

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

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

**RESPONSE TO PLAINTIFF’S NOTICE OF SUPPLEMENTAL AUTHORITY IN
OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS AMENDED COMPLAINT**

On November 30, 2007, defendants Fifth Third Bank N.A. and Fifth Third Bancorp (collectively, “Fifth Third”) moved to dismiss Plaintiff’s Amended Complaint in this matter. This motion is now fully briefed. On February 27, 2008, Plaintiff filed a notice of supplemental authority [Doc. No. 26] (the “Notice”). Plaintiff’s Notice cites two newly decided cases. Neither case supports overruling Fifth Third’s Motion to Dismiss.¹

The first case is *Cheatham v. Kentucky Lottery Corp.*, 2008 U.S. Dist. LEXIS 1391 (W.D. Ky. 2008). The facts of *Cheatham* could hardly be more different than the facts of the present case. *Cheatham* concerns a dispute between the Kentucky Lottery Corporation (“KLC” or “the Lottery”) and its employees. Rather than participating in the federal government’s social security program, the Lottery maintains its own retirement system. *Id.* at *1. The employees sued the Lottery claiming that the Lottery misstated the advantages of the Lottery’s retirement plan and that the employees would have received superior treatment in the social security

¹ Capitalized terms used herein have the meaning ascribed to them in Fifth Third’s Motion to Dismiss the Amended Complaint [Doc. 22] and Fifth Third’s reply brief in support of that motion [Doc. 25]. Also, rather than repeat the standards for SLUSA preemption in this pleading, Fifth Third incorporates herein by reference the relevant sections of its prior pleadings.

system. *Id.*² The Lottery removed the action to federal court pursuant to SLUSA and the putative class moved to remand.

The *Cheatham* Court held that SLUSA did not apply and granted the motion to remand. The court ruled that the Lottery did not establish the “in connection with” requirement because rather than a misrepresentation in connection with the purchase of a security, “the crux of Plaintiffs’ complaint is that KLC misrepresented the terms of their employment.” *Id.* at *8. The Lottery’s alleged misrepresentations “had nothing to do with the trading of any particular security and any misrepresentation or omission by KLC did not affect the value of the KLC Plan....” *Id.*

Unlike *Cheatham*, where the allegations had “nothing to do with the trading of any particular security,” the allegations in the Amended Complaint here are tied directly to the Fifth Third mutual funds. *See* Motion to Dismiss [Doc. 22] at 14-17; Reply Brief in Support of Motion to Dismiss [Doc. 25] at 14-19 (describing how the allegations of wrongdoing were inextricably linked to the purchase of securities). Indeed the allegations in the Amended Complaint are based on supposed wrongdoing associated with selecting one “particular security” (the Fifth Third mutual funds) as opposed to other potential investments. And while the allegations in the complaint in *Cheatham* did not affect the value of the KLC Plan, the *sine qua non* of the Amended Complaint in this case is that Fifth Third’s purchase of the Fifth Third mutual funds damaged the trusts and other fiduciary accounts managed by Fifth Third.³

² For additional information, the *Cheatham* complaint is attached as Exhibit A.

³ While the facts of *Cheatham* are far different than the present case, one legal principle acknowledged there is relevant and supports the arguments advanced in Fifth Third’s Motion to Dismiss; namely that SLUSA is an express exception to the well-pleaded complaint rule. The Court will recall that Plaintiff here argued that he was able to control the applicability of SLUSA pursuant to the well-pleaded complaint rule. *See* Plaintiff Opposition [Doc. 23] at 8-10, 22. Fifth Third pointed out that Plaintiff’s argument ignored well-settled jurisprudence holding that SLUSA provides an exception to the well-pleaded complaint rule. Reply Brief in Support of Motion to Dismiss [Doc. 25] at 4-5. *Cheatham* joins the long line of cases acknowledging that SLUSA is an express exception to the

The recent slip opinion in *Hughes v. LaSalle Bank*, (02 Civ. 6384 (RMB)) also does not inform the issue before the Court. In *Hughes*, the defendant attempted to establish federal jurisdiction pursuant to the removal provision of SLUSA. The court ruled that the defendant did not meet the elements of SLUSA preemption because the plaintiff's proposed second amended complaint is "stripped of all allegations of fraud and misrepresentation." *Hughes*, slip. op. at 11.

The *Hughes* slip opinion contains no discussion of what allegations were contained in the proposed second amended complaint. Plaintiff's counsel (one of whom, Mr. Greenfield, is also counsel in *Hughes*) did not submit the *Hughes* proposed second amended complaint with his Notice and the proposed complaint is not available on the Southern District of New York's CM/ECF system.⁴ It is unclear how Plaintiff expects the Court to analyze the applicability of *Hughes* if the Court (to say nothing of Fifth Third) has no idea what the allegations are in *Hughes*. In any event, Fifth Third already has explained how the Amended Complaint in this matter is not stripped of misrepresentations, but rather remains rife with allegations of misrepresentations made by Fifth Third in connection with the sale of a security. *See* Motion to Dismiss [Doc. 22] at 9-14; Reply Brief in Support of Motion to Dismiss [Doc. 25] at 5-14.

Plaintiff's Notice also significantly misstates the discussion of authority in the *Hughes* opinion. In his Notice, Plaintiff represents that the *Hughes* court found that "a misrepresentation or omission must be a requisite element of a claim to be subject to SLUSA preemption." *See* Notice at 3. This is not the law and the *Hughes* Court did not suggest that it is. The *Hughes* court cited *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258

well-pleaded complaint rule. *Cheatham*, 2008 U.S. Dist. LEXIS 1391 at *4. If relevant, *Cheatham* supports Fifth Third.

⁴ Footnote 2 of the slip opinion states that the proposed second amended complaint was filed with the court on or about January 15, 2008. Undersigned counsel accessed the docket for the *Hughes* case using the Southern District of New York's CM/ECF system on February 28, 2008. While the docket shows documents that were filed on and around January 15, none of those documents are available for download.

(S.D.N.Y. 2004), where the court announced and applied its so-called “necessary component test” for SLUSA preemption. Under that test, SLUSA preemption is appropriate if the state law claims rely on misrepresentations and omissions as a “necessary component” of the claim. This test is satisfied if plaintiff makes an explicit claim of fraud or when the claim “sounds in fraud.” *Id.* at 266. “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.” *Id.* at 269 (emphasis added).⁵

Thus, despite Plaintiff’s characterization, the *Xpedior* test applied by *Hughes* does not limit preemption to those circumstances where fraud is an element of the claim to be preempted. The *Hughes* Court accurately applied the *Xpedior* rule, noting that none of the claims in *Hughes* required a misrepresentation as a necessary element and none of the claims sound in fraud. *Hughes*, slip. op. at 12.⁶ Thus, Plaintiff’s position that a misrepresentation or omission must be an element of a claim to trigger SLUSA is wrong and disingenuous.⁷

Neither *Cheatham* nor *Hughes* save the Amended Complaint from dismissal.

⁵ To the extent the Court chooses to utilize the “necessary component test” (many courts have not referred to this test in analyzing the applicability of SLUSA), the Amended Complaint in this case is clearly preempted because the alleged scheme supposedly perpetrated by Fifth Third to bolster its proprietary funds at the expense of trust beneficiaries clearly “sounds in fraud.”

⁶ Plaintiff’s position that a misrepresentation must be an element of a claim to trigger SLUSA preemption is also contradicted by the countless decisions where courts have preempted a breach of contract, unjust enrichment, and/or breach of fiduciary duty claim (none of which require a fraudulent misrepresentation as an element of the cause of action). See, e.g. *Siepel v. Bank of America, N.A., et al*, 239 F.R.D. 558 (E.D. Mo. 2006), reconsideration of dismissal denied, *Siepel v. Bank of America N.A., et al* 2007 U.S. Dist. LEXIS 14430 (E.D. Mo. 2007); *Kutten v. Bank of America, N.A.*, 2007 U.S. Dist. LEXIS 63897 (E.D. Mo. 2007); *Rabin v. JP Morgan Chase Bank, N.A.*, 2007 WL 2295795 (N.D. Ill. 2007).

⁷ Plaintiff knows quite well that *Xpedior* does not hold that a claim can only be preempted if a misrepresentation or omission is an element of the claim. In his opposition to Fifth Third’s motion to dismiss, Plaintiff expressly acknowledged that *Xpedior*’s preemption rule covers both claims where misrepresentation is an element of the claim and also claims that “sound in fraud” even though a misrepresentation is not an element. See Plaintiff Opposition at 20, n. 19 (directly quoting the relevant portions of *Xpedior*).

Respectfully submitted,

/s/ Brian P. Muething

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notice of such filing to ECF participants.

/s/ Brian P. Muething

Brian P. Muething

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