annuities to accounts that already enjoyed tax-deferred status. *Id.* at 877. The plaintiffs argued that "[t]he annuities were inappropriate investments . . . because tax-deferred accounts did not need the tax benefits, and therefore the extra fees and costs that tax-deferred annuities entail were a waste of the investors' money." *Id.* The defendants moved to dismiss the plaintiffs' state law claims as preempted by SLUSA, and the district court granted the motion finding that the claims "were in substance based upon material misrepresentations and non-disclosures in the purchase or sale of a covered security." *Id.* at 877-78.

On appeal, the plaintiffs argued that their claims were "based upon excessive fee charges, not alleged misconduct *in connection with* the purchase or sale of a security." *Id.* at 878. The Eighth Circuit noted that the plaintiffs were claiming that "defendants' misconduct caused plaintiffs to invest in inappropriate securities. Regardless of what made the investments inappropriate, if these are covered fraud claims . . . they are claims 'in connection with the

purchase or sale of a covered security' for purposes of SLUSA preemption." *Id.* at 878-79. The Court ultimately found that although plaintiffs did not specifically allege fraud, misrepresentation or non-disclosure, these issues

> permeated their complaint . . . and the overall target is what [the] plaintiffs call[ed] [the] defendants' "general business plan to sell tax-deferred annuities for investment by persons owning qualified retirement plans." As the district court recognized, the essence of [the complaint] is the unlawful marketing of tax-deferred annuities, either by misrepresenting their suitability for tax-deferred retirement plans, or by failing to disclose their unsuitability for such accounts.

Id. at 880.

Although the Eleventh Circuit has not directly addressed this issue, the Court has favorably cited *Dudek* in a similar case. *See Behlen*, 311 F.3d at 1094. In *Behlen*, the plaintiffs asserted claims for breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment and negligence and/or wantonness. *Id.* at 1089. The plaintiffs alleged "that the defendants sold [them] Class B shares in [a] growth fund when they were unknowingly eligible to purchase Class A shares" and "that the defendants sold them the wrong shares, because the Class B shares were subject to higher fees and commissions than the Class A shares." *Id.* The Court compared the plaintiffs in *Behlen* to the plaintiffs in *Dudek* and noted that

> although Behlen argue[d] that the excess fees and commissions paid by the class members were incidental to the sale of the securities, it seems certain that the very reason they were sold the Class B shares was *because* those shares were subject to the excess fees and commissions. Thus, the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions.

Id. at 1094. The Court ultimately found "that the crux of the complaint was that the defendants either misrepresented or omitted crucial facts about the Class A and Class B shares, thus causing [Behlen] and the class to invest in inappropriate securities." *Id.*

Similarly, here, regardless of what made the deferred variable annuities inappropriate, Cochran is alleging that HTK's misconduct caused him and the Class members to invest in inappropriate securities. Although Cochran argues that HTK's representations are irrelevant, according to the Complaint, the reason Cochran and the Class members purchased a deferred variable annuity was *because* of what HTK represented when providing its advice and recommendations. In other words, the essence of the Complaint is the unlawful marketing of tax-deferred annuities, either by misrepresenting their suitability for tax-deferred retirement plans, or by failing to disclose their unsuitability for such accounts. Thus, HTK's representations are not irrelevant. Therefore, this Court finds that SLUSA precludes the class action breach of fiduciary duties claim, and the Court need not reach

Defendants' remaining arguments regarding the statute of limitations and Cochran's failure to state a claim for breach of fiduciary duties.

Additionally, the class action claim against Penn State for procuring (or aiding and abetting) the breach of fiduciary duties, as well as the class action claims for attorney's fees and punitive damages against both defendants, are derivatives of the breach of fiduciary duties claim against HTK. Because the breach of fiduciary duties claim is precluded, the remaining derivative claims are also precluded. Therefore, Defendant's Motion to Strike Class Action Allegations is denied as moot.

C. Motion to Compel Cochran's Individual Claims to Arbitration

As the Court initially noted, a plaintiff in Cochran's position would normally have the option of repleading his state-law claims on an individual basis. Here, however, Defendants have also moved to compel arbitration of Cochran's individual claims.

Under 9 U.S.C. § 4,

> [a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which . . . would have jurisdiction under title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.

Importantly, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

Here, the terms of the parties' Account Agreement included the following Arbitration Clause: "It is agreed that any controversy between us arising out of your business or this agreement shall be submitted to arbitration conducted before the Financial Industry Regulatory Authority ("FINRA") and in accordance with its rules." [Doc. 27-1, p. 16]. In Cochran's Response to Defendants' Motion, Cochran does not challenge Defendants' argument that if the class action claims fail, Cochran's individual claims should go to arbitration. Importantly, "[a]rguments and issues not addressed in an opposition brief are deemed waived." *E.E.O.C. v. Riverview Animal Clinic, P.C.*, 761 F. Supp. 2d 1296, 1304 (N.D. Ala. 2010). Additionally, during oral argument, Cochran, again, did not challenge the arbitration clause or Defendants' arguments regarding Cochran's individual claims being subject to arbitration.

Therefore, this Court finds that the making of the agreement for arbitration and the failure to comply therewith is not in issue and **HEREBY ORDERS** the parties to proceed to arbitration on Cochran's individual claims in accordance with the terms of the Account Agreement.

Appendix B

CONCLUSION

For the foregoing reasons, Defendants' Motion to Strike and Compel Arbitration or, in the alternative, Motion to Dismiss [Doc. 33] is **GRANTED in part and DENIED in part**. Defendants' Motion to Strike Class Action Allegations is **DENIED** as moot. Defendants' Motion to Dismiss Class Action Allegations is **GRANTED**, and Defendants' Motion to Compel Arbitration is **GRANTED**. The Clerk is **DIRECTED** to close the case.

SO ORDERED this 12th day of August, 2020.

/s/ J. P. Boulee
J. P. BOULEE
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 16, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13477-JJ

JEFFREY A. COCHRAN, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff - Appellant,

versus

THE PENN MUTUAL LIFE INSURANCE
COMPANY, HORNOR, TOWNSEND & KENT, LLC,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

BEFORE: WILSON, LAGOA, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Jeffrey A. Cochran is DENIED.