No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH M. KRUPKA AND JOSEPH J. LEE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

STIFEL NICOLAUS & CO., INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law negligence claim based solely on an underwriter's acts and omissions with respect to a securities offering document "relates to the rights, duties. . ., and obligations relating to, or created by or pursuant to" a security so as to come within the securities exception (the "Securities Exception") to federal jurisdiction under the Class Action Fairness Act. ("CAFA")

RELATED PROCEEDINGS

Krupka, et al. v. Stifel Nicolaus & Co., E.D. Mo. Case No. 4:23-cv-00049

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PETITION FOR WRIT OF CERTIORARI

Keith M. Krupka and Joseph J. Lee respectfully petition this Honorable Court for a Writ of Certiorari to review the denial of their motion to remand.

OPINIONS BELOW

On May 11, 2023, the District Court denied Petitioners' Motion to Remand which was based on the Securities Exception. (Appendix p.3a) Thereafter, Petitioners sought permission to appeal which the Eighth Circuit denied on June 9, 2023. (Appendix p.1a)

JURISDICTION

The Eighth Circuit denied Petitioners' Petition for Permission to Appeal on June 9, 2023, thus, this Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 242 (1998) (Supreme Court may grant certiorari after Court of Appeals denies permission to appeal); *see, e.g., Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *see, e.g., Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554-55 (2014).

STATUTORY PROVISIONS

The Class Action Fairness Act codified, in pertinent part, at 28 U.S.C. §1332(d), provides:

(2) The district courts shall have original jurisdiction of any civil action in which the matter in

controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>
> ***
>
> (9) Paragraph (2) shall not apply to any class action that solely involves a claim—
>
> (C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

STATEMENT OF THE CASE

Petitioners filed a class action lawsuit in the Circuit Court of St. Louis County, Missouri, on November 17, 2022. Petitioners brought two causes of action under Missouri state law: (1) Negligence, and (2) Negligent Misrepresentation/Concealment. Petitioners alleged, in pertinent part, that beginning in or about 2016, the Illinois Finance Authority ("IFA") issued over $160,000,000 in bonds ("Bonds") to "borrowers" (*i.e.*, the Better Housing Foundation ("BHF") with various conflicts of interest, to own, operate, manage or otherwise control the acquisition and rehabilitation of low-income housing projects in Chicago, Illinois ("Projects"). The Projects were

identical with respect to their structure, primary participants, and purpose. As such, the Projects constituted one unitary scheme. Respondent Stifel Nicolaus & Co., Inc. ("Stifel" or "Respondent") underwrote, issued, and sold the Bonds in what turned out to be one of the largest public financing failures in the United States.

Stifel, as underwriter, had a duty to prepare accurate, complete, and truthful official statements. "Official Statements" "typically contain the most detailed description of the terms and features of the bonds through maturity." *Municipal Securities Rulemaking Board*, *Official Statements*, published September 11, 2020. Official statements "continue to be valuable as **the most comprehensive source of information on the specific terms of the bonds**." *Id.* (emphasis added). "The following information is typically included in an official statement:"

- The interest rate or, if the interest rate is variable, the manner in which such rate is determined.
- The timing and manner of payment of the interest on and the principal of the bonds.
- The minimum denomination in which the bonds may be sold.
- Whether the bonds can be redeemed by the state or local government prior to maturity and, if so, on what terms.

- Whether the investor has the right to require the state or local government to repurchase the bonds at their face value.
- **The sources from which the state or local government has promised to make payment on the bonds.**
- Whether any bond insurance, letter of credit or other guarantees have been provided for repayment.
- **The consequences of a default by the issuer**.
- **A description of outstanding debt, the authority to incur debt, limitations on debt and the future debt burden of the issuer**.
- **A description of basic legal documents such as authorizing resolution, indenture and trust agreement.**
- **Legal matters such as pending proceedings that may affect the securities offered, legal opinions and tax considerations**.

Id. (emphasis added).

Thereafter, Stifel delivered the proceeds of the Bond issue to the IFA which then made "loans" to BHF. In turn, BHF operated and/or otherwise controlled the Projects. Pursuant to the loan agreement, BHF was required to pay back the principal (with interest) to the investors solely through monies earned from the Projects. By the end of 2019, the Bond Trustee had declared BHF to be in

default on all of the Projects due to its failure to comply with certain of its covenants set forth in the various Project agreements. Petitioners contend that Stifel's negligent due diligence and reporting of the facts caused Petitioners and the putative class to suffer substantial damages as a result of the Projects' failure.

An official statement is *the document* that investors rely on to inform them of the key terms and features of a bond offering and they are intimately related to the rights, duties, and obligations created as a result of the issuance of the Bonds. As underwriter, Stifel had a duty to conduct due diligence and inform investors—via the Official Statements—of the core terms and features of the Bonds.

REASONS FOR GRANTING THE WRIT

A. THE CONSTRUCTION OF CAFA'S SECURITY EXCEPTION SHOULD BE SETTLED BY THIS COURT.

This Court has yet to construe CAFA'S Security Exception. Left to their own devices, the circuit courts' rulings on this issue are a confused mishmash of untidy statutory construction. Indeed, while Petitioners obviously hanker to make the "conflict between Circuits" argument here, the muddled nature of the circuit courts' opinions renders impossible any such contention. By the same token, however, any lawyer would be hard pressed to show any harmony among the decisions.

This case presents yet another dispute relating to the Class Action Fairness Act's "cryptic text" which, here, affects the rights of every class action plaintiff and defendant involved in a lawsuit *that relates to* the rights, duties (including fiduciary duties), and obligations related to, created by or pursuant to a security. Depending on which Circuit suit is brought a litigant can expect a different approach to the breadth of the Securities Exception. Even the Second Circuit, which was the first to address the Securities Exception, recognized, through a trilogy of cases, *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d. Cir. 2008), *Greenwich Fin. Services Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23 (2d Cir. 2010), and *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169 (2d Cir. 2012), that the Securities Exception does not give up its meaning easily and the interpretation thereof "arguably renders the words 'relating to' superfluous."

In *Cardarelli*, the plaintiffs were purchasers of money market certificates—unsecured, fixed-interest debt instruments—whose issuer had gone bankrupt. The court found the Securities Exception did not apply because the plaintiffs as purchasers of a security, not holders, had sued under state law for fraud alleging that Agway fraudulently concealed its insolvency when it peddled the certificates. *Id.* at 31. As the court interpreted the Securities Exception: "'Obligations' can be owed by persons *or* by instruments, but the natural reading of this statutory language is to differentiate obligations from duties by reading obligations to be those

created in instruments, such as a certificate of incorporation, **an indenture**, a note, or some other corporate document." *Id.* at 31 (emphasis added). "And certain duties and obligations of course 'relate to' securities even though they are not rooted in a corporate document but are instead superimposed by a state's corporation law or common law on the relationships underlying that document." *Id.* Ultimately, the *Cardarelli* court determined that Congress "intended that § 133(d)(9)(C) and § 1453(d)(3) should be reserved for 'disputes over the meaning of the terms of a security.'" *Id.* at 33.

Judge Pooler wrote a dissenting opinion in *Cardarelli* that took exception to the majority's failure to stay within the plain language of the statute. In Judge Pooler's opinion, the "terms of the [Securities Exception] itself merely say, *without qualification*, that claims which 'relate [] to' the 'rights'—*another term which is unqualified*—of securities holders are exempted from CAFA's scope." *Id.* at 36 (emphasis in original). The "instant suit plainly concerns Agway's failure to fulfill its obligations with respect to the Certificates and the plaintiffs' consequent deprivation of their rights with respect to the same." *Id.* at 35. "If this suit does not solely involve a claim 'that relates to the rights . . . and obligations relating to or created by or pursuant to' the Certificates, I am at a loss to understand why." *Id.*

In *Greenwich Financial Services*, holders of mortgage-backed securities sued to force lenders to buy back loans pursuant to pooling and service agreements—agreements defining the rights,

duties, and obligations of parties administering mortgage securities. *Id.* at 25. Despite the plaintiffs not being parties to the pooling and service agreements, the *Greenwich Financial Services* court **applied** the Securities Exception, finding the **sources** of the security holders' claims were the pooling and service agreements, instruments separate from the securities themselves but nevertheless enumerating security holders' rights. *Id*. at 29-30. ("The fact that a certificate holder's rights may be enumerated in an instrument other than the security itself is not material. Securities are created and defined not simply by their own text, but also by any number of deal instruments executed between various parties."). "Indeed, [the Second Circuit] made clear in *Cardarelli* that the '**instruments that create and define securities' include** documents such as certificates of incorporation and **bond indentures**." *Id.* at 29 (emphasis added). Such instruments are part of the Official Statements.

The final case in the Second Circuit's Securities Exception trilogy is *BlackRock Financial Management*. The Bank of New York Mellon sought a judicial determination (i) that it had the authority to assert and settle claims on behalf of the trusts and (ii) that it "acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts. Similar to *Greenwich Financial Services*, the court found that a suit regarding "representations and warranties that [certain] mortgages conformed to the trusts' requirements for credit quality, property value,

titles, and lien priority" in pooling and servicing loan agreements ("PSA") was subject to the Securities Exception. *Id.* at 173 (emphasis added). "Because The Bank of New York Mellon [sought] a construction of its rights under the PSA and an instruction from the court as to whether it has complied with its 'duties . . . and obligations' arising from the PSA and its 'fiduciary duties' superimposed by state law, we conclude that" the claim fell within the Securities Exception. *Id.* at 178. That is, "**duties superimposed by state law as a result of the relationship created by or underlying the security** [e.g., the duty to avoid conflicts of interest] **fall within the plain meaning of the statute**." *Id.* at 179 (emphasis added).

Through this trilogy of cases the majority opinions in the Second Circuit attempted to fashion a limiting principle: whether a suit seeks relief based on the "terms of the instruments that create and define securities" versus claims based on rights arising from independent sources of state law. Yet, the Second Circuit itself recognized the difficulty and dangers of reaching this conclusion. *Cardarelli*, ("although the matter is not entirely clear given the imperfect wording of the statute . . . .") ("Our interpretation arguably renders the words 'relating to' superfluous."); *BlackRock Fin. Mgmt.*, ("Although the wording of the exception (like much of CAFA) does not easily give up its meaning[.]").

Further, the limiting principle is confounded by the Second Circuit's own precedent. If the Securities Exception applies to claims seeking relief based on misrepresentations and warranties subject

to the duties superimposed by state law as a result of the relationship created by or underlying the terms of a mortgage instruments (*see BlackRock*) then how and *why* did it not apply to claims of fraud in marketing worthless securities in *Cardarelli* or, as here, an underwriter's legal obligation to conduct proper due diligence and report on the same in the Official Statements documents that were related to, created by, and pursuant to the Bonds.

In both *Greenwich Financial Services* and *BlackRock Financial Management*, the **sources** of the rights the plaintiffs sought to enforce were in agreements defining how trustees administered mortgage securities—creating relationships between the trustees and the securities holders, thus satisfying the Securities Exception. Likewise, Petitioners here seek to enforce the legal duties and obligations imposed on Respondent with respect to its role as underwriter of municipal bonds and preparer of the Official Statements.

Stifel's Official Statements purport to explain who the borrowers (i.e., BHF) are and their qualifications to handle large scale housing acquisition and rehabilitation Projects; how the municipal housing bond projects would proceed; how repayment would be made, inducing Petitioners, and the class, to purchase the housing bonds (securities). For example, one provision in the Official Statements states that the "obligations of the Borrowers under the Loan Agreement, the Note and Mortgages are payable solely from Project Revenues and Funds and Accounts under the Indenture . . . ." Accordingly, Petitioners' claim that Stifel did not

accurately disclose information regarding the Borrowers and their ability to pay investors back from Project Revenues "relates to" the Borrowers "obligations relating to or created by or pursuant to" the bond instruments. Yet, depending on which portion of the Second Circuit's trilogy one reads, different results would be had.

The Fourth Circuit Court of Appeals considered the Securities Exception in *Dominion Energy, Inc. v. City of Warrant Police and Fire Retirement System*, 928 F.3d 325 (4th Cir. 2019). In *Dominion Energy*, the relevant securities were "SCANA stock" which created a relationship and corresponding fiduciary duty between and among SCANA board members and stockholders. *Id.* at 342. Thus, "prior to the merger agreement between Dominion and SCANA, SCANA stock did not create a relationship—nor any duties—between [Dominion and its subsidiary] and SCANA's stockholders." *Id.* "Put simply, [Dominion and its subsidiary] were outsiders to all relationships created by" the stock prior to merger. *Id.* "Consequently, the **aiding and abetting claims** against [Dominion and its subsidiary] are *not* predicated on any duties 'created by or pursuant to' SCANA stock." *Id.* (underlined emphasis added). The Fourth Circuit did note that the parties agreed that the plaintiffs' **breach of fiduciary duty claim** satisfied CAFA's exception, but that the question before it was whether the plaintiffs' claims "solely" related to rights, duties, and obligations relating to the SCANA stock. *Id.* at 336-342. The Fourth Circuit in reaching its decision and analyzing the Second Circuit's trilogy created a list of guiding principles:

1. The Securities Exception "does not apply to 'any and all claims that relate to any security.'" *Id.* at 341.

2. The Securities Exception "does apply, however, 'to suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities." *Id.*

3. "Generally, a claim based on '**an extrinsic provision of state law**' is not within the [Securities Exception], but the exception does encompass a claim predicated on the '**duties superimposed by state law** *as a result of the relationship created by or underlying [a] security*.'" *Id.* (bold emphasis added).

Judge Diana Motz wrote a dissenting opinion taking issue with the majority opinion that the Securities Exception did not apply. "The most natural reading of the [Securities Exception] is that a state-law claim of aiding and abetting a breach of fiduciary duty 'relates to' state-law fiduciary duties 'created by' a security." *Id.* at 344. Further, Judge Motz pointed to the majority's acknowledgement that "the securities-related exception covers [the] *direct* breach-of-fiduciary claims against SCANA's CEO and directors, standing alone," but does not cover the indirect. *Id.* at 344-45. "Under the majority's rule, the securities-related exception covers only claims arising from rights and duties 'created by' a security (direct fiduciary claims) or 'pursuant to' it (involving the underlying contractual terms) — not other

claims 'relating to' it (like Plaintiffs' aiding-and-abetting claims)." *Id.* at 345. However, a proper interpretation of the Securities Act gives meaning to the phrases "relates to" and "relating to" thereby encompassing the plaintiffs' aiding-and-abetting claim as it "both *arises under* a state's fiduciary duty law and is *necessarily dependent* on a direct breach-of-fiduciary-duty claim[.]" *Id.* (emphasis in original). Judge Motz then added to the majority's list of three principles taken from the *Cardarelli* trilogy, specifically: "the securities-related exception also encompasses claims involving parties *outside* the internal orbit of a corporation – i.e., beyond the scope of the internal affairs exception – who may not be parties to the underlying contract or instrument." *Id.* at 347.

Again, here, Respondent had a state law obligation to conduct its due diligence correctly and to accurately report on the same. So, is the obligation to conduct due diligence an "extrinsic provision of state law" or is it "superimposed by state law as a result of the relationship underlying [the] security"? The answer, to the virtually identical questions, is yes. *See* Mo. Rev. Stat. § 409.5-509. In conducting its underwriting obligations, Respondent had a duty to conduct its due diligence correctly and to accurately report on the same. *Id.*

The Court of Appeals for the Ninth Circuit interpreted the Securities Exception in *Eminence Investors, L.L.L.P. v. Bank of New York Mellon*, 782 F.3d 504 (9th Cir. 2015). *Eminence Investors* is perhaps the closest case on point as it dealt with the administration of $16,000,000 in municipal bonds.

Rightly so, the parties did not dispute "that the issuance of the Bonds gave rise to rights, duties, and obligations between the holders of the Bonds, the borrower, and the indenture trustee." *Id.* at 506. The dispute regarded whether *all* the claims related to those rights, duties, and obligations. *Id.* Five causes of action were at issue: the first three were for breach of fiduciary duty, based respectively on non-disclosure, loyalty, and duty of care, the fourth was for gross negligence, and the fifth was for "injunctive relief." *Id.* at 506-07. "All of the duties allegedly breached by the Bank, such as the fiduciary duties supporting the first three causes of action and the duties supporting the gross negligence cause of action, arise out of the Bank's position as indenture trustee and *Eminence*'s corresponding position as holder of the Bonds." *Id.*

Reading the Fourth Circuit's dissent and the Ninth Circuit's majority opinion in harmony, it is a reasonable conclusion to draw the principle: the municipal bond underwriter has rights, duties, and obligations to the bondholders as well. After all, underwriters, such as Respondent, are obligated to conduct thorough due diligence and accurately report on the same in the form of official statements which "typically contain the most detailed description of the terms and features of the bonds through maturity." *Municipal Securities Rulemaking Board*, *Official Statements*, published September 11, 2020. Official Statements "continue to be valuable as the most comprehensive source of information on the specific terms of the bonds." *Id.*

Moreover, the lack of an articulable—and consistent—governing principles with respect to application of the Securities Exception on the whole has led to contradictory opinions in the Eighth Circuit and elsewhere. Several district courts, including the Western District of Missouri, have followed the logic of the Fourth Circuit's dissent and granted remand where various state law claims stemmed from a breach of fiduciary duty. *See Williams v. Wells Fargo Bank, Nat. Ass'n*, 9 F. Supp. 3d 1080 (W.D. Mo. 2014) (involving claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, and breach of contract by the trustee of bond debentures); Williams v. Texas Commerce Tr. Co. of New York, 2006 WL 1696681 (W.D. Mo. June 15, 2006) (involving claims against an indenture trustee for breach of fiduciary duty, breach of contract, negligence, equitable restitution, and civil conspiracy); *Fannin v. UMTH Land Dev. L.P.*, 2016 WL 7042078 (D. Del. Dec. 2, 2016) (involving unit-holders' claims of breach of fiduciary duty, aiding and abetting, breach of contract, and unjust enrichment by private equity managers and funds); *Schumel v. Bank Mut. Corp.*, 2017 WL 4564908 (E.D. Wis. Oct. 11, 2017) (on facts similar to *Dominion*, reasoning that the aiding-and-abetting claim against the acquiring company was dependent on the plaintiff shareholders' claims of breach of fiduciary duty by their company's board); and *Rubin v. Mercer Ins. Group, Inc.*, 2011 WL 677466 (D.N.J. Feb. 15, 2011) (same). Accordingly, the numerous scattered and rambling decisions by lower federal courts make certiorari review necessary.

B. THE CIRCUIT COURTS HAVE IGNORED THIS COURT'S PRECEDENT REGARDING STATUTORY CONSTRUCTION.

By its express terms, CAFA excepts from federal jurisdiction "any class action that solely involves a claim. . .that relates to the rights, duties (including fiduciary duties) and obligations relating to, created by or pursuant to any security. . ." It can hardly be argued that Petitioners' claims here do not qualify for the Securities Exception. Petitioners' claims for negligence against Stifel for its inadequate work in preparing and disseminating misleading Official Statements relates to the rights, duties, and obligations relating to or created by or pursuant to the Bonds. Thus, the Securities Exception applies.

Central to its opinion in *Cardarelli*, however, the Second Circuit determined that the Securities Exception did not apply to securities "purchasers" only to "holders". The district court in this case adhered to such theme. (Appendix 3a at 10a-11a) It is impossible, however, to find any such limitation within the text of the Securities Exception or anywhere else for that matter. This construction is at odds with this Court's teachings:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first

> canon is also the last: the judicial inquiry is complete.

Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (internal quotation marks omitted).

Thus, by construing "purchasers" of securities out of the Securities Exception, the Second Circuit and the district court below have violated this most basic rule of statutory construction.

CONCLUSION

Petitioners respectfully request that this Honorable Court grant this Petition for Writ of Certiorari on the question presented above.

Dated: September 7, 2023
Respectfully submitted,

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