Case No. 09-55513

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

FREEMAN INVESTMENTS, L.P., TRUSTEE DAVID KEMP, TRUSTEE OF THE DARRELL L. FREEMAN IRREVOCABLE TRUST, AND TRUSTEE DAVID KEMP, TRUSTEE OF THE FREEMAN JOINT IRREVOCABLE TRUST, individually, and on behalf of a class of others similarly situated,

Appellants

v.

PACIFIC LIFE INSURANCE COMPANY,

Appellee.

On Appeal from the United States District Court
For the Central District of California
The Honorable David O. Carter

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT
Federal Rule of Appellate Procedure 26.1

Plaintiffs/appellants Freeman Investments, L.P., the Darrell L. Freeman Irrevocable Trust, and the Freeman Joint Irrevocable Trust have no parent corporations and no publicly-held corporation owns 10% or more of any of their stock.

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JURISDICTIONAL STATEMENT

The district court below had subject matter jurisdiction under 28 U.S.C. § 1332(a) (diversity) and (d)(2)(A) (the Class Action Fairness Act). Diversity jurisdiction under 28 U.S.C. § 1332(a) existed below because Plaintiffs/Appellants are all citizens of Kansas, Defendant/Appellee is incorporated in Nebraska with its principal place of business in California, and the matter in controversy exceeds $75,000, exclusive of interest and costs. Jurisdiction under 28 U.S.C. § 1332(d)(2)(A) existed below because Plaintiffs brought the case on behalf of a class of persons, some of whom had citizenship that differed from Defendants, and the total matter in controversy exceeds $5,000,000.

The district court dismissed the action with prejudice without leave to amend on the basis that the claims were preempted by the Securities Litigation Uniform Standards Act, 15 U.S.C. § 77p(b). (Excerpts of Record ("E.R.") 14-19.) The district court entered final judgment on April 1, 2009. (E.R. 12-13.) This Court has jurisdiction over this case as an appeal from a final judgment of the district court under 28 U.S.C. § 1291. Plaintiffs timely filed a notice of appeal on April 3, 2009 under Federal Rule of Appellate Procedure 4(a)(1). (E.R. 1-2.)

INTRODUCTION AND STATEMENT OF THE ISSUES

Plaintiffs purchased variable life insurance policies from defendant Pacific Life Insurance Company. At some point after purchasing the policies, Pacific Life began charging Plaintiffs more for the "cost of insurance"—meaning the mortality benefit—than permitted by the policy language. Plaintiffs filed suit on behalf of themselves and others similarly situated to recover the excess charges.

The issues in this appeal are as follows:

(1) Do Plaintiffs' breach of contract and other state law claims—which allege that the Defendant failed to comply with the terms of insurance contracts—fall within the Securities Litigation Uniform Standards Act (SLUSA) where they are not based on any misrepresentation or omission of material fact in connection with the purchase or sale of a security?

(2) Even if SLUSA applies, should Plaintiffs' individual claims be dismissed with prejudice, where SLUSA does not preempt any claim but merely bars the class action device for certain types of claims?

Plaintiffs respectfully submit that the answer to both questions is "no" because SLUSA does not, and was not intended to, preempt breach of contract claims that arise after the initial purchase or sale of such policies.

STATEMENT OF THE CASE

Nature of the Case

Plaintiffs/appellants Freeman Investments, LP and David Kemp, Trustee of the Darrell L. Freeman Irrevocable Trust and Trustee of the Freeman Joint Irrevocable Trust alleged that after purchasing variable life insurance policies from defendant/appellee Pacific Life Insurance Company (Pacific Life), Pacific Life breached the policies by charging Plaintiffs and other similarly situated policy holders a higher amount for the "cost of insurance" charge than permitted by the terms of the policy. Plaintiffs thus asserted claims for breach of contract, breach of the duty of good faith and fair dealing, and unfair competition under the California Unfair Competition Law.

Course of Proceedings and Disposition Below

Plaintiffs filed their Complaint on October 10, 2008 (E.R. 207) and filed a Second Amended Complaint on December 12, 2008 (E.R. 20). Pacific Life filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the ground that Plaintiffs' claims are preempted by the Securities Litigation Uniform Standards Act ("SLUSA"). (*See* Docket Sheet Entry #22, E.R. 10.) The District Court granted Pacific Life's motion and dismissed Plaintiffs' Second Amended Complaint (E.R. 14-19), and entered Judgment against Plaintiffs on April 1, 2009 (E.R. 12-13). Plaintiffs filed this appeal on April 3, 2009. (E.R. 1-2.)

STATEMENT OF FACTS

Pacific Life sold Plaintiffs and the Class universal life ("UL") and variable universal life ("VUL") insurance policies.[1] (E.R. 22.) Under the terms of UL and VUL policies, premium payments above the cost of insurance are credited to the cash value of the policies. (*Id.*) The cash value is credited each month with interest or investment earnings, and the policy is debited each month by various deductions, including a Cost of Insurance (COI) charge. (*Id.*) The policies define the COI charge as a mortality charge that will be subject to calculation as defined in the policies. (*Id.*) Beginning at or after the commencement of the policy term, and contrary to the policy provisions, Pacific Life deducted from premiums, under the guise of COI Charges, amounts unrelated to mortality. (*Id.*)

More specifically, the Policies identify the following "Monthly Deductions":

- the Cost of Insurance Charge;
- the Mortality and Expense Risk Charge;
- the Administrative Charge; and
- rider or benefit charges, if any.

(E.R. 23.) The Policies provide that such charges may be deducted on each monthly payment date. The first monthly payment date is the Policy Date, and later monthly payment dates are the same day each month thereafter. (*Id.*)

[1] The parties agree that VUL policies are securities and UL policies are not securities. The policies Plaintiffs own are VUL policies. Plaintiffs' class allegations include UL policies.

The policies, and common usage in the industry, define the COI Charge as the insurer's mortality charge for the life of the insured. (E.R. 23-24.) The Internal Revenue Service considers the COI Charge to be the insurer's mortality cost—the charge "necessary from each policy to meet the death benefits anticipated during that year." *Internal Revenue Service, Insurance Industry Handbook*, §4.42.6.1.1 (349). (E.R. 24.) Likewise, the American Institute of Certified Public Accountants recognizes the COI Charge is "the portion" of premiums from each policyholder "set aside to pay claims." 360 Degrees of Financial Literacy, "*Types of Life Insurance Policies,*" American Institution of Certified Public Accountants. (*Id.*)

A mortality charge can be specifically calculated based on industry accepted actuarial determinations. (*Id.*) Pacific Life's COI Charges are of such an amount that, on information and belief, Plaintiffs allege that Pacific Life has deducted COI Charges in excess of the true mortality charges. (*Id.*)

The Polices are contracts between Plaintiffs and Pacific Life. (*Id.*) The Policies specifically define the charges that Pacific Life may deduct each month from premiums. (*Id.*) Pacific Life may deduct only those charges specifically allowed by contract. (*Id.*) By deducting hidden loads in excess of those permitted by the Policies, Pacific Life has wrongfully diverted funds to the financial detriment of the Plaintiffs and all other similarly situated policyholders. (*Id.*)

SUMMARY OF THE ARGUMENT

The very first words of the insurance policies at issue here state, "READ YOUR POLICY CAREFULLY. This is a legal contract between you, the Owner, and us, Pacific Life Insurance Company." (E.R. 34.) Pacific Life breached one of the provisions of this contract, and now demands that Plaintiffs satisfy the heightened pleading and burden of proof requirements for a securities fraud claim to enforce their contract. This is not a securities fraud case, however, in that Plaintiffs do not allege they were induced to enter into this contract in reliance on misrepresentations or omissions, that they received less coverage than expected, or that they were otherwise defrauded in their purchase of these policies. Rather, Plaintiffs allege that, after the contract was formed, Pacific Life charged more than permitted by the contract for the death benefit.

Neither the language of nor the intent behind the Private Securities Litigation Reform Act ("PSLRA") or the Securities Litigation Uniform Standards Act ("SLUSA") reflects an attempt to federalize breach of contract actions and impose significant procedural and substantive hurdles to enforce a contract. Instead, SLUSA merely closes a loophole in the PSLRA by prohibiting claims that should be brought as federal securities fraud claims from being brought in state court under state law.

This is not such a case. First, Plaintiffs' claims in no way depend on a misrepresentation or omission that would invoke SLUSA. Plaintiffs' claims are based on an act, not a statement or omission—the *act* of making monthly cost of insurance deductions that were more than the actual cost of insurance. Plaintiffs do not contend they were misled about what they purchased, only that Pacific Life failed to honor the contract after it was executed.

Second, the breach at issue here did not occur "in connection with the purchase or sale" of a security, as SLUSA requires, but rather in connection with Pacific Life's performance of a fully executed contract. Indeed, the District Court found this prong satisfied not based on the Plaintiffs' initial purchase of their policies but based on the fact that the breach occurred each time Plaintiffs made a premium payment.

Finally, even if SLUSA were applicable here, the District Court erred in dismissing Plaintiffs' claims with prejudice. The United States Supreme Court and this Court have previously recognized that SLUSA does not *preempt* any claim, but merely bars the class action device for certain securities claims. For these reasons, the District Court's Order and Judgment should be reversed and the case remanded to the District Court.

STANDARD OF REVIEW

This Court reviews the district court's ruling on a motion to dismiss *de novo*. *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 840 (9th Cir. 2007). This Court must reverse the district court unless the Court finds beyond doubt that Plaintiffs can prove no set of facts to support their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court must accept the factual allegations of the Second Amended Complaint as true, along with all reasonable inferences to be drawn therefrom, construing the complaint in the light most favorable to Plaintiffs. "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *U.S. Mortg.*, 494 F.3d at 840.

Pacific Life bears the burden to show that the requirements of SLUSA are met. *Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002). Each claim raised by the Plaintiffs must be independently tested for SLUSA preemption, and even if some claims are preempted, other claims not preempted must not be dismissed. *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1126 (9th Cir. 2002) (modified on other grounds by 320 F.3d 905 (9th Cir. 2003)) (affirming dismissal of fraud claim, but reversing dismissal of breach of contract claims).

ARGUMENT

I. The District Court Erred in Dismissing Plaintiffs' Complaint Because SLUSA Does Not Preempt Plaintiffs' Claims

As shown by the statutory language of the Securities Litigation Uniform Standards Act ("SLUSA"), the case law interpreting the statute, and the legislative history behind it, the District Court improperly expanded the scope of SLUSA.

A. History and Purpose of SLUSA

In an effort to curb perceived abuses in securities litigation brought under Securities and Exchange Commission (SEC) Rule 10b-5, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), which "insists that securities fraud complaints 'specify' each misleading statement; that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (quoting 15 U.S.C. §§ 78u-4(b)(1), (2)). The concern behind these cases was that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (the Court accordingly limited standing to assert claims under Rule 10b-5, unlike here where Pacific Life seeks expand the scope of Rule 10b-5 claims by turning a breach of contract action into a Rule 10b-5 claim).

To avoid the PSLRA's procedural and substantive hurdles, some plaintiffs began filing securities fraud class actions in state court under state law. *See* H.R. Rep. No. 105-640, p. 10 (1998); S. Rep. No. 105-182, pp. 3-4 (1998). To prevent the PSLRA from being marginalized, SLUSA provides that no "covered class action" based on state law that alleges "a misrepresentation or omission of material fact in connection with the purchase or sale of a covered security" "may be maintained in any State or Federal court by any private party." 15 U.S.C. § 78bb(f)(1). This central purpose of SLUSA—federalizing securities fraud and preventing plaintiffs from seeking more favorable state courts for securities fraud claims—is not implicated here, where Plaintiffs filed originally in federal court under 28 U.S.C. §§ 1332 and 1367.

By its terms, SLUSA does not preempt all state law claims relating to securities; instead, it only "prevent[s] certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the PSLRA. 112 Stat. 3227, SLUSA §2(5). Nor does SLUSA universally "cut off any claim where the plaintiff happens to reference a misrepresentation in the complaint." *LaSala v. Bank of Cyprus Public Co. Ltd.*, 510 F.Supp.2d 246, 272 (S.D.N.Y. 2007). SLUSA preemption applies only where the plaintiff "alleges fraud as an integral part of the conduct giving rise to the claim." *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F.Supp.2d 258, 269 (S.D.N.Y. 2004).

B. SLUSA Was Not Intended to Preempt Breach of Contract Claims

The Supreme Court has said that SLUSA's preemptive reach does not eliminate "historically entrenched state-law remed[ies]." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 88 (2006). In fact, in passing SLUSA, Congress specifically noted that SLUSA would not eliminate historically entrenched state law remedies because "[p]rior to the passage of the [PSLRA], there was essentially no significant securities class action litigation brought in State court." H.R. Conf. Rep. No. 105-803, p.14 (1998). Breach of contract claims, on the other hand, are among the most basic of state-law remedies and thus do not fall within the scope of claims Congress intended to preempt.

As a result, courts have refused to apply SLUSA to ordinary breach of contract claims or require they be brought under the PSLRA. *E.g.*, *Webster v. N.Y. Life Ins. & Annuity Corp.*, 386 F.Supp.2d 438, 439 (S.D.N.Y. 2005); *Walling v. Beverly Enter.*, 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"). "Just as 'plaintiffs may not avoid SLUSA pre-emption simply by artful pleading that avoids the actual words "misrepresentation" or "fraud," neither may defendants avoid every possible claim by recasting any lawsuit in which a securities broker is a defendant into a securities fraud action.'" *Webster*, 386 F.Supp.2d at 441 (quoting *Norman v. Salomon Smith Barney Inc.*, 350 F.Supp.2d 382, 386 (S.D.N.Y. 2004)). "Were

[the Court] to endorse the proposition that a disagreement over the application of words in a contract is 'effectively' a claim that the contract itself was a deceptive practice, SLUSA would swallow up all of contract law." *Id.* at 442.

Instead of expanding the scope of what constitutes a securities fraud claim, the Supreme Court has noted that the PSLRA actually discourages plaintiffs from seeking the expanded remedies available under Rule 10b-5 in cases that should be brought as breach of contract actions. *The Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 532 U.S. 588, 597 (2001). The question here, then, is whether Plaintiff's Complaint, fairly read, alleges claims that ought to be brought as securities fraud claims. *Green*, 279 F.3d at 598 (can the Complaint "reasonably be read as alleging a sale or purchase of a covered security made in reliance on the allegedly faulty information provided to [the plaintiffs] and to putative class members by [the defendant]").

C. Neither of Two Required Elements of SLUSA Are Met Here

Under SLUSA, a plaintiff's claim may not proceed as a class action based on a state law cause of action *if* the claim is based on "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). Plaintiffs' claims here are not based on a misrepresentation or omission of a material fact and did not arise in connection with the purchase or sale of a covered security.

1. Plaintiffs' Claims Do Not Depend On a Misrepresentation or Omission of Material Fact

Federal courts routinely find securities breach of contract claims do not fall within SLUSA's ambit because breach of a promise does not constitute a "misrepresentation." *Falkowski*, 309 F.3d at 1131-32 (affirming dismissal of plaintiffs' state-law fraud claims but reversing dismissal of plaintiffs' contract claim); *LaSala*, 510 F.Supp.2d at 277; *Webster*, 386 F.Supp.2d at 440; *Norman*, 350 F.Supp.2d 382, 387-88 (S.D.N.Y. 2004); *Xpedior Creditor Trust*, 341 F.Supp.2d at 269-70; *Magyery v. Transamerica Fin. Advisors, Inc.*, 315 F.Supp.2d 954, 962 (N.D. Ind. 2004); *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 216 F.Supp.2d 251, 257 (S.D.N.Y. 2002).

"The failure to carry out a promise made in connection with a securities transaction is normally a breach of contract. It does not constitute fraud unless, when the promise was made, the defendant secretly intended not to perform or knew that he could not perform." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993); *accord In re: Weeks*, S.E.C. Release No. 199, 2002 WL 169185, at *41 (S.E.C. 2002) ("The common law distinction between a fraudulent promise, made without intending to perform it, and mere breach of promise, has also been recognized in fraud cases decided under the federal securities laws").

In evaluating application of SLUSA, the court should "focus on the gravamen of the complaint: 'when an allegation of misrepresentation… operates as

a factual predicate to a legal claim, that ingredient is met.'" *In re Charles Schwab Corp. Sec. Lit.*, 2009 WL 262456, at *12 (N.D. Cal. Feb. 4, 2009). "To be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail." *Id.* Here, Plaintiffs allege that Pacific Life breached the terms of the insurance contracts by charging more for the cost of insurance than is contractually permitted. Although Plaintiffs alleged that Pacific Life failed to disclose its hidden loads[2] within the COI Charge, Plaintiffs' claims in no way depend on Pacific Life's nondisclosure; Pacific Life breached the contracts whether or not the breach was disclosed. Nor do Plaintiffs allege that Pacific Life secretly intended not to perform. Plaintiffs' claims in no way depend on Pacific Life's intent in breaching the contracts. For their breach of contract claim, Plaintiffs need only show the fact of the overcharge—not that Pacific Life intended the breach from the outset.

Plaintiffs' claim that Pacific Life breached the COI term of the policy is not based on a misrepresentation or omission. Pacific Life breached the policy not by what it did or did not *say* before or during execution of the contract, but by what it did or did not *do* following execution of the contract. This case thus differs from *Araujo v. John Hancock Life Insurance Company*, where the court applied SLUSA because the plaintiff alleged the "deceptive practice" of selling, and charging for,

[2] "Hidden load" is an industry term of art, not an allegation of fraudulent omission as Pacific Life alleges, that means a charge embedded in other charges.

insurance for an initial period of time at the beginning of the policy during which the insurer in fact provided no coverage, making the putative policy date on the face of the policy a *factually untrue statement at the time it was made*. 206 F.Supp.2d 377, 379 (E.D.N.Y. 2002). As a result, the *Araujo* plaintiff did not receive the coverage as represented.

In this case, in contrast, Plaintiffs' claims do not depend on whether Pacific Life misrepresented anything; Plaintiffs' claims are based on Pacific Life's failure to honor its promises in the contracts after they were sold. It would be a "deep misunderstanding of the word 'misrepresentation'" to construe every unfulfilled promise as a misrepresentation, thereby converting every breach of contract into a claim for fraud. *Consolidation Servs., Inc. v. Keybank Nat'l Ass'n*, 185 F.3d 817, 823 (7th Cir. 1999). A dispute over the *construction* of a securities contract is not a basis "to transform a contract construction dispute into a federal [securities law] cause of action." *Klorer v. Bennett*, 1990 WL 94241, at *6 (6th Cir. 1990). "[W]hile a contract dispute commonly involves a 'disputed truth' about the proper interpretation of the terms of a contract, that does not mean one party omitted a material fact by failing to anticipate, discover and disabuse the other of its contrary interpretation of a term in the contract." *Webster*, 386 F.Supp.2d at 441.

The District Court improperly relied on allegations of "misrepresentations" in Plaintiffs' original Complaint to suggest that Plaintiffs were attempting to

artfully plead around SLUSA. But Plaintiffs amended the Complaint to remove references to "misrepresentations" once Pacific Life raised the SLUSA issue because such references were not material to Plaintiffs' claims. In any event, this Court has recognized that a plaintiff may amend the complaint to clarify that claims do not meet SLUSA's requirements. *U.S. Mortg*, 494 F.3d at 842-43; *accord Green*, 279 F.3d at 593; *Schuster v. Gardner*, 319 F.Supp.2d 1159, 1163-64 (S.D. Cal. 2003).

While the Court must look beyond the face of the pleading to the substance of the claim to assess SLUSA preemption, "it is equally true that the plaintiff is the master of his claims, even when … the plaintiff is openly and admittedly seeking to plead around existing barriers, jurisdictional or otherwise, to his claims." *Beary v. ING Life Ins. & Annuity Co.*, 520 F. Supp. 2d 356, 364 (D. Conn. 2007). "It is well established that an amended complaint ordinarily supercedes the original, and renders it of no legal effect." *Id.* at 364-65. Because, as in *Beary*, Plaintiffs here expressly represent that they "will not assert any misrepresentation or fraud in response to any defenses raised by" Pacific Life, the District Court erred in looking to Plaintiffs' original Complaint to suggest that Plaintiffs' claims were disguised claims of fraud and misrepresentation. *Id.* at 365.

The District Court further relied on Plaintiffs' allegations in the Second Amended Complaint that Pacific Life imposed "excessive charges" through

"hidden loads" to conceal its breach as evidence that Plaintiffs' claims depended on a misrepresentation or omission. But the fact that Pacific Life hid its breach from Plaintiffs, thus justifying tolling the statute of limitations, does not provide a basis to find that fraud is "an integral part of the conduct giving rise to the claim," as required to invoke SLUSA. *Xpedior Creditor Trust*, 341 F.Supp.2d at 269. Federal and state courts alike have adjudicated similar claims involving COI over-charges as breach of contract claims. *Dean v. United of Omaha Life Ins. Co.*, No. CV 05-6067-GHK, slip op. at 12 (C.D. Cal. Aug. 27, 2007) (granting partial summary judgment to plaintiff class on contract construction of COI provision) (attached hereto at E.R. 223); *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, 2005 WL 5678842, at *1 (C.D. Cal. April 26, 2005) (certifying class in claim for breach of COI provision); *Lee v. Allstate Life Ins. Co.*, 838 N.E.2d 15, 24 (Ill. App. 2005) (affirming class certification of claim for breach of COI provision); *Beller v. William Penn Life Ins. Co. of N.Y.*, 778 N.Y.S.2d 82, 84 (N.Y. App. Div. 2004) (reversing dismissal of claim for breach of COI provision).

2. "In Connection With" the Purchase or Sale of a Security

Plaintiffs' claims also do not arise "*in connection with* the purchase or sale of a covered security" as required by SLUSA. 15 U.S.C. § 78bb(f)(1) (emphasis added). SLUSA's requirement that the fraud occur "in connection with" the purchase or sale of a security comes from the language of Section 10(b) of the

Securities Exchange Act of 1934. This element is satisfied only if "the fraud alleged is that the plaintiff bought or sold a security *in reliance* on misrepresentations as to its value." *Araujo*, 206 F.Supp.2d at 383 (quoting *Steiner v. Ames Dep't Stores, Inc.*, 991 F.2d 953, 967 (2d Cir. 1993)) (emphasis added). This reliance element is not satisfied if the plaintiff does not allege "that the fraud concerned the value of the security or the consideration received in return." *Id*. The plaintiff in *Araujo* alleged that the misrepresentation concerning the time period for which coverage applied meant the policyholders did not get what they thought they were getting at the time they purchased the policy. *Id.* In contrast, Plaintiffs here initially received the policy as represented; Pacific Life *thereafter* breached its promise concerning deductions it would make from the premiums.

"The fraud in question must relate to the nature of the securities, the risks associated with their purchase or sale, or some other factor with similar connection to the securities themselves." *Falkowski*, 309 F.3d at 1130-31; *accord Cheatham v. Kentucky Lottery Corp.*, 2008 WL 90034, at *3 (W.D. Ky. Jan. 8, 2008) (misrepresentations regarding employment benefits that included securities purchases were not "in connection with" purchase of securities); *Strigliabotti v. Franklin Resources, Inc.*, 398 F.Supp.2d 1094 (N.D. Cal. 2005) (alleged breach of contract for overcharging for securities advisory services was not "in connection with" purchase or sale of securities). Here, Plaintiffs allege that Pacific Life

breached the terms of the policies after their sale, not that Plaintiffs were misled into purchasing the policies. For this reason, SLUSA's "in connection with" requirement is not met.

II. Even if SLUSA Were Applicable, Dismissal With Prejudice is Inappropriate Because SLUSA Does Not Preempt Any Claim

"SLUSA does not actually preempt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims." *Dabit*, 547 U.S. at 87. "The Act 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." *Id.; accord Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006) ("The [SLUSA] preclusion provision is often called a preemption provision; the Act, however, does not itself displace state law with federal law but makes some state-law claims nonactionable through the class action device."); *Madden v. Cowen & Co.*, 556 F.3d 786, 789 n.1 (9th Cir. 2009) ("SLUSA precludes, rather than preempts, state law claims"). Even if SLUSA were applicable to any of Plaintiffs' claims, dismissal with prejudice would be inappropriate because Plaintiffs are free to pursue those claims individually. The trial court thus erred in dismissing Plaintiffs' claims with prejudice.

CONCLUSION

For the reasons set forth above, Plaintiffs ask this Court to reverse the District Court's Order and Judgment and remand the case to the District Court for further proceedings.

Respectfully submitted,

/s/ Richard M. Paul, III

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STATEMENT OF RELATED CASES

Counsel of record for Plaintiffs/Appellees states that there are no known related cases pending in this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)

The attached brief is not subject to the type-volume limitations of F.R.A.P. 32(a)(7)(B) because the brief complies with F.R.A.P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages.

CERTIFICATE OF SERVICE

I certify that on September 21, 2009 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are represented by at least one counsel of record registered as CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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