UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (Cincinnati)

DANIEL J. SEGAL, on behalf of himself, his minor children and all others similarly situated,	)	
Plaintiff,	)	Case No. 1:07 CV 348
v.	)	(District Judge Sandra S. Beckwith)
	)	(Magistrate Judge Hogan)
FIFTH THIRD BANK, N.A. and **FIFTH THIRD BANCORP**,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT WITH ATTACHED MEMORANDUM IN SUPPORT

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Defendants' SLUSA argument is an attempt to establish federal question jurisdiction. Federal question jurisdiction ordinarily exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The well-pleaded complaint rule makes the plaintiff the "master of the complaint," meaning a plaintiff may avoid federal jurisdiction by relying exclusively on state law for his or her cause of action. *See Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514-15 (6th Cir. 2003). If the plaintiff chooses to bring a state law claim, that claim cannot be "recharacterized" by a defendant as a federal claim. *See Roddy v. Grand Trunk Western R. R. Inc.*, 395 F.3d 318, 322 (6th Cir. 2005).

Defendants have the burden of proof to establish SLUSA preemption. *Green v. Ameritrade, Inc.*, 279 F.3d 590, 597, 599 (8th Cir. 2002). Established general federal preemption principles, and a settled apportionment of rules of decision between state and federal law, make clear that Plaintiff's Complaint is not preempted under SLUSA. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 212-14 (2004).

Defendants do not, and cannot, allege any particular "covered security" as required for SLUSA preemption.

Defendants do not allege any misrepresentation as required for SLUSA preemption. Defendants may not "recharacterize" a plaintiff's pleading to establish preemption. *Paru v. Mutual of America Life Ins. Co.*, 2006 U.S.Dist.LEXIS 28125, *9-*11 (S.D.N.Y. May 10, 2006). As "master of the complaint," a plaintiff may choose to plead state law claims, only, even where underlying allegations may also support a federal claim. *See Burns v. Prudential Securities*, 167 Ohio App.3d 809, 839, 857 N.E.2d 621, 644 (Ohio Ct. App. 2006); *see also See Burns v. Prudential Securities*, 116 F.Supp.2d

Plaintiff has adequately alleged breach of contract under Ohio law, including the following allegations of contractual provisions breached: Defendants promised high-level, customized fiduciary services, but provided low-level, standardized services; Defendants promised "customized trust solutions," but did not provide them; Defendants promised provision of services by "experienced trust professionals," but did not provide them; *etc.* Plaintiff adequately alleges recoverable damages theories under Ohio contract law. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 552, 554 (6th Cir. 2006).

Defendants' statute of limitations argument fails on numerous grounds, including because the defense does not begin to run on a breach of trust claim under Ohio law until the trust terminates – there is no evidence of such date(s) in Plaintiffs' pleading. *See Cassner v. Bank One Trust Co.*, 2004 Ohio 3484 (Ohio Ct. App.), *appeal dismissed*, 817 N.E.2d 407 (Ohio 2004). The affirmative defense also fails because it is not appropriate to resolve such a defense at the motion to dismiss stage; because of the existence of a fiduciary relationship; and because some of the named Plaintiff beneficiaries are minors.

Defendants' motion to dismiss Plaintiff's individual claim related to the West Clifton Avenue building fails, including because this issue can not be resolved unless the Court impermissibly goes outside Plaintiff's pleading; issues of valuation cannot properly be resolved in a motion to dismiss; Plaintiff alleges, with specificity, that it was a breach of fiduciary duty to sell the building at all; Plaintiff alleges specific facts indicating the sales price was, in fact, inadequate and unreasonable at the time; and Plaintiff has alleged Defendants' intentional, self-interested breach of trust.

I. Overview

On October 19, 2007, Plaintiff filed the Amended Class Action Complaint ("Complaint") on his own behalf, on behalf of his minor children, and on behalf of the putative Classes identified in the Complaint. Plaintiff's Complaint alleges state law claims that Fifth Third Bank, N.A. (the "Bank" or "Fifth Third") promised high-level, individualized fiduciary services, but, in fact, provided low-level, generalized services, as well as allegations related to the charging of exorbitant and/or unreasonable fees. *See* Compl., Doc. 17 (¶¶ 10, 25, 27-31, 34-35, 53).[1] On November 30, 2007, Defendants filed their Motion To Dismiss Amended Complaint and accompanying memorandum of law ("Memorandum").[2]

Although Defendants seek dismissal of the action on various grounds, their primary argument is that this action is preempted by the Securities Litigation Uniform Standards Act ("SLUSA"), *see* 15 U.S.C. §§ 77p; 78bb(f). Defendants' position is wrong: the essence of this case and the sole basis for the Defendants' liability is the

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[1] On January 11, 2008, the United States Department of Labor ("DOL") issued a release (attached hereto as Exhibit A) informing the public of a Complaint that it filed on December 28, 2007 against Fifth Third Bank, N.A. (Exhibit B hereto). The DOL Complaint sets forth allegations that are strikingly similar to those made by Plaintiff in this action and affects beneficiaries of employee benefits plan who are members of the putative Class herein. The exhibits are for context; the pending motion to dismiss is determined by the allegations in plaintiff's operative pleading, including as identified, *infra*.

[2] Defendants' motion to dismiss is properly determined by reference to the Complaint, only (i.e., not by reference to any earlier pleading), as the operative pleading in the action. *See Beary v. ING Life Ins. & Annuity Co.*, 2007 U.S.Dist.LEXIS 81694, *24-*25, Fed. Sec. L. Rep. (CCH) P94,507 (D. Conn. Nov. 5, 2007) (holding same); *Gurfein v. Ameritrade, Inc.*, 2006 U.S.Dist.LEXIS 75374, *2-*3 (S.D.N.Y. Oct. 13, 2006) (same – implicitly); *Green v. Ameritrade, Inc.*, 120 F.Supp.2d 795, 798-99 (D. Neb. 2000) (same), *aff'd*, 279 F.3d 590 (8th Cir. 2002).

alleged mismanagement of entrusted assets, which is a classic state-law breach of fiduciary duty case. The motion to dismiss should be denied.

SLUSA does not preempt all state-law actions involving or referring to securities. Rather, Congress preempted only *some* such actions, but left others *not* preempted and completely able to proceed under state law. To meet their burden of establishing SLUSA preemption, Defendants are required to establish, among other things, that this action:

(i) involves plaintiff's claim of misrepresentation/omission of material facts; *and*

(ii) that such a misrepresentation/omission claim is "in connection with" the purchase or sale of securities.

Here, Defendants do not establish either required factor.

As Defendants seem to concede, Plaintiff's Complaint not expressly allege any, *per se*, misrepresentations. *See* Memorandum, at 12. Defendants confront this difficulty by attempting to re-write the Complaint and arguing, in effect, that every breach of state law alleged by Plaintiff is really a "misrepresentation" because (Defendants argue) what plaintiff is really alleging is that Defendants failed to disclose to plaintiff that same breach of state law. *See id.* ("At the heart of any broken promise is a misrepresentation."). According to Defendants, any breach of state contract law (e.g., failure to do *x* on date *y*) is really a misrepresentation claim because what Plaintiff is really alleging is that Defendant did not tell Plaintiff that it was not going to do *x* on date *y*; any breach of state fiduciary law (e.g., waste of trust assets) is really a misrepresentation claim because what the Plaintiff is really alleging is that Defendant did not tell Plaintiff that Defendant was going to waste trust assets; *etc.* This creative fiction is not federal law. Defendants' proposed interpretation ignores the fact that Congress

carefully calibrated SLUSA to allow certain suits based upon state law to proceed. Defendants' proposed interpretation would, in effect, preempt all suits of any type which in any way refers to or involves securities. That is not what SLUSA says. Congress presumably could have written a statute with such wholesale preemptive effects that Defendants argue exist. However, Congress did not do so.

Defendants also rely upon the Supreme Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). Yet, *Dabit* is not so broad as Defendants maintain and does not preempt Plaintiff's claims in this case. SLUSA also requires that Defendants establish a misrepresentation claim is "in connection with" the purchase or sale of securities. *Dabit* makes clear that SLUSA preemption is, generally speaking, limited to transaction-related violations of the federal securities laws, *not* claims arising under state law that are *independent* of securities transactions. *Dabit* is not dispositive because Plaintiff's case does not allege breaches of securities laws, but instead involves traditional state law claims of breach of fiduciary duty and allegations related to the charging of exorbitant and/or unreasonable fees. *See* Compl. (¶¶ 10, 25, 27-31, 34-35, 53). Defendants do not establish SLUSA's "in connection with" requirement. Defendants' SLUSA preemption arguments fail.[3]

[3] Defendants attach an exhibit, a "Comparison Chart Of Complaints," Doc. 22-12 (filed 11/30/07). This Chart purports to compare the allegations of the Complaint, the current operative pleading, with the allegations in several other cases. The "Chart" is both too broad and too narrow to be meaningful. It is too broad because reference to it makes unnecessary, meaningless work for the Court. What matters is Plaintiff's allegations in *this* case and in particular, the present Complaint, Defendants' arguments for dismissal of *this* action, and the Court's application of the claims actually alleged by Plaintiff to appropriate law. Reference to the "Chart" is circular and superfluous. The "Chart" is too narrow because (as plaintiff believes even defendants would concede) plaintiff's operative pleading has to be read as a whole with respect to the SLUSA determination. Moreover, even a cursory review of the "Chart" demonstrates that the allegations in the

II. Factual Allegations

This case is a proposed class action, brought by Plaintiff Segal on behalf of himself, his minor children, Alex and Graham Segal, and all others similarly situated (collectively, the "Beneficiaries"). *See* Compl. (¶ 45). The claims are against Defendant Fifth Third , as well as its controlling corporate parent of the Bank, Fifth Third Bancorp ("Bancorp"), alleging breaches of fiduciary and contractual duties and other wrongful conduct.

This case is based on state law. SLUSA does *not* apply. As stated in the Complaint:

> [T]he claims made are based solely on the defendants' failures to fulfill their responsibilities as a corporate fiduciary and/or to unjustly enrich themselves arising out of the fiduciary relationships described herein. This case is about tortious breach of trust and directly related principles well recognized under Ohio law . . . . Plaintiff makes principally classic state-law breach of trust/fiduciary allegations: defendants used and unjustly benefited from entrusted funds in their own self-interest, not primarily for the benefit of plaintiff, his children or the members of the Classes.

See id. (¶ 2).[4] Plaintiff alleges that the Bank administers fiduciary accounts for the Class and contractually offered a variety of services, including purportedly customized management of Beneficiaries' portfolios. *See id.* (¶ 10, 25). Plaintiff alleges in the alternative that Defendants contractually breached this promise by allocating fiduciary

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Segal, *Siepel*, *Rabin*, and *Spencer* actions have significant differences. Also irrelevant are cases not on point but which involve one of the plaintiff's counsel or which Attorney General held office when, *etc.*

[4] Indeed, the Complaint alleges that the Beneficiaries played **absolutely** no role in the purchase, sale, or holding of any shares in the Beneficiaries' fiduciary accounts; neither Plaintiff, his children, nor other members of the putative Classes ("Class") purchased securities. *See id.* (¶ 8). The only purchaser of securities was Fifth Third, acting in its capacity as a corporate fiduciary. There is no allegation in the Complaint, nor could there be one, that Plaintiff played any role whatsoever in connection with the purchase of shares in Fifth Third's mutual funds.

funds to the greatest extent feasible to standardized investment options, including such options in which Defendants had a conflicting pecuniary interest. *See id.* (¶¶ 25, 34).[5]

Also, Plaintiff alleges that the Bank undertook fiduciary duties to act in the hest interests of Plaintiff and the Class through, *inter alia*, the investment of the assets in Beneficiaries' fiduciary accounts. *See id.* (¶ 10, 25). Plaintiff alleges that the Bank contractually breached this promise, including its failure to act as a prudent investor would, including *its investment* of assets in the Beneficiaries' fiduciary accounts, in the best interests of Defendants and *not* in the best interests of Beneficiaries. *See id.* (¶¶ 24, 25, 30). Specifically, Plaintiff alleges that the Bank breached its fiduciary duties owed to the Beneficiaries by failing to consider, appropriately, the investment of fiduciary assets in non-proprietary vehicles. *See id.* (¶ 35(a)).[6]

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[5] More particularly, as alleged, the Bank, currently using the "Fifth Third" name, made the contractual promise (including through its website and otherwise) of "customized trust solutions" in portfolio management. *See id.* (¶ 27). Plaintiff alleges that the Bank breached its promise by exploiting opportunities to standardize asset placement for its fiduciary accounts (including Beneficiaries' accounts), including for Defendants' selfish and wrongful gain. *See id.* Plaintiff further alleges, specifically, that the Bank does not provide "experienced trust professionals," as promised; that the Bank does not service fiduciary accounts at the individualized, high level, as promised, but provides standard and/or general low-level service; and that the Bank breaches its duties by not having adequate regard for Beneficiaries' tax circumstances. *See id.* (¶¶ 28, 34, 35(e)). The Bank failed to make adequate "suitability" determinations, and relied upon computerized models instead of providing the promised customized, individualized attention appropriate to serving as a corporate fiduciary. *See id.* (¶ 35(f)). Plaintiff alleges that the Bank's employees, acting under pre-determined Bank and Bancorp corporate policy, provide planning "advice" under the guise that this advice is customized when, in fact, it is not; instead, the Bank invests fiduciary assets in a self-interested and/or inappropriate manner. *See id.* (¶ 35). Furthermore, to establish punitive damages under applicable state law on this point, plaintiff makes certain allegations related to defendants' motivations. *See id.* (¶¶ 42, 51).

[6] Given these allegations, a statement such as "[a]ll of [plaintiff's] allegations relate to activity Fifth Third undertook in connection with investing money from fiduciary accounts **in mutual funds sold by FT Funds**" is simply wrong. *See* Memorandum, at 3 (emphasis added). There is no allegation in the Complaint that any relevant trust

Plaintiff further alleges that Defendants wrongfully overcharged certain fees and expenses to Beneficiaries' fiduciary accounts. The Bank breached its fiduciary and contractual duties to the affected Beneficiaries in the context of their plan to consolidate the fiduciary operations of various Acquired Banks (defined *id.* (¶ 3)). The wrongful charging of excessive and unjustified fees and expenses by the Defendants and their subsidiaries was a veiled attempt to extract operational efficiencies from their acquisitions of smaller financial institutions, including to make up for the deterioration of the Bank's traditional profit model (i.e., commercial lending) and to replace those profits with fee and related income as a primary revenue source (with as little "overhead" as possible). Such wrongfully over-charged fees and expenses include fees for advisory, administrative, and other services imposed on Beneficiaries' fiduciary accounts, directly and indirectly, by Defendants and their subsidiaries. *See id.* (¶¶ 29, 30, 31).[7] In particular, Plaintiff alleges that the Bank has not negotiated in any meaningful way the fees and expenses charged to Beneficiaries' investments by Defendants' affiliates (including the Bank Subsidiaries (defined, *id.* (¶ 3)), nor did Defendants negotiate with non-affiliated firms that could provide the same (or better) financial advice or other services to fiduciary accounts at lower cost. *See id.* (¶¶ 35(d), 53).

Plaintiff also alleges that Defendant Bancorp engaged in and/or benefited from the foregoing conduct, giving rise to a common law unjust enrichment cause of action. *See id.* (¶¶ 82-85).

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agreement (or the trust relationship, otherwise) required Defendants to allocate certain assets (e.g., securities) to Beneficiaries' accounts.

[7] To establish punitive damages under applicable state law, plaintiff makes certain allegations related to defendants' motivations. *See id.* (¶¶ 29, 54).

III. Legal Standards

A. Motion To Dismiss

In addressing a defendant's motion to dismiss, it remains settled that:

> the Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007). Under general pleading standards, the facts alleged in the complaint need not be detailed, although "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id.* at 1964-65 (alteration in original).

United States ex rel. Bledsoe v. Community Health Systems, Inc., 501 F.3d 493, 502 (6th Cir. 2007). As the Sixth Circuit in *Bledsoe* makes clear, *Bell Atlantic v. Twombly* must be read in conjunction with Fed. R. Civ. P. 8:

> Rule 8 is commonly understood to embody a regime of "notice pleading" where technical pleading requirements are rejected in favor of an approach designed to reach the merits of an action. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.").

Id. at 503.

In fact, the Sixth Circuit has been applying a standard essentially identical to the *Twombly* standard for many years:

> A complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory. *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993).

Weiner v. Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997). The Sixth Circuit has concluded that *Twombly* tweaked the federal pleading standard only, and did *not* overturn either the notice pleading principles of Rule 8 or the *Swierkiewicz* decision. *See Lindsay v. Yates*,

498 F.3d 434, 440 n.6 (6th Cir. 2007). Thus, under federal notice pleading, a plaintiff's complaint need not contain detailed factual allegations to state a cause of action and survive a Rule 12(b)(6) motion to dismiss; a complaint need only contain enough detail to make clear that it is unlawful (as opposed to lawful) conduct of which complaint is being made. *See Wysong v. Dow Chem. Co.*, 503 F.3d 441, 446 (6th Cir. 2007); *Association of Cleveland Fire Fighters v. City of Cleveland*, 503 F.3d 545, 548 (6th Cir. 2007).[8]

B. The Well-Pleaded Complaint Rule

As a jurisdictional basis in this Court, Plaintiff has alleged state law causes of action and federal diversity jurisdiction under 28 U.S.C. § 1332(d). *See* Compl. (¶ 43). In contrast, by attempting to have the Court invoke preemption principles of SLUSA, Defendants effectively seek to establish federal question jurisdiction over this action. The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal question jurisdiction ordinarily exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see Davis v. McCourt*, 226 F.3d 506, 510 (6th Cir. 2000).

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[8] Consistent with the fact that the Federal Rules were not amended, *Twombly* can fairly be said to establish only two not very remarkable, common sense propositions: a complaint need only contain enough factual detail to make clear that plaintiff is complaining of unlawful (as opposed to lawful) conduct; and, in clarifying the Court's prior decision in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), it is *not* the District Court's function to search a plaintiff's pleading for a cause of action where a plaintiff might have, but did not, fairly plead one. *See Association of Cleveland Fire Fighters*, 503 F.3d at 548.

After their *de facto* re-writing the Complaint to suit their argument, Defendants appear to enjoy their discussion of *Twombly*, which goes on for three pages (*see* Memorandum, at 5-7). However, *Twombly* seems little relevant to the SLUSA issue which (so defendants' argument goes) appears to depend upon facts **not** pled, not upon the qualitative weight of facts pled.

The well-pleaded complaint rule makes the plaintiff the "master of the complaint," meaning a plaintiff may avoid federal jurisdiction by relying exclusively on state law for his or her cause of action. *See Caterpillar*, 482 U.S. at 392; *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514-15 (6th Cir. 2003). Hence, with few exceptions, the plaintiff, as "master of the complaint," may select a state forum by choosing to rely on state-law claims, only, even if the facts alleged also would support a claim under federal law. "Accordingly, if the plaintiff chooses to bring a state law claim, that claim cannot generally be 'recharacterized' as a federal claim . . . ." *Roddy v. Grand Trunk Western R. R. Inc.*, 395 F.3d 318, 322 (6th Cir. 2005).[9] Further, even if the initial complaint in this case might conceivably have run afoul of SLUSA, which it did not, the current Complaint before the Court is what matters. In *Beary v. ING Life Ins. & Annuity Co.*, 2007 WL 3274426 (D. Conn. Nov. 5, 2007), the court found that plaintiffs' initial complaint was governed by SLUSA because it sounded in "fraud" and "manipulation" (*see id.*, at *7), but that plaintiffs' second complaint did not. The *Beary* court noted that the plaintiff is the master of his claims, even where the plaintiff admittedly amended his complaint in order to avoid SLUSA preemption. The *Beary* court found that SLUSA was not applicable.[10] *Id.*

The Complaint in its present form is utterly devoid of any federal cause of action and the only substantive claims made by Plaintiff are those summarized in ¶ 2 of the Complaint. A defendant cannot, merely by attempting to re-write a complaint to inject a

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[9] *See Tisdale v. United Assoc. of Journeymen*, 25 F.3d 1308, 1311 (6th Cir. 1994) ("'[T]he plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.'") (citation omitted); *Central Laborers' Pension Fund v. Chellgren*, 2004 U.S.Dist.LEXIS 6066, *36-*45, Fed. Sec. L. Rep. (CCH) P92,830 (E.D. Ky. March 29, 2004) (same – SLUSA context).

[10] The *Beary* action was dismissed on other grounds.

federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 809 (1988) (holding that even where defense is only question truly at issue, a federal patent law defense does not automatically cause the case to arise under patent law); *Caterpillar*, 482 U.S. at 399. Rather, in order for 'arising under' jurisdiction to attach, a right or immunity created by the institution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *See Robinson v. Michigan Consolidated Gas Co*, 918 F.2d 579, 585 (6th Cir. 1990) (internal quotes and citations omitted).

IV. Plaintiff's Claims Are Not Subject to Dismissal Under Rule 12(b)

A. SLUSA Does Not Preempt Plaintiff's Claims

The Complaint alleges classic state-law causes of action for a trustee's breach of fiduciary duty, breach of contract, and related equitable remedies. It is settled under American law that such claims and remedies, including as related to a trustee accounting for wrongful conduct, are governed by well-established principles of state law. *See Sherwood v. Saxton*, 63 Mo. 78, 82-83 (Mo. 1876). The federal securities laws and related statutes that Defendants attempt to engraft to this case are statutory enactments enacted long after fiduciary duty, breach of contract, and related equitable remedies were developed under state law. Rule 10b-5 was enacted by the SEC in 1942 pursuant to the

Securities Exchange Act of 1934,[11] the Private Securities Law Reform Act ("PSLRA") was enacted in 1995,[12] and SLUSA was enacted in 1998.

Defendants argue for SLUSA preemption. Defendants have the burden of proof to establish SLUSA preemption. *Green v. Ameritrade, Inc.*, 279 F.3d 590, 597, 599 (8th Cir. 2002). Under the statutory scheme, four conditions must be satisfied to trigger SLUSA's preemption provisions: (1) the underlying suit must be a "covered class action"; (2) the action must be based on state or local law; (3) the action must concern a "covered security"; and (4) the defendant must have misrepresented or omitted a material fact or employed a manipulative device or contrivance "in connection with the purchase or sale" of that security.[13] 15 U.S.C. § 78bb(f). Congress intended certain covered class actions based upon state law claims to remain viable either where the action does *not* involve any misrepresentation/omission *or* where the claimed wrongdoing is *not* "in connection with" the purchase or sale of securities. Equally, it is clear that state-law claims of the type asserted by the Complaint long-preceded SLUSA's preemptive statutory framework.

Before addressing particular SLUSA issues, it is important to note that critical factors that were found to justify federal preemption in other situations are not present in this case. In *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), the Supreme Court found state law preempted, reasoning that the deciding factor was that the legal duty at issue

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[11] *See James v. Gerber Products Co.*, 483 F.2d 944, 946 (6th Cir. 1973).

[12] The PSLRA is codified at 15 U.S.C. §§ 77z-1, *et seq.*; 78u-4, *et seq.*; for a general discussion of the PSLRA, *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, ___ U.S. ___, 127 S.Ct. 2499, 2508-09, 168 L.Ed.2d 179 (2007) (citing statutory text).

[13] Plaintiff does not contest the applicability of the first two points of this SLUSA preemption framework.

arose under federal law. *Davila*, 542 U.S. at 212-14. Here, the Complaint arises under state law.

In *Eastman v. Marine Mechanical Corp.*, 438 F.3d 544, 552 (6th Cir. 2006), the Court recognized that "[a] 'substantial' federal question involves the interpretation of a federal statute that actually is in dispute in the litigation and is so important that it 'sensibly belongs in federal court.'" *Id.* at 552 (citation omitted).[14] This case interprets only principles of state law and is in federal court only by virtue of diversity jurisdiction. "Moreover, Congress' withholding a private right of action from these statutes is an important signal to its view of the substantiality of the federal question involved." *Id.* There is no suggestion by Defendants that tbe federal securities laws provide a remedy for the conduct complained of in the Complaint. "Next, and perhaps more importantly," reasoned *Eastman*, "we find that accepting jurisdiction of this state employment action would be disruptive of the sound division of labor between state and federal courts envisioned by Congress." *Id.* at 553. State law has traditionally guaranteed remedies for breach of fiduciary duty, breach of contract, and other equitable violations. Thus, an overly expansive interpretation of SLUSA impermissibly threatens to disrupt a carefully established federal – state balance and portends an "enormous shift of traditionally" state law rules of decision to unintended federal regulation. *Id.*[15]

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[14] *See Alongi v. Ford Motor Co.*, 386 F.3d 716, 726 (6th Cir. 2004) (making preemption determination, in federal labor law context, by focusing upon whether individual cause of action arises from collective bargaining agreement, or some other source).

[15] *See Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 479, 97 S.Ct. 1292, 1304, 51 L.Ed.2d 480 (1997) (acknowledging the risk that inappropriate extension of the federal securities laws "would overlap and quite possibly interfere with state corporate law"); *see also Medtronic v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L.Ed.2d 700, (1996) (highlighting "the assumption that the historic police powers of the States were no to be superseded by [] Federal Act unless that was the clear and manifest purpose of

1. There is No Covered Security, Required for SLUSA Preemption

Dabit, supra, makes clear that SLUSA preemption is, generally speaking, limited to transaction-related violations of the federal securities laws, *not* claims arising under state law that are independent of securities transactions. *See*, *infra* (discussion of *Dabit*). Defendants identify no specific "covered security" required for SLUSA preemption, nor are there any such allegations. *See* Memorandum, at 7-17. Defendants' breaches of contractual and fiduciary duties to Beneficiaries is at the core of this case.

2. No Misrepresentation Alleged

The Complaint does not allege, either expressly or implicitly, any misrepresentations that would justify SLUSA preemption. Defendants seem to acknowledge this in their Memorandum, but argue that some phantom allegations that plaintiff *might have made, but did not*, somehow convert this into a Rule 10(b)-5 securities fraud class action. As discussed, below, courts have rejected defendants' efforts to re-cast a plaintiff's pleading based not upon the allegations made, but upon defendants' characterization of allegations that *might* have been (but were *not*) made.

Defendants' "misrepresentation" argument fails. Plaintiff has alleged breaches of duty imposed by state law. Defendants say, in effect, that 'plaintiff has alleged defendants breached *x*, *y*, and *z*, so this is really a misrepresentation case because the plaintiff is really alleging defendants failed to disclose their breach of *x*, *y*, and *z*.' That is not the law.[16] If it were the law, SLUSA would completely preempt state contract and

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Congress."); *In re DPL, Inc. Sec. Litig.*, 285 F.Supp.2d 1053, 1057-59 (S.D. Ohio 2003) (recognizing principles of comity and federalism applicable in shareholder litigation).

[16] *See Paru v. Mutual of America Life Ins. Co.*, 2006 U.S.Dist.LEXIS 28125, *9-*11 (S.D.N.Y. May 10, 2006) ("While this Court is mindful that plaintiff may not escape SLUSA preemption through artful pleading meant to disguise allegations of

fiduciary law. The statute is undisputedly not that broad. SLUSA is a sturdy hammer that does the job it was crafted to do; the statute is *not* an unrestrained sledgehammer that indiscriminately crushes hundreds of years of state law breach of contract, fiduciary duty, and related law.

Ohio courts recognize these principles.[17] The case of *Burns v. Prudential Securities* has generated at least four relevant opinions addressing SLUSA issues.[18] *Burns*, like *Magyery* (cited below), was essentially litigation where plaintiffs alleged that defendants liquidated plaintiffs' accounts without required approval, breaching the brokerage contracts. *See Burns I*, 116 F.Supp.2d at 918. Rejecting defendants' SLUSA argument, the Northern District of Ohio Court ordered remand in *Burns I*: "Courts have consistently declined to find violations of the Securities Act based on allegations of conversion, breach of contract, breach of fiduciary duty, and negligence." *See id.*, 116

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misstatements or omissions, it is similarly mindful that defendant may not recast plaintiff's Complaint as a securities fraud class action so as to have it preempted by SLUSA . . . . Many breach of fiduciary duty claims rest on allegations that because a defendant possessed expertise in his field, he was obligated to fulfill certain duties, which he failed ultimately to do. According to defendant's logic, a disguised allegation of non-disclosure hides behind each of these claims, and if such a claim is connected to the purchase or sale of a security, it is necessarily preempted by SLUSA. This result is at odds with the well-established principle that federal preemption provisions must be read with the presumption that Congress did not intend to displace state law entirely . . . . [S]LUSA preemption may be broad, it is not unlimited . . . ."); *Webster v. New York Life Ins.*, 386 F.Supp.2d 438, 442 (S.D.N.Y. 2005) ("Were we 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."); *Chellgren*, 2004 U.S.Dist.LEXIS 6066, at *36-*45 (same principle).

[17] Plaintiff's research uncovered no decision of the United States Court of Appeals for the Sixth Circuit citing SLUSA.

[18] *See Burns v. Prudential Securities*, 116 F.Supp.2d 917 (N.D. Ohio 2000) ("*Burns I*"); *Burns v. Prudential Securities*, 218 F.Supp.2d 911 (N.D. Ohio 2002) ("*Burns II*"); *Burns v. Prudential Securities*, 450 F.Supp.2d 808 (N.D. Ohio 2006) ("*Burns III*"); *Burns v. Prudential Securities*, 167 Ohio App.3d 809, 857 N.E.2d 621 (Ohio Ct. App., Marion Co. 2006) ("*Burns IV*").

F.Supp.2d at 924-25 n.2 (citing cases). In *Burns II*, another remand decision, the Court recognized that "to come within" SLUSA preemption "a court must conclude that the common law claim under state law should be characterized as a superseding SLUSA action to recover damages for 'a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security' or to enforce rights established by SLUSA." *See id.*, 218 F.Supp.2d at 915 n.2. The District Court held plaintiffs' allegations did not dictate SLUSA preemption. Particularly, the Court held that discovery of post-transaction misrepresentations by plaintiff in the Ohio Court of Common Pleas action did not justify SLUSA removal and preemption. *See id.* at 916.

Burns III, a post-*Dabit* decision, was a third attempt at removal on SLUSA grounds on the eve of trial. The federal Court rejected belated removal on procedural grounds and ordered remand, the Court also reconfirming its earlier holdings:

> Following . . . removal, Burns sought remand on the basis that their claims were for state law violations, and did not state a cause of action under SLUSA. Because the Complaint only contained allegations of unauthorized trading coupled with a later cover-up attempt, as opposed to allegations that Prudential misrepresented material facts or used a deceptive contrivance, remand was ordered. *Burns v. Prudential Securities*, 116 F. Supp.2d 917, 924 (N.D. Ohio 2000).

Burns III, 450 F.Supp.2d at 810; *see id.* at 810-11 (reconfirming *Burns II* holding).

Burns IV was an appeal by the Prudential defendants from final judgment awarding compensatory and punitive damages based upon causes of action for breach of contract, breach of fiduciary duty, and negligent supervision. *See id.*, 167 Ohio App.3d at 819, 857 N.Ed.2d at 628. Ohio's intermediate appellate court considered the various SLUSA issues raised, and held, also, that SLUSA did *not* apply to plaintiffs' case, essentially on the reasoning stated by the federal District Court Judges in *Burns I*, *II*, and

III. *See id.* at 839-41, 857 N.E.2d at 643-45. The Court recognized that "under the 'well-pleaded complaint rule,' a plaintiff who has both state and federal claims may avoid federal court by limiting his or her complaint to only the state law claims." *See id.* at 839, 857 N.E.2d at 644.

Norman v. Salomon Smith Barney, Inc., 350 F.Supp.2d 382 (S.D.N.Y. 2004), addresses these issues and carefully explains why SLUSA does not broadly disrupt existing state law remedies for breach of contract, breach of fiduciary duty, and unjust enrichment. *Norman* alleged that plaintiffs were promised that investment decisions would be made within certain guidelines, were promised "individual portfolio management," and were promised that such individual investment decisions would be "guided by the experience and 'breadth and depth' of Salomon's research department." *Id.* at 384. The plaintiffs sought to recover both improper fees charged and losses as a result of the wrongful conduct. *See id.* at 385. Similar to the *Norman* plaintiffs, Plaintiff here was promised high-level, individualized fiduciary services, but, in fact, was provided low-level, generalized services and Plaintiff here also alleges charging exorbitant and/or unreasonable fees. *See* Compl. (¶¶ 10, 25, 27-31, 34-35, 53). As here, the *Norman* plaintiffs alleged breach of contract and breach of fiduciary duty causes of action. *See Norman*, 350 F.Supp.2d at 386.

Norman rejected the SLUSA preemption argument, including rejecting the argument that plaintiffs alleged any misrepresentation claims as defined by SLUSA:

> [Defendant] Salomon cites to a litany of cases holding that actions against broker-dealers for the misrepresentations and omissions in their research analyst reports are covered by SLUSA . . . . However, all of those cases involve actions brought by purchasers or sellers of securities, alleging either that their decisions to purchase or sell were made in direct reliance on false or misleading analyst reports, or that the false or misleading

> analyst reports perpetrated a "fraud on the market" that caused the plaintiffs' losses from the purchase or sale of securities, even though some of the plaintiffs styled their claims as a common law breach of fiduciary duty . . . .

Id. *Norman* reasons that the plaintiff class alleged traditional state-law claims:

> [T]he Complaint simply contains no allegation of fraud, misrepresentation or omission "in connection with" the purchase or sale of securities. The claims at issue are for breach of contract and breach of fiduciary duty, neither of which has fraud or misrepresentation as an element . . . . While 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. *See MDCM Holdings Inc. v. Credit Suisse First Boston*, 216 F.Supp.2d 251, 257 n.12 (S.D.N.Y. 2002) (noting that facts underlying a complaint may give rise to multiple possible allegations, but "because the determination of whether SLUSA applies may only be made by reference to what a party has alleged, and not what it could have alleged, courts should be wary of a defendant's attempts to recast the plaintiff's complaint as a securities lawsuit in order to have it pre-empted by SLUSA.") . . . *Greater New York Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 105 (2d Cir. 1999)[].

Id. at 386-87. Thus, reasoned *Norman*, SLUSA had no application because no relevant misrepresentations were alleged:

> Here, the gravamen of the Complaint is plainly a straightforward breach claim: plaintiffs purchased a service (portfolio management) pursuant to a contract, paid the fees for that service under the contract, and now allege that they did not receive the full range of services paid for, and suffered damages as a result. Plaintiffs further allege that, in the course of providing some of the contracted-for services, defendant breached its fiduciary duty to plaintiffs to act in their best interests and not engage in activities that would place its interests in conflict with theirs. Regardless of the factual merits of these claims, they are not securities fraud claims, nor claims that depend on establishing material misrepresentations or omissions in connection with the purchase or sale of securities, within the meaning of SLUSA. *See Magyery v. Transamerica Financial Advisors, Inc.*, 315 F.Supp.2d 954, (N.D. Ind. Apr. 16, 2004) (breach of contract action for unauthorized trading is not preempted by SLUSA; "attempting to read a fraud claim into a breach of contract claim blurs the distinction between two separate causes of action and merges them into one."); . . . *MDCM*, 216 F.Supp.2d at 257 (allegations that defendant failed to carry out promises made in connection with a securities transaction are not fraud

> allegations and are not preempted by SLUSA); *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2001 U.S.Dist.LEXIS 15943, 01 Civ. 3013 (DLC), *aff'd*, 332 F.3d 116 (2d Cir. 2003) (although plaintiffs alleged misrepresentation, case does not fall within SLUSA because misrepresentations were about broker-defendant's "bargain with its accountholders" and "not sufficiently connected to the underlying securities").

Id. at 387. Using language strikingly similar to the factual scenario in this case, *Norman* held SLUSA did not apply:

> [U]nlike the plaintiffs in the cases cited by Salomon, plaintiffs here did not purchase or sell any securities to or from Salomon, or in the market generally. It is undisputed that the GPM accounts were discretionary custodial accounts and all decisions about the purchase and sale of securities for those accounts were made by employees of Salomon . . . . Plaintiffs' claim is simply that Salomon said it would do something in exchange for plaintiffs' fees, and then didn't do what it had promised. The fact that the actions underlying the alleged breach could also form the factual predicate for a securities fraud action by different plaintiffs cannot magically transform every dispute between broker-dealers and their customers into a federal securities claim -- the mere "involvement of securities [does] not implicate the anti-fraud provisions of the securities laws." *Spielman*, 2001 U.S.Dist.LEXIS 15943, 2001 WL 1182927 at *3.

Id. at 387-88.

Norman has been favorably cited in the post-*Dabit* decision, *LaSala v. UBS, AG*, 510 F.Supp.2d 213, 240 (S.D.N.Y. 2007). *LaSala* is instructive on the appropriate standard to apply in determining whether any misrepresentation sufficient to implicate SLUSA has been alleged. *LaSala* held SLUSA did *not* apply as to allegations that the defendant unlawfully laundered money, post-transaction, resulting from certain securities transactions. *See id.* at 243-44.

After *Dabit*, the *LaSala* Court invoked Judge Scheindlin's earlier decision in *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F.Supp.2d 258

(S.D.N.Y. 2004), to state the appropriate framework for determining whether any misrepresentation has been pled that would require SLUSA preemption:

> [T]he mere allegation of misrepresentations somewhere in the complaint is not sufficient for SLUSA preemption . . . .
>
> [I]n order for a claim to be preempted by SLUSA, the claim must sound in fraud. *See Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 341 F.Supp.2d 258, 269 (S.D.N.Y. 2004) (discussing this requirement and stating that "[a] claim sounds in fraud when, although not an essential element of the claim, the plaintiff alleges fraud as an integral part of the conduct giving rise to the claim.") . . . . In *Xpedior*, Judge Scheindlin articulated a test that captures this requirement of a connection between the misrepresentations or omissions alleged in the complaint and the claim or claims being advanced. She observed, "Each of these courts applied what I will call the 'necessary component' test, wherein a court must determine whether the state law claim relies on misstatements or omissions as a 'necessary component' of the claim. In this context, 'necessary component' encompasses both technical elements of a claim as well as factual allegations intrinsic to the claim as alleged." *Xpedior*, 341 F.Supp.2d at 266. This test is applied to the substance, rather than the face, of plaintiff's claim. *Id.* at 268 ("[T]he real question was whether the claim was based on fraudulent conduct, regardless of the appearance of the word 'fraud' or 'misrepresentation.'"). Under the necessary component test, "a complaint is preempted under SLUSA only when it asserts (1) an explicit claim of fraud (e.g., common law fraud, negligent misrepresentations, or fraudulent inducement), or (2) other garden-variety state law claims that 'sound in fraud.'" *Id.* at 266. Judge Scheindlin found that none of plaintiff's claims -- breach of contract, breach of the implied covenants of good faith and fair dealing, breach of fiduciary duty, or unjust enrichment -- required misrepresentations or omissions as a necessary element, none of them sounded in fraud, and thus they were not preempted by SLUSA . . . .
>
> The test articulated in *Xpedior* is a sensible way of identifying the types of claims SLUSA was intended to preempt. If merely making allegations of fraud somewhere in the complaint were sufficient to bring the case within the reach of SLUSA, a class action complaint for commission of an environmental tort, that also alleged that the company fraudulently altered its books and thereby deceived shareholders, would be preempted, even if the claim against the defendant had nothing to do with securities fraud.

See LaSala, 510 F.Supp.2d at 239-40.

Applying this framework in this case makes clear that Plaintiff and the Class have not alleged even a single misrepresentation or omission that would justify SLUSA preemption. Alleging breach of contract, breach of fiduciary duty, and unjust enrichment, Plaintiff has not alleged any cause of action for misrepresentation, omission or is otherwise cognizable under the federal securities laws. Further, looking at the allegations of the Complaint in its entirety, Plaintiff has *not* artfully pled allegations sounding in misrepresentation, labeled something else.[19] And, although the Complaint does not allege *any* misrepresentations or omissions (and Defendants have not persuasively cited any), *LaSala* makes clear that the misrepresentation must be a meaningful aspect of a plaintiff's claim for recovery to invoke SLUSA preemption: "the mere allegation of misrepresentations somewhere in the complaint is not sufficient for SLUSA preemption . . . ." *Id.* at 239. Other persuasive decisions have held, based upon allegations analogous to this case, that a plaintiff did not plead sufficient misrepresentation to justify SLUSA preemption.[20]

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[19] *See Xpedior*, 341 F.Supp.2d at 269 ("Nor do any of Xpedior's claims "sound in fraud." A claim sounds in fraud when, although not an essential element of the claim, the plaintiff alleges fraud as an integral part of the conduct giving rise to the claim . . . . Xpedior's Complaint contains no such allegations. To the contrary, Xpedior alleges only tbat DLJ acted contrary to its express and implied duties. That DLJ might, in fact, never have intended to perform under the terms of the contract is irrelevant; that is not what Xpedior is alleging. Xpedior's claims require no evidence of DLJ's mental state at all, nor has Xpedior made any allegations about DLJ's mental state at the time that the parties entered into the underwriting contract. Accordingly, Xpedior's claims do not sound in fraud.").

[20] *See Beary v. ING Life Ins. & Annuity Co.*, 2007 U.S.Dist.LEXIS 81694, *15-*25, Fed. Sec. L. Rep. (CCH) P94,507, *supra* (holding allegations that defendants improperly profited from plan investments held in trust was asserted as a state-law claim (for breach of fiduciary duty); rejecting argument of any misrepresentation sufficient for SLUSA preemption); *Gurfein v. Ameritrade, Inc.*, 2006 U.S.Dist.LEXIS 75374, *3-*5 (S.D.N.Y. Oct. 13, 2006) (holding allegation of defendant's promise to execute plaintiff's orders "instantaneously, i.e. within seconds," but failing to do so, was a "straightforward claim

Based upon the foregoing principles, SLUSA does *not* preempt Plaintiff's claims in this case because Plaintiff's operative pleading does not allege *any* misrepresentations or omissions. Nor are Defendants' arguments persuasive to the contrary. For example, Defendants argue that Plaintiffs' allegations that Defendants acted in bad faith equates to pleading a misrepresentation. *See* Memorandum, at 10-11. That is simply not so. A party can breach a contract in bad faith under state law just as easily as committing a misrepresentation in bad faith. Indeed, Ohio law recognizes the obligation of good faith and fair dealing as inherent in the contractual relationship. *See Littlejohn v. Parrish*, 163 Ohio App.3d 456, 462, 839 N.E.2d 49, 54 (Ohio Ct. App. 2005).

Just as unavailing, Defendants argue that Plaintiff's use of the word "scheme" equates to pleading a misrepresentation. *See* Memorandum, at 11. A "scheme" is a "plan," and one can plan to breach a contract just as easily as one can plan to commit a misrepresentation. *E.g.*, *Bergstein v. Jordache Enters.*, 767 F.Supp. 535, 540 (S.D.N.Y. 1991) ("In support, Bergstein points to his **allegation** that Jordache's pricing **scheme breached** Bergstein's **contract** . . . .") (emphasis added). Likewise, Defendants

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of breach of contract"; rejecting argument of any misrepresentation sufficient for SLUSA preemption); *Paru*, 2006 U.S.Dist.LEXIS 28125, at *6-*14 (holding allegation that defendant's allowing "market timing" to occur was traditional state-law breach of fiduciary duty claim; rejecting argument of any misrepresentation sufficient for SLUSA preemption); *Webster*, 386 F.Supp.2d at 439-42 (holding allegation of defendant's promise of 3 percent return on certain funds, but failing to so provide, was traditional state-law breach of contract claim; rejecting argument of any misrepresentation sufficient for SLUSA preemption); *Magyery v. Transamerica Financial Advisors, Inc.*, 315 F.Supp.2d 954, 957-62 (N.D. Ind. 2004) (holding allegation of defendants' reallocation of account assets, in violation of brokerage agreement, "alleges classic breach of contract"; rejecting argument of any misrepresentation sufficient for SLUSA preemption); *Xpedior*, 341 F.Supp.2d at 269 (holding allegation that underwriter capitalized on underpricing of IPO violated agreement, sufficient to allege state-law contract and related claims; rejecting argument of any misrepresentation sufficient for SLUSA preemption).

ineffectually equate an allegation of a conspiracy with necessarily pleading a misrepresentation (*see* Memorandum, at 12), but, again, this has no basis in fact: one can conspire to breach a contract.[21]

The astonishing scope of Defendants' position is laid bare at page 12 of their Memorandum, where they state: "At the heart of any broken promise is a misrepresentation." This position would preempt all of state contract law and transmogrify breach of contract claims into fraud claims. In effect, Defendants' argument is that any lawsuit in any way referencing securities is preempted by SLUSA. Of course, that is not the law and no court has even come close such a holding. Defendants wrongly invite this Court into legal error. Moreover, it is clear from Congress' careful drafting of SLUSA that **certain** suits involving securities and **certain** state-law causes of action and class actions were *not intended* to be preempted by SLUSA.

In addition, Defendants' arguments ignore the well-pleaded complaint rule; a plaintiff may refuse to plead a claim (or may refuse to plead a claim in a particular manner) as master of his or her complaint. Further, as an example, Defendants ignore the distinction between contract and tort in wrongly suggesting that any set of facts that may support a tort claim (e.g., misrepresentation) may not also, likewise, support an actionable state-law breach of (contractual or fiduciary) duty claim.[22]

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[21] *See Pedwell v. First Union Nat'l Bank of North Carolina*, 275 S.E.2d 565, 566 (N.C. Ct. App. 1981) (breach of contract forms a basis for a civil conspiracy claim); *Columbia Real Estate Title Ins. Co. v. Caruso*, 39 Md.App. 282, 289, 384 A.2d 468, 472-73 (1978) (recognizing that a breach of contract is an "unlawful act" sufficient to support a cause of action for civil conspiracy).

[22] In this regard, SLUSA preemption may be analogized as the converse of the federal so-called "filed rate" or "filed tariff" doctrine, which, generally speaking, allows the

For these reasons, Defendants have failed their burden to establish the existence in the Complaint of any misrepresentation or omission that would justify SLUSA preemption in this case.[23]

3. Any Misrepresentation Not "In Connection With" Purchase / Sale of Securities

Since Defendants do not identify any specific misrepresentation/omission in Complaint (*see* Memorandum, at 12 ("[p]laintiff strategically avoids using the word 'misrepresent'")) and there are none, Defendants cannot meet their required burden to establish that any misrepresentations or omissions were made "in connection with" the purchase or sale of securities. Under the Supreme Court's *Dabit* decision, any alleged fraud must at least "'coincide' with" the securities transaction. *See id.*, 547 U.S. at 85. As one post-*Dabit* decision has recognized, there must be a sufficient nexus between any misrepresentation and a securities transaction. *See LaSala*, 510 F.Supp.2d at 240-41 – give me the district court name (citing cases). "Where the alleged conduct giving rise to

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pleading of certain tort claims, including misrepresentation, but does **not** allow the pleading of a breach of contract claim arising from the same underlying facts. *See Crump v. WorldCom, Inc.*, 128 F.Supp.2d 549, 553-54, 557-59 (W.D. Tenn. 2001). Of course, SLUSA presents the converse, allowing breach of duty claims under state law (including contractual and fiduciary duties), but not allowing certain misrepresentation tort claims to be pled including as arising from the same underlying facts. To the extent this line of reasoning is meaningful to the Court, *Crump* and the Sixth Circuit's decision in *In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987), are persuasive.

[23] A case such as *Siepel v. Bank of America, N.A.*, 239 F.R.D. 558 (E.D. Mo. 2006), cited by Defendants (*see* Memorandum, at 4-5), even if correctly decided (it is currently on appeal) is distinguishable: the *Siepel* complaint contained numerous allegations that information was concealed from plaintiffs; the complaint also alleged that certain information was either misrepresented or omitted from disclosures made to the *Siepel* plaintiffs. *See also id.* at 569 ("[*Green v. Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002)] is factually distinguishable from this case . . . . In his amended complaint, the [*Green*] plaintiff alleged that the defendant promised to provide 'real-time' information but instead provided stale information. *Id.*[at 593.] The [*Green*] plaintiff did not allege that he actually used the stale information to purchase or sell a security. *Id.* at 597. Thus, the case involved a typical breach of contract claim . . . .").

the claim is too far removed from a securities transaction, the 'in connection with' requirement is not met." *Id.* at 240.

In this case, even assuming, *arguendo*, the existence of a claim of misrepresentation or omission in the Complaint, there is no sufficient nexus between any misrepresentation/omission and either the federal securities laws or the essential elements of Plaintiff's claims. Plaintiff alleges that Defendants promised one type of fiduciary services but, in fact, delivered something materially different and less valuable; Plaintiff also primarily alleges Defendants improperly charged fees and expenses related to these services and, in the context thereof, breached their fiduciary duties to the Plaintiff and other similarly affected beneficiaries. *These fiduciary services provided by Fifth Third (as well as the fees and expenses imposed by Defendants in connection therewith) were provided regardless of whether any securities were bought or sold by the Bank for the Beneficiaries' accounts*. *Cf. Norman*, 350 F.Supp.2d at 384 (addressing allegations that plaintiffs were promised certain investment services; proposed class paid defendant an annual fee based on the market value of account assets). Given that these services provided and fees charged were to occur regardless of any particular securities transaction, (and given the absence of any allegation that any relevant trust agreement (or the trust relationship, otherwise) *required* Defendants to allocate certain assets (e.g., securities) to Beneficiaries' accounts,) there is simply no nexus established in the Complaint between Plaintiff's allegations and the purchase or sale of securities by Fifth Third. The "in connection with" requirement of SLUSA is not met.[24]

[24] Plaintiff also alleges that Fifth Third breached its fiduciary duties by self-interestedly managing assets in Beneficiaries' accounts and, *inter alia*, investing those assets against Beneficiaries' best interests.

A Sixth Circuit District Court case makes this point, with clarity. *See French v. First Union Securities*, 209 F.Supp.2d 818 (M.D. Tenn. 2002). Memorably, *French* was a proposed class action involving plaintiffs' allegations that First Union withheld relevant information about a particular broker, Mr. Phillips – to wit, that he used his position to have clients invest in his own venture, a cross-dressing, cowboy night club named "Cowboy LaCage." *See id.* at 823. The *French* plaintiffs alleged a classic state-law breach of fiduciary duty claim:

> Plaintiffs assert that FUS was aware of Mr. Phillips' conduct, but failed to disclose it to Plaintiffs. Plaintiffs contend that FUS had a duty to disclose these facts, and that if Plaintiffs knew of these facts, they never would have allowed Mr. Phillips to act as their broker.

Id. Addressing SLUSA's "in connection with" requirement, the Court stated:

> [W]here a fraudulent scheme involves a simultaneous security transaction and breach of fiduciary duty, the breach is considered to be "in connection with" securities sales . . . . However, in order for a breach to be "in connection with" securities sales, the breach of the fiduciary duty must do more than simply implicate securities. Rather, there must be a showing of a nexus between the fraud and a securities transaction. *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993).

Id. at 824 (citation omitted). The essence of *French*'s reasoning is clear: where the alleged complained of misconduct is **independent** of any securities transaction (e.g., the misconduct would have occurred regardless of any particular securities transaction), there is not a sufficient nexus to establish SLUSA's "in connection with" requirement. *See id.* Hence, *French* holds that claims arising from a broker's provision of services (as opposed to matters related to individual securities transactions) are *not* subject to SLUSA. *See id.* at 827-28.[25]

[25] *See also id.* (citing *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 (2d Cir.) (Friendly, J.) (holding that misrepresentations or omissions "involved in a securities

Dabit does not direct that this court dismiss the Plaintiff's case under SLUSA, to the contrary. The *Dabit* plaintiff's theory of the case had a transaction-related basis and sounded in fraud. *See id.* at 75 n.2, n.2 (detailing allegations that subject stock prices were artificially inflated; that price manipulation occurred "through a variety of deceptive devices, artifices, and tactics"). The Supreme Court rejected the argument that bringing a case on behalf of proposed holders (i.e., those who continued to hold the security, as opposed to selling it) was *not* a claim in connection with the purchase or sale of stock that would implicate SLUSA. The Court acknowledged that it was not relying upon the text of Rule 10b-5 itself, which, by its plain language, would allow preemption for only a claim "in connection with the **purchase** or **sale**" of securities (emphasis added). *See id.* at 84, 126 S.Ct. at 1512-13. Rather, more broadly, under the Court's precedents, SLUSA preemption occurs if "the fraud alleged 'coincide[s]' with a securities transaction." *Id.* at 85, 126 S.Ct. at 1513 (citation omitted). The basis of *Dabit*'s holding is that because the proposed class, by necessity, purchased securities, and their theory of damages presumes the valuation of the securities (i.e., sale) – or, that the holding of a security is but the decision not to sell it – then the asserted claims in *Dabit* "coincide[d]" with the purchase or sale of securities.

Dabit found SLUSA preemption where recovery was sought for *fraudulent, transaction-related alleged wrongs*. *See id.* at 86-87, 126 S.Ct. at 1514 (strongly

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transaction but not pertaining to the securities themselves" could not form the basis of a § 10(b) violation), *cert. denied*, 469 U.S. 884, 105 S.Ct. 253, 83 L.Ed.2d 190 (1984); *Siegel v. Tucker, Anthony & R.L. Day, Inc.*, 658 F.Supp. 550, 553 (S.D.N.Y. 1987) (holding that promises of "conservative stewardship" are not sufficiently "in connection with" the purchase or sale of covered securities); *Laub v. Faessel*, 981 F.Supp. 870 (S.D.N.Y. 1987) (holding failure to disclose lack of qualifications was not within Rule 10(b)'s "in connection with" language)).

suggesting SLUSA's reach extends only to state-law causes of action that a have a federal analogue); *id.* at 87 n.12, 126 S.Ct. at 1514 n.12 (same); *id.* at 88-89, 126 S.Ct. at 1515 (same). SLUSA does not apply to this case because it is *not* a federal securities case but, instead, is a traditional breach of state law action. *See id.* at 88-89, 126 S.Ct. at 1515.

The post-*Dabit* decision by the Seventh Circuit Court of Appeals in *Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir. 2006), *cert. denied*, ____ U.S. ____, 127 S.Ct. 1492, 167 L.Ed.2d 244 (2007), reinforces these points. As the Seventh Circuit found, *Gavin* was essentially a consumer fraud case where the shareholders alleged that the contractor sent them a fraudulent letter that urged the proposed class to exchange their securities shares for the surviving corporation's stock or cash through the contractor for a fee but did not mention that the shareholders could exchange their shares for stock through an exchange agent at no charge. *See id.* at 636-37. *Gavin* was a case where there was alleged fraud and there was the exchange of securities, yet still no SLUSA preemption was found. As *French* and *Dabit* illustrate, in *Gavin* the alleged wrongdoing did not "coincide" with federal securities transactions. *See id.* at 639 (citing *Chemical Bank, supra*). Moreover, as *Dabit* indicates, the Seventh Circuit found that the *Gavin* plaintiffs were not pursuing a federal securities case but were, instead, pursuing a traditional state-law case. *See id.* at 639-40. Stated another way, "but for" causation (i.e., the wrong would not have been committed "but for" the purchase or sale of securities) is ***not*** sufficient to find SLUSA preemption. *See id.* at 639; *Green v. Ameritrade, Inc.*, 279 F.3d 590, 599 (8th Cir. 2002) ("Misrepresentation claims come in many forms that do not necessarily involve any purchase or sale of a security.").

Indeed, *Gavin* presents a much stronger case for SLUSA preemption than this case, given that in *Gavin* fraud was plainly alleged and the transfer of particular securities was implicated. In this case, Plaintiff primarily alleges failures to provide services required to be provided in the context of a fiduciary/beneficiary relationship, as well as the charging of unjustified fees and expenses, all conduct independent of any securities transactions. Defendants have not met SLUSA's "in connection with" requirement sufficient to prove SLUSA preemption.[26]

B. Rule 12(b)(6) State-law Issues

Defendants also move to dismiss Plaintiff's state law causes of action on traditional Rule 12(b)(6) grounds. Plaintiff addresses those arguments, in turn:

1. Count I – Breach of Fiduciary Duty

In Count I, Plaintiff states a state law cause of action for breach of fiduciary duty, including claims under the common law and Ohio Revised Code ("ORC") § 1339.53, renumbered ORC § 5809.02. Defendants invoke ORC § 1111.13 in seeking dismissal, which is the equivalent of arguing an affirmative defense in an attempt to immunize conduct that would otherwise be actionable. Defendants' purported invocation of ORC § 1111.13 fails, both because it seeks to have court effectively grant summary judgment in their favor (absent required discovery[27]) and resolve, as a matter of law, issues properly resolved only by the trier of fact after discovery. Further, resolution of the argument

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[26] Footnote 10 (p. 16) of Defendants' Memorandum argues the operative pleading is subject to dismissal for failure to comply with F.R.C.P. 9(b), stating, among other things, fraud is required to be pled with specificity. However, Plaintiff has not alleged a fraud cause of action and the Rule is simply inapplicable to this case.

[27] Defendants have made a Rule 12(b)(6) motion, only, not a Rule 56 motion for summary judgment. Fact-intensive issues are appropriate for resolution only after discovery at the summary judgment stage, not in a preliminary Rule 12(b)(6) motion context prior to discovery.

interposed by Defendants necessarily requires the Court's improper consideration of facts outside of Plaintiff's operative pleading.

Defendants' ORC § 1113.13(H) argument is improper. Whether considered as issues not properly resolved in a motion to dismiss or as matters outside of Plaintiff's operative pleading, Defendants' ORC § 1113.13(H) argument implicates at least the following issues: (i) whether the Bank is a "trust company" under the statute (*see also* ORC § 1101.01, § 1101.06); (ii) whether any other identified company is an "affiliated investment company"; (iii) whether any fee charged was "reasonable"; (iv) whether any "services" were "provided to an affiliated investment company"[28]; (v) whether any "fee" was charged in a manner required by the statute; and (vi) whether annual disclosure occurred, as required by the statute. *See* ORC § 1113.13(H). None of these fact-based issues – much less all of them – are plainly raised by the Complaint. Of course, it is a settled rule of pleading that in a Rule 12(b)(6) motion to dismiss, a Defendant's averments outside the operative pleading are disregarded in resolving the motion.[29]

Likewise, the foregoing issues are properly resolvable only by the trier of fact (including after discovery), not by preliminary motion. For example, the case of *Dejaiffe v. KeyBank USA Nat'l Assoc.*, 2006 Ohio 2919 (Ohio Ct. App., Lucas Co. 2006), involved a breach of fiduciary duty claim in a trust context. The Court noted that issues were to be resolved by an objective, reasonable trustee standard (*see id.* at P17), and that

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[28] Particularly, ORC § 1113.13(H) appears to contemplate where the trust company charges *x* to the beneficiary and *y* to the affiliated investment company; the Complaint can fairly be read for the allegation that the Bank charges *x* and *y* to the Class. *See* Compl. (¶ 31).

[29] In assuming the truth of all facts and reasonable inferences to be drawn from a complaint, a District Court "must disregard the contrary allegations of the opposing party." *Seafarers Welfare Plan v. Philip Morris, Inc.*, 27 F.Supp.2d 623, 626-27 (D. Md. 1998) (citing *A.S. Abell Co. v. Chell*, 412 F.2d 712, 715 (4th Cir. 1969)).

the trial court erred in granting summary judgment because evidence needed to be received and weighed by the trier of fact to determine reasonableness of the trustee's conduct. *See id.* at P23. Defendants' motion to dismiss Count I is procedurally improper.

Furthermore, Defendants cite no authority for the proposition that a defense to negligence (i.e., "reasonable[ness]" in the words of ORC § 1113.13(H)) can exculpate an intentional, self-interested breach by the trustee, and Plaintiff submits that no such authority exists given the fiduciary nature of the relationship at issue in this litigation. As one court has reasoned, in the directly analogous agent-principal context:

> [A]n agent is under a strict duty to avoid any conflict between his or her self-interest and that of the principal: "'It is an elementary principle that the fundamental duties of an agent are loyalty to the interest of his principal and the need to avoid any conflict between that interest and his own self-interest . . . .'"
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> * * * * *
>
> Where an agent breaches a duty to the principal and profits from the breach, the principal may maintain an action to recover those profits for her or himself . . . . RESTATEMENT (SECOND) OF AGENCY § 388 (1958) ("An agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.").

Green v. H & R Block, 355 Md. 488, 517-19, 735 A.2d 1039, 1055-56 (1999) (citations omitted). Defendants may not knowingly breach their fiduciary duties and invoke ORC § 1113.13(H) in this Court to exculpate themselves.[30]

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[30] Notably, as well, other than Defendants' procedural arguments (including the ORC § 1113.13(H) argument), Defendants make no argument that Plaintiff has not substantively stated a cause of action for breach of trust / fiduciary duty under Ohio law in Count I. *See 1st Federal Savings & Loan Ass'n v. U. S. Sterling Capital Corp.*, 2005 U.S.Dist.LEXIS 3480, *6-*7 (N.D. Ohio March 7, 2005) (discussing breach of fiduciary duty cause of action under Ohio law); *Cassner v. Bank One Trust Co.*, 2004 Ohio 3484,

2. Count II – Unjust Enrichment

Defendants also move to dismiss Plaintiff's unjust enrichment cause of action, brought against both Defendants. Defendants assert ORC § 1113.13(H), an argument that Plaintiff has already addressed, *supra*.

In addition, Defendants argue that Plaintiff may not assert an unjust enrichment cause of action because a contractual relationship exists between Plaintiff and the Bank. In the first instance, the Complaint does not allege a contractual relationship between Plaintiff and Bancorp, so this argument fails on this ground as to Bancorp. Also, Defendants argue that Plaintiff does not state his breach of contract claim with sufficient clarity, so if that is true (and, as discussed below, it is not), then the asserted principle would not apply to this claim against the Bank, on this ground, as well.

Moreover, Defendants cite nothing in the operative pleading that establishes that Plaintiff and the Class are express parties to the agreement; Plaintiff alleges an intended beneficiary status regarding the agreement. Further, federal decisions have recognized that although the general rule is that the equitable remedy of unjust enrichment is unavailable if an express agreement exists between the parties, equally, an exception to that rule (permitting recovery) is where the defendant is unjustly enriched as to matters outside the scope of the relevant agreement. In *Drysdale v. Woerth*, 153 F.Supp.2d 678 (E.D. Pa. 2001), *aff'd mem.*, 53 Fed.Appx. 226 (3rd Cir. 2002), the Court made this very

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at P28, P29 (Ohio Ct. App., Franklin Co.) (same – breach of trust), *appeal dismissed*, 817 N.E.2d 407 (Ohio 2004). Also, as discussed, below, Plaintiff has stated a cause of action for breach of contract related to the promise of certain (high-level, individualized) trust services not delivered. Plaintiff alleges that low-level, standardized services were provided by Fifth Third to him and other similarly situated Beneficiaries and avers, as well, that this conduct is an actionable breach of fiduciary duty (including to the extent the Court would determine such allegations do not state a cause of action for breach of contract).

point: "Although unjust enrichment is inapplicable when the relationship between the parties is founded on a written agreement or express contract, an unjust enrichment claim may go forward when one party performs services wholly outside the scope of the contract." *Id.* at 687. Other federal decisions are in accord. *See Still v. Regulus Group, LLC*, 2003 WL 22249198, *6 (E.D. Pa. Oct. 1, 2003) (same; citing cases); *Forman v. Banfe*, 1992 WL 38397, *4 (E.D. Pa. Feb. 21, 1992) (same); *see also Annecca Inc. v. Lexent, Inc.*, 345 F.Supp.2d 897, 905 (N.D. Ill. 2004).

A motion to dismiss an alternatively pled equitable remedy is properly denied at the preliminary stage where the contours of the parties' agreement (if any) and the precise nature of the parties' conduct are subject to discovery. *See Triple Canopy, Inc. v. Moore*, 2005 U.S.Dist.LEXIS 14219, *43-*44 (N.D. Ill. July 1, 2005) (same); *Foster v. Kovner*, 840 N.Y.S.2d 328, 333 (N.Y. Ct. App. 2007) (same); *see also id.* ("[T]he adequacy of the compensation cannot be resolved on a motion to dismiss . . . .").

3. Count III – Breach of Contract

Defendants' argument that Plaintiff does not allege a breach of contract cause of action with sufficient specificity fails. Regarding that cause of action,

> [u]nder Ohio law, the elements of breach of contract are: (1) existence of a valid contract; (2) performance by the plaintiff; (3) non-performance by the defendant; and (4) damages resulting from the defendant's breach.

Yoder v. Hurst, 2007 Ohio 4861, at P27 (Ohio Ct. App., Franklin Co. 2007). Plaintiff and his children "performed," and did not breach, the contracts with the Bank embodied in the trust agreements that established the Segal Trusts. They were passive third party beneficiaries and were not required to do anything to satisfy the "performance" requirement of the cause of action.

Further, Plaintiff has alleged specific terms of a contractual relationship, that those terms were breached, and how the breach occurred. Plaintiff alleges that the Bank administers fiduciary accounts for himself, his children and the members of the Class and contractually offered to those who established the fiduciary relationships with the Bank a variety of services, including purportedly customized management of Beneficiaries' assets.. *See id.* (¶ 10, 25). Plaintiff alleges that Defendants breached their contractual obligations to himself and the other Beneficiaries by acting as they did including, *inter alia*, failing to deliver the contractually obligated fiduciary services and by otherwise acting wrongfully in their own self-interest. *See id.* (¶¶ 25, 34). More particularly, as alleged, the Bank, currently using the "Fifth Third" name, agreed to provide as an element of the fiduciary relationship (including through its website and otherwise) "customized trust solutions" in portfolio management. *See id.* (¶ 27). Plaintiff alleges that the Bank breached its promise by exploiting opportunities to standardize management of the assets in the fiduciary accounts of Plaintiff, his children and those of other Beneficiaries for Defendants' selfish and wrongful gain. *See id.* Plaintiff further alleges, specifically, that the Bank does not provide "experienced trust professionals," as it was contractually obligated to do; that the Bank does not service fiduciary accounts in an individualized manner, but provides standard and/or generally low-level service; and that the Bank breaches duties by not having adequate regard for Beneficiaries' tax circumstances. *See id.* (¶¶ 28, 34, 35(e)).[31]

[31] Also, the Bank failed to make adequate "suitability" determinations, and relied upon computerized models instead of providing the customized, individualized attention to which the Beneficiaries were entitled. *See id.* (¶ 35(f)). Plaintiff alleges that the Bank's employees, acting under pre-determined Bank and Bancorp corporate policy, provide non-individualized planning "advice" and services. *See id.* (¶ 35).

Finally on this point, Plaintiff adequately alleges damages. "'The general measure of damages in a breach of contract case is the amount necessary to put the non-breaching party in the position that the party would have occupied had the breach not occurred.'" *Martin v. Lake Mohawk Property Owners Assoc., Inc.*, 2007 Ohio 6432, at P35 (Ohio Ct. App., Carroll Co. 2007) (citation omitted). With respect to the provision of services not in conformance with contractual obligations, this necessarily allows for the possibility of recovery of damages for the difference between the value of the services promised less the value of the services delivered – one form of traditional contract damages. *See id.* at P29, P35; *see also Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006) (applying Ohio law; applying principle in class action context); *cf. id.* at 554 ("[T]he difference in value between conforming and non-conforming goods is better litigated in a class-wide context.").[32] Plaintiff and the Class have properly stated a cause of action for breach of contract.

4. Counts I and IV – Statute of Limitations

Defendants invoke a four-year statute of limitation as to Plaintiff's breach of fiduciary duty causes of action. This argument fails on numerous grounds. The case of *Cassner v. Bank One Trust Co.*, 2004 Ohio 3484 (Ohio Ct. App., Franklin Co.), *appeal dismissed*, 817 N.E.2d 407 (Ohio 2004), is very instructive.

Initially, *Cassner* notes that although a breach of trust claim is equitable in nature, it is subject to the statute of limitation at law *if* brought after the termination of the trust.

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[32] Similarly, the possibility exists of recovery for Plaintiff and the Class if it can be proven what would have occurred had the promised services been provided, assuming such damages were reasonably foreseeable. *See Crawn v. Croxton*, 1987 Ohio.App.LEXIS 6492, *9-*11 (Ohio Ct. App., Stark Co. April 6, 1987) (citing *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

See id. at P29. "The statute of limitations on a claim for breach of fiduciary duty premised upon a tortious breach of trust will not begin to run while the trustee continues to exercise any of his powers over the trust res." *Id.* at P37. Defendants have pointed to nothing in the Complaint that would indicate the date of a termination of Defendants' exercise of trust authority – needed facts are not presented, much less established as undisputed – this issue can not be resolved by preliminary motion to dismiss. *See Levitt v. Riddell Sports (In re MacGregor Sporting Goods)*, 199 B.R. 502, 516 (Bankr. D.N.J. 1995) ("The Court finds that the question regarding tolling of the statute of limitations involves factual issues which cannot be resolved in the absence of discovery. The tolling issue cannot be resolved on a motion to dismiss . . . .").[33]

Likewise, any tort must be complete for the statute of limitations to run (*see Owner-Operator Indep. Drivers Assoc. v. Arctic Express, Inc.*, 2003 U.S.Dist.LEXIS 4217, *18-*20 (S.D. Ohio Jan. 29, 2003), and, again, such facts establishing that date (and any related inferences) are not established unequivocally by the Complaint. Also, a fiduciary relationship provides the legal obligation to speak, making equitable tolling applicable in the context of an alleged tortious omission. *See Doe v. Archdiocese of Cincinnati*, 2006 Ohio 2525, P48, 849 N.E.2d 268, 279 (Ohio 2006) (citing *Martinelli v. Bridgeport Roman Catholic*, 196 F.3d 409, 430 (2nd Cir. 1999)). Finally on this point, the Complaint alleges causes of action on behalf of Plaintiff's children who are minors (*see id.*, ¶¶ 1, 45), thus tolling the running of any statute of limitation under ORC § 2305.16

[33] Similarly, regarding the running of any statute of limitation, the termination of a trust must be "unequivocal[]." *See Cassner*, 2004 Ohio 3484 at P42. Again, Defendants do not present the facts on this point, but even if facts were presented, a motion to dismiss is not a procedurally proper mechanism to resolve disputed facts and/or inferences. Even if Defendants could establish these facts and inferences in their favor, a "discovery rule" analysis would still be appropriate. *See id.* at P48.

until they reach majority. Thus, even if, following a more developed record, Plaintiff's individual claims were to suffer some infirmity due to the running of a limitations period, the claims he has asserted on behalf of his minor children remain viable and unaffected.

5. Count V – Breach of Fiduciary Duty (Individual Segal Claim)

Lastly, Defendants seek the dismissal of Plaintiff's individual cause of action for breach of fiduciary duty. They argue, in effect, that it is clear from the face of the Complaint and two purported appraisals that Defendants have proffered that the Bank acted reasonably and obtained fair market value for the West Clifton Avenue building (the "Building"). *See* Compl. ¶¶ 93-102. Defendants attempt, once again, effectively to introduce matters beyond the operative pleading (e.g., a motion for summary judgment), improper in the Rule 12(b)(6) motion context, and lead the Court to reversible error.

First of all, it is not possible for the Court to reasonably make a fair market value determination in the context of a Rule 12(b)(6) motion to dismiss.[34] *See Foster*, 840 N.Y.S.2d at 333 ("[T]he adequacy of the compensation cannot be resolved on a motion to dismiss . . . ."). This is particularly so when Defendants have gone well beyond the four corners of the Complaint to introduce appraisals the legitimacy of which are challenged in the Complaint (Compl. ¶ 96).

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[34] Defendants attach two appraisals to the Memorandum as Exhibits O and P. Although Defendants cite *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997), for the proposition that the appraisals can be considered in a motion to dismiss, Plaintiff disputes that – the Court's consideration of such a fact-laden issue is even remotely appropriate. Although Plaintiff has challenged the legitimacy and circumstances of the appraisals carried out by Fifth Third in connection with the sale of the Building, Defendants' reference to the purported appraisals in no way establishes their authenticity or the accuracy of matters stated therein. The Complaint, at ¶ 96, specifically alleges that whatever appraisals were carried out were not accurate and/or not reasonable. Further, the broader allegations of the Complaint establish the alleged unreasonableness of the sale of the Building by the Bank under the circumstances described therein even if the appraisals came in at the purported values they did.

Next, Plaintiff plainly alleges that is was unreasonable for the Bank to sell the Building, in the manner and under the circumstances alleged. *See* Compl. ¶¶ 94-100. Plaintiff alleges that the Building was generating a consistent return on investment of approximately 11.5% annually (*see id.* at ¶ 94), and the plain inference is that the investment of the net, after-tax proceeds of the sale were not anticipated (and, in fact, did not) come anywhere close to the level of that sustained performance; rather, the Bank sold the Building for its own self-interested purposes, unreasonably and in knowing breach of fiduciary duties. *See id.* ¶¶ 93-102.

Additionally, Plaintiff alleges the sale of a nearby parcel with a footprint of half the size of the Building was sold for $1.6 million (*see id.* ¶ 99) – suggesting the fair market value of the Building was well in excess of the price realized in the Bank's sale of it. The sale of the building for $828,000 was unreasonable waste, carried out by the Bank for self-interested purposes.

Lastly, as discussed, above, Defendants cite no authority for the proposition that a defense to negligence (i.e., "reasonable[ness]" in the words of ORC § 1113.13(H)) can exculpate an intentional, self-interested breach by the trustee. *See*, *supra*, *Green*, 355 Md. at 517-19, 735 A.2d at 1055-56. Fact-intensive issues are appropriate for resolution only after discovery at trial or the summary judgment stage, not in a preliminary Rule 12(b)(6) motion context prior to discovery.

V. Conclusion

For each of these reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion To Dismiss The Amended Complaint.[35]

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[35] To the extent the Court perceives any deficiency in the Complaint that is curable, Plaintiff conditionally requests leave to amend to cure any deficiency. In *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222, (1962), the Supreme Court announced that, under Rule 15(a), courts should liberally grant plaintiffs leave to amend their complaints. *See Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of such filing to ECF participants.

/s/ Marshall N. Perkins
Marshall N. Perkins