No.

IN THE
Supreme Court of the United States

NORTHERN TRUST CORPORATION AND
NORTHERN TRUST COMPANY,
Petitioners,

v.

LINDIE L. BANKS AND
ERICA LEBLANC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress first sought to curb abusive federal securities litigation through the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. §§ 77z-1, 78u-4. The PSLRA imposed new requirements on class action lawsuits involving federally-regulated securities, such as a heightened pleading standard, an automatic stay of discovery during the pendency of any motion to dismiss, and a cap on damages.

Because the PSLRA only applied to federal claims, however, plaintiffs began evading its procedural safeguards by bringing securities class actions under state law instead. This led Congress to enact the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), 15 U.S.C. §§ 77p(b), 78bb(f)(1). Congress intended for SLUSA to ensure uniform application of federal securities law standards to class action lawsuits by precluding class action claims under state law alleging deceptive conduct in connection with a transaction involving federally-regulated securities.

The question presented for review is:

> For purposes of SLUSA, does a trust beneficiary allege misconduct “in connection with” the purchase or sale of a covered security when the beneficiary alleges that the trustee used trust assets to buy and sell the trustee’s own proprietary securities rather than competitors’ securities and did so for the trustee’s own pecuniary gain?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners disclose as follows: Petitioner Northern Trust Corporation is a Delaware corporation with its principal place of business in Chicago, Illinois. The stock of Northern Trust Corporation is traded on the NASDAQ stock exchange under the symbol "NTRS." No publicly traded company owns 10% or more of the stock of Northern Trust Corporation. Petitioner The Northern Trust Company is a wholly-owned subsidiary of Northern Trust Corporation.

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.)

Banks v. Northern Trust Corp., No. 17-56025 (July 21, 2017)

United States District Court (C.D. Cal.)

Banks v. Northern Trust Corp., No. 2:16-cv-09141-JFW (JCx) (Dec. 9, 2016)

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PETITION FOR WRIT OF CERTIORARI

Northern Trust Corporation and The Northern Trust Company (collectively, "Northern") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit (Pet. App. 1a) is reported at 929 F.3d 1046. The decision of the District Court (Pet. App. 23a) is unreported but available at 2017 WL 3579551.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 5, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 78bb(f)(1) provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

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

INTRODUCTION

In 1995, Congress responded to a torrent of frivolous securities-fraud class actions by enacting the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1, 78u-4. The PSLRA weeded out vexatious suits by imposing new requirements on class action lawsuits involving federally-regulated securities, such as a heightened pleading standard, an automatic stay of discovery during the pendency of any motion to dismiss, and a cap on damages. When it became clear that class-action lawyers would attempt to evade the PSLRA by filing state-law suits, Congress enacted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p(b), 78bb(f)(1). SLUSA ensured that cases involving *nationally* traded securities would be heard under *federal* law. It barred plaintiffs from bringing class actions based on state law claims if they allege that, "in connection with the purchase or sale of a covered security"—*i.e.*, a security traded nationally and listed on a regulated national exchange—the defendant made "a misrepresentation or omission of a material fact" or employed a "manipulative or deceptive device or contrivance." 15 U.S.C. § 78bb(f)(1)(A)-(B).

SLUSA's enactment did not end the efforts of class-action lawyers to bring securities fraud claims under state law. Their next maneuver was to advocate for an improbably narrow reading of SLUSA's broad preemption provision. This Court unanimously rejected that gambit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). In *Dabit*, the class action plaintiff argued that SLUSA should preclude only a narrow category of class actions: those where the plaintiff alleges that he himself was defrauded into purchasing or selling particular securities. *Id.* at 85. This Court rejected this argument, holding that the plain text of SLUSA must be construed according to its terms, rather than grudgingly. *See id.* at 84-85. The Court observed that the operative language in SLUSA—"in connection with the purchase or sale of a covered security"—also appears in Rule 10b-5 itself, which governs the scope of the SEC's authority to regulate securities fraud, and it held that the same phrase carries the same meeting across the two statutes. *Id.* at 85-86. The Court therefore held, consistent with its Rule 10b-5 precedents, that SLUSA applies when the fraud "coincide[s] with a securities transaction—whether by the plaintiff or by someone else." *Id.* at 85. The Court relied heavily on *SEC v. Zandford*, 535 U.S. 813 (2002), which unanimously held that a stockbroker who sells his customer's securities, and uses the proceeds for his own benefit, has committed fraud "in connection with the purchase or sale of any security" within the meaning of Rule 10b-5. *Id.* at 815.

This case presents another chapter of the same story: the Ninth Circuit permitted further evasion of the PSLRA by allowing a securities-fraud class-action suit to proceed under state law in direct contravention of

SLUSA's text. Respondents are beneficiaries of a trust for which Northern is the trustee. Respondents allege that Northern, acting in its capacity as trustee, committed fraud by investing trust assets in Northern's affiliated funds rather than making allegedly superior investments in outside assets. The "connection with the purchase or sale of a covered security" is obvious: Respondents contend that Northern defrauded them by buying Northern's securities for its own pecuniary gain, to the exclusion of securities offered by Northern's competitors. Thus the allegedly fraudulent self-dealing did not merely "coincide" with the purchase and sale of covered securities; the alleged fraud consists of the *very act* of buying and selling the funds. Indeed, this case is *exactly* like *Zandford* except that Northern is the trustee rather than the stockbroker. Other than that, the theory of liability—that the entity responsible for buying and selling the securities committed fraud by doing so for its own benefit—is identical.

Yet the Ninth Circuit adopted an impossibly narrow view of *Dabit* and *Zandford* and allowed Respondents' suit to proceed as a nationwide class action under state law. According to the Ninth Circuit, SLUSA distinguishes between stockbroker trades and trustee trades. Thus, when a stockbroker commits fraud by buying or selling certain securities on behalf of an investor, the fraud is "in connection with the purchase or sale of any security," but when a trustee does the same thing on behalf of a beneficiary, the fraud ceases to be "in connection with the purchase or sale of any security." This holding has no basis in the text, history, or purpose of SLUSA and creates an arbitrary exception to SLUSA's broad preclusive force.

In addition to being wrong, the Ninth Circuit's decision conflicts with *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009) (Sutton, J.), and *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008), both of which faithfully followed *Dabit* and *Zandford* and held that SLUSA barred state-law class actions on identical facts. The Ninth Circuit did not dispute that its decision conflicts with *Segal* and *Siepel*. Instead, it held that *Segal* and *Siepel* are wrong in view of this Court's subsequent decision in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014). But *Troice* addressed an entirely different issue, holding that sellers of *uncovered* securities—the securities that Congress had *excluded* from SLUSA's scope—could not invoke SLUSA merely because those sellers had made statements that they subsequently would trade in covered securities with other people (and then did not). *Id.* at 397. Nothing in that holding endorses the stockbroker/trustee distinction that the Sixth and Eighth Circuits rightly rejected.

Indeed, this Court went out of its way in *Troice* to prevent courts from drawing the exact erroneous inference that the Ninth Circuit drew here. The Court stated that "[w]e do not here modify *Dabit*." *Id.* at 387. The Court made clear that its approach would not subject those "whose profession it is to give advice, counsel, and assistance in investing in the securities markets to complex and costly state-law litigation." *Id.* at 390. And the Court stated that "the *only* issuers, investment advisers, or accountants that today's decision will continue to subject to state-law liability are those who do not sell or participate in selling securities traded on U.S. national exchanges." *Id.* (emphasis in original). For the Ninth Circuit thus to read *Troice* as overruling *Segal* and *Siepel* is nothing short of astonishing.

This case also presents an issue of grave importance to the efficient operation of the securities industry in the United States. The Ninth Circuit's decision exposes professional trustees like Northern to nationwide class actions seeking to enforce an unpredictable patchwork of state-law securities-related claims, which is exactly what SLUSA was designed to prevent. That decision should be reviewed, and reversed, immediately. Awaiting additional percolation would serve no purpose: every future securities-fraud plaintiff will accept the court of appeals' invitation to file suit within the Ninth Circuit and attempt to certify a nationwide class, just as Respondents did here.

At a minimum, the Court should seek the views of the Solicitor General. Because Rule 10b-5 uses the same "in connection with" language as SLUSA, the Ninth Circuit's narrow construction of SLUSA will correspondingly narrow the SEC's authority to combat securities fraud. The result of the Ninth Circuit's decision will be ironic: dishonest trustees will be able to commit fraud without the risk of SEC enforcement actions, while plaintiffs' lawyers attempt to enrich themselves by pursuing strike suits against deep-pocketed financial institutions. The Solicitor General should be permitted to weigh in before the United States is stripped of the authority to enforce the securities laws in a broad class of cases in the Nation's largest geographic circuit.

STATEMENT OF THE CASE

A. Statutory Framework

Congress enacted SLUSA to curb the abuse of the class action device in cases involving securities transactions governed by federal law. *See Dabit*, 547 U.S. at 81-82. Congress first sought to impose restrictions on such class actions through the PSLRA, 15 U.S.C. §§ 77z-1, 78u-4, which imposes heightened burdens on plaintiffs who assert class action claims pursuant to Section 10(b) and Rule 10b-5. *See Dabit*, 547 U.S. at 81-82. However, because the PSLRA only applied to federal claims, some plaintiffs attempted to circumvent that statute by "bringing class actions under state law" instead. *Id.* at 82. This led Congress to enact SLUSA, 15 U.S.C. §§ 77p(b), 78bb(f)(1), in 1998. *See Dabit*, 547 U.S. at 82-83.

SLUSA compels the dismissal of any "covered class action" that alleges:

A. "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security"; or

B. "that the defendant used or employed any manipulative or deceptive device or

> contrivance in connection with the purchase or sale of a covered security."

15 U.S.C. § 78bb(f)(1); *see id.* § 77p(b).[1]

As this Court has observed, "Congress envisioned a broad construction" of SLUSA to prevent plaintiffs from "undercut[ting] the effectiveness of the [PSLRA]" by burdening the courts with "wasteful, duplicative" and "vexatious litigation" brought under state law. *Dabit*, 547 U.S. at 86. SLUSA therefore bars any state law class action brought on behalf of 51 or more putative class members "whether styled in tort, contract or breach of fiduciary duty, that in essence claim[s] misrepresentation or omission in connection with certain securities transactions." *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1114 (9th Cir. 2013).

In *Dabit*, this Court held that SLUSA's "in connection with" language carries the same meaning as the same "in connection with" language in SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. In other words, if the SEC *can* bring an enforcement action under federal law, a plaintiff *cannot* bring a securities fraud class action under state law. The Court explained that not only did Congress deliberately choose to use "the same words" in SLUSA "as are used in § 10(b) and Rule 10b–5," it did so "in a provision that appears in the same statute as § 10(b)." 547 U.S. at 85-86. Congress therefore is

[1] "A 'covered class action' is a lawsuit in which damages are sought on behalf of more than 50 people," while "[a] 'covered security' is one traded nationally and listed on a regulated national exchange." *Dabit*, 547 U.S. at 83 (citing 15 U.S.C. § 78bb(f)(5)(B) and (E)).

presumed to have intended the "broad construction adopted by both this Court and the SEC when it imported the key phrase—'in connection with the purchase or sale'—into SLUSA's core provision." *Id.* at 85.

B. Factual Background

Respondents are beneficiaries of the Lindstrom Trusts, for which Northern serves as trustee. Pet. App. 4a. Respondents brought this putative nationwide class action against The Northern Trust Company, a financial services company which they allege has the authority to make investments on behalf of the Lindstrom Trusts and similar trusts, *id.*, as well as Northern Trust Corporation, the bank holding company that is The Northern Trust Company's corporate parent, *see id.* 3a. Collectively, the two defendants will be referred to as "Northern."

Respondents allege that Northern pursued a surreptitious and self-serving program of investing trust assets in federally regulated securities that are affiliated with Northern. This Court has repeatedly held that a scheme designed to further a fiduciary's own self-interest at the expense of its client in connection with securities trading constitutes an unlawful deceptive device under Section 10(b). *Zandford*, 535 U.S. at 820-21; *United States v. O'Hagan*, 521 U.S. 642, 653 (1997).

Specifically, respondents allege that Northern operates a standardized program designed to favor Northern-affiliated funds for its own pecuniary gain, without regard for the best interest of the trust beneficiaries. Pet. App. 4a. According to respondents, "none of the choices made by [Northern] were untainted by their own pecuniary self-interest," and Northern does not invest in competitors' funds "because there is no financial incentive … to do so." *Id.* 26a (quoting FAC). Respondents further allege that the "financial benefits" Northern purportedly receives from investing trust assets primarily in affiliated securities "are significant and [are to] the detriment" of trust beneficiaries. *Id.* (quoting FAC).

Based on these allegations, respondents asserted seven state-law causes of action against Northern, for breach of fiduciary duty; unjust enrichment or restitution; accounting; unfair competition under California Business and Professions Code § 17200; and violation of California's Elder Abuse and Dependent Adult Civil Protection Act, California Welfare & Institutions Code §§ 15600 et seq.[2] The District Court dismissed respondents' complaint under SLUSA, finding that plaintiffs' claims were barred because they challenged conduct undertaken "in connection with" the purchase or sale of covered securities. Pet. App. 31a-32a, 34a, 37a (quotation marks omitted). The District Court relied on this Court's holding in *Dabit* that the "in connection with" requirement must be interpreted broadly, and it rejected plaintiffs' argument that their claims are not covered by SLUSA because Northern alone made the investment decisions. *Id.* 31a-32a.

2 The District Court dismissed an initial version of the complaint under SLUSA without prejudice but granted leave to refile. Pet. App. 25a-26a. After respondents then filed a materially similar complaint, the District Court dismissed it under SLUSA with prejudice. *Id.* 37a.

The Ninth Circuit reversed and remanded, holding that respondents' class action claims were not barred under SLUSA because the fraud alleged was not "in connection with the sale of covered securities." *Id.* 17a (internal quotation marks omitted). According to the Ninth Circuit, "a trustee's misconduct – over which a beneficiary of an irrevocable trust has no control – cannot constitute misconduct 'in connection with' the sale of covered securities." *Id.* (citation omitted). The Ninth Circuit based its holding on this Court's *dicta* in *Troice* that "[a] fraudulent misrepresentation or omission is not made 'in connection with' … a 'purchase or sale of a covered security' unless that fraudulent conduct 'is material to a decision by one or more individuals (*other than the fraudster*) to buy or sell a 'covered security.'" *Id.* 9a, 17a (emphasis and alterations in original) (quoting 571 U.S. at 387).

The Ninth Circuit acknowledged that this Court "was careful to state that *Troice* did not overrule *Dabit*." *Id.* 9a (citing 571 U.S. at 387). Nevertheless, despite recognizing that *Troice* "clarifies – rather than modifies – *Dabit*," *id.* 16a, the Ninth Circuit determined that *Troice* narrowed the "in connection with" requirement to exclude allegations that "coincide with" a covered securities transaction "when those allegations are brought by the beneficiaries of an irrevocable trust." *Id.* 16a-17a.

The Ninth Circuit also recognized that its holding directly conflicted with the rulings of the Sixth and Eighth Circuits that state-law claims asserted by trust beneficiaries against a trustee (like those asserted against Northern here) are precluded by SLUSA. *Id.*

14a (citing *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009); *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122 (8th Cir. 2008)). The Ninth Circuit distinguished those cases, however, on the ground that they were decided "pre-*Troice*." *Id.*

In addition, the Ninth Circuit rejected Northern's argument that in *SEC v. Zandford*, 535 U.S. 813, 822 (2002), this Court already determined that the phrase "in connection with" reaches alleged misconduct by a defendant who "controlled" the underlying transaction. Pet. App. 12a-13a. The Ninth Circuit distinguished its holding from *Zandford*, however, on the basis that even though the defendant in *Zandford* made the investment decision, the alleged victim in that case had a greater "degree of control" over the conduct of the fiduciary than respondents had over Northern's conduct. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DEFIED THIS COURT'S PRECEDENT.

This case should have been easy. The "connection with" the "purchase or sale of a covered security" is as clear as could be. Respondents allege that Northern broke the law because it purchased and sold covered securities from its affiliates, rather than from third parties. The purchase and sales do not just coincide with the purported fraud, they are the very fraudulent act that is alleged.

Any doubt on this score is resolved by *Zandford*, which held, on materially indistinguishable facts, that the "in connection with" requirement was satisfied. The defendant in *Zandford* was a broker whose customers granted him full "discretion to manage their account and a general power of attorney to engage in securities transactions for their benefit without prior approval." 535 U.S. at 815. The defendant sold securities in the discretionary account and then made personal use of the sale proceeds. *Id.* at 815-16.

This Court reversed the Fourth Circuit's decision holding that the broker's alleged misconduct did not satisfy the "in connection with" element of a Section 10(b) violation because the broker made no affirmative misrepresentation to the plaintiffs. *Id.* at 817-18. This Court held that because "the SEC complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide," the alleged breaches "were therefore 'in connection with' securities sales within the meaning of § 10(b)." *Id.* at 825. That is, the defendant's undisclosed, disloyal securities trading activity was the core deceptive conduct held actionable under Section 10(b): "each time respondent exercised his power of disposition for his own benefit, that conduct, without more, was a fraud." *Id.* at 821 (internal quotation marks omitted). That the investment decisions were made without the knowledge or involvement of the principal was of no consequence; it mattered only that the defendant was alleged to have breached "a duty to disclose arising from a relationship of trust and confidence between" the parties. *See id.* at 823 (quotation marks omitted).

The Court's words in *Zandford* could have been written for this case. Respondents' complaint "describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide," *id.* at 825: they allege that, by trading in securities with their affiliates, Northern is committing a breach of fiduciary duty. Similarly, respondents allege that "each time [Northern] exercised [its] power of disposition for [its] own benefit, that conduct, without more, was a fraud." *Id.* at 821 (internal quotation marks omitted). Although *Zandford* concerned the scope of Rule 10b-5, *Dabit* subsequently held that *Zandford* also governs the scope of SLUSA. 547 U.S. at 85. A straightforward application of *Zandford* and *Dabit* therefore resolves this case.

Yet the Ninth Circuit held that the phrase "in connection with the purchase or sale of a covered security" distinguishes between purchases and sales by a stockbroker, and purchases and sales by a trustee. Pet. App. 8a, 10a-11a. Where did this distinction come from? Certainly not from the text. No amount of textual exegesis can wring a stockbroker/trustee distinction from the phrase "in connection with the purchase or sale of a covered security." Nor from any legislative history. Nor from any assessment of SLUSA's purpose. Nor from any argument that this is a sensible way of dividing authority between states and the federal government.

Instead, the Ninth Circuit laid the responsibility for its strange holding on this Court. It held that dicta in *Troice*, a case that had nothing to do with trustees or stockbrokers, compelled it to adopt its new rule. *Troice* did no such thing; instead, it rejected an extreme view of SLUSA's preclusive coverage on completely different facts. The *Troice* defendant sold *uncovered securities* to the plaintiffs—the very securities that Congress had *declined* to address in SLUSA—and then bought *real* *estate*—which is not a covered security either. Yet the defendant argued that SLUSA precluded the plaintiffs' lawsuit anyway, merely because the defendant had made statements that it *would* buy covered securities (even though it never actually did). *Troice*, 571 U.S. at 384. The Fifth Circuit held that these statements about hypothetical stock purchases that never even materialized did not transform a fraud that was transparently in connection with an *uncovered* security into fraud "in connection with the purchase or sale of a *covered* security." *Id.* at 386-87 (emphasis added). This Court affirmed, observing that "a connection matters where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security, not to purchase or to sell an uncovered security, something about which the Act expresses no concern." *Id.* at 387-88.

In reaching that conclusion, the Court made the unremarkable observation that statements regarding the purchase or sale of "covered securities" were being made by the *fraudster*, rather than by the victims. The Court stated, for instance: "A fraudulent misrepresentation or omission is not made 'in connection with' … a 'purchase or sale of a covered security'" unless that fraudulent conduct "is material to a decision by one or more individuals (other than the fraudster) to buy or sell a 'covered security.'" *Id.* at 387; *see also id.* at 388 ("If the only party who decides to buy or sell a covered security as a result of a lie is the liar, that is not a 'connection' that matters."). Seizing on these statements, the Ninth Circuit inferred that because trustees formally hold title to trust assets and are not controlled by beneficiaries, trustees' purchases and sales of covered securities did not have a sufficient "connection" to respondents' allegations. Pet. App. 17a. The Ninth Circuit declared that a contrary interpretation of *Troice* would make *Troice* "meaningless," though it offered no substantive explanation for this point. *Id.* 16a.

The Ninth Circuit's analysis of *Troice* is a paradigmatic example of a court improperly reading a judicial opinion like a statute. *Troice* had nothing to do with whether the fraudster formally held an asset in trust or was instead acting as a stockbroker. *Troice* concerned the circumstances under which traders in *uncovered* securities could transform their lawsuits into suits "in connection with" *covered* securities. The Court held that federal jurisdiction does not expand to cover such trades merely because the fraudster also makes statements about covered securities. By contrast, here, the trading in covered securities *is* the alleged fraud. That is, respondents allege that the trustee's purchase of covered securities from its affiliate is, in and of itself, fraudulent. *Troice* did not consider facts remotely like these, and its dicta could not possibly have resolved this case.

Indeed, the Court's opinion made that plain as day. To avoid any doubt on that score, the Court rejected the argument that its opinion would broadly subject the investor and advisor community to "costly state-law litigation," stating unequivocally that "the *only* issuers, investment advisors, or accountants that today's decision will continue to subject to state-law liability are those who do not sell or participate in selling securities traded on U.S. national exchanges." 571 U.S. at 390 (emphasis in original). The Ninth Circuit ignored that portion of *Troice* and instead caused the exact outcome this Court said that it was trying to avoid: subjecting traders of securities that *are* traded on U.S. national exchanges to massive state-law liability.

This Court's decision in *O'Hagan* confirms that the Ninth Circuit got *Troice* wrong. In *O'Hagan*, this Court affirmed the conviction under Section 10(b) and Rule 10b-5 of an attorney who, while representing a company in connection with a tender offer, misappropriated confidential company information and used it to enrich himself through insider trading. 521 U.S. at 647-50. This Court held that the government's "misappropriation theory comports with § 10(b)'s language, which requires deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller." *Id.* at 658. Like *Zandford*, *O'Hagan* was a case about the scope of Rule 10b-5, but *Dabit* subsequently confirmed that *O'Hagan* also defined SLUSA's scope. 547 U.S. at 85.

Troice observed that *Dabit* had incorporated *O'Hagan* into SLUSA, and then stated that "[w]e do not here modify *Dabit*". 571 U.S. at 387. However, under the Ninth Circuit's reasoning, *O'Hagan*—and hence *Dabit*—has been overruled. The Ninth Circuit construed *Troice* as adopting a universal principle that if the fraudster is purchasing or selling the securities by and for himself, then there is no "connection with" the purchase or sale of securities. That would overrule *O'Hagan*, in which the fraudster did indeed purchase and sell the securities for himself alone. The Ninth

Circuit did not address this point, ignoring *O'Hagan* entirely. But *O'Hagan* demonstrates clearly the error of the Ninth Circuit's reasoning. *O'Hagan* establishes that when the purchase or sale of the covered security *is* the fraud, then the "connection with the purchase or sale of a covered security" requirement of Section 10(b) and Rule 10b-5—and by extension, SLUSA—is satisfied. 15 U.S.C. § 78bb(f). That is precisely what respondents allege here.

Not just the holding of *O'Hagan* but also its reasoning confirms the Ninth Circuit's error. In recognizing a misappropriation theory of liability under Section 10(b) and Rule 10b-5, this Court observed that "an animating purpose of" the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*, is "to insure honest securities markets and thereby promote investor confidence." 521 U.S. at 658. Against that backdrop, there is no reason Rule 10b-5 would distinguish between misappropriating confidential information to engage in insider trading (*O'Hagan*), misappropriating the assets of a discretionary brokerage account for personal use (*Zandford*), and misappropriating the assets of a discretionary brokerage or trust account to artificially prop up the defendant's affiliated mutual funds and generate fees (as respondents allege here). Each alleged act is a "manipulative or deceptive device or contrivance" that undermines the securities markets and risks damage to investor confidence. There likewise is no basis to distinguish between a stockbroker and a trustee, or an agent and trustee, as those distinctions are entirely irrelevant insofar as the text and purpose of SLUSA is concerned.

Indeed, as Judge Easterbrook explained in his opinion for the court of appeals in *Holtz v. JP Morgan Chase Bank, NA*, 846 F.3d 928 (7th Cir. 2017), "[t]he sort of situation we encounter — in which one party to a contract conceals the fact that it planned all along to favor its own interests — is a staple of federal securities law." *Id.* at 932. Thus, "[a] fiduciary that makes a securities trade without disclosing a conflict of interest violates federal securities law." *Id.* "That some of the investment decisions were made by investment advisers as [the plaintiff's] agent does not take this out of the 'in connection with' domain." *Id.* at 933. Likewise, here, respondents assert a classic securities-fraud claim: they contend that Northern, a fiduciary, made securities trades despite having an actual conflict of interest. Yet under the Ninth Circuit's approach, the fact that Northern is a trustee exempts this case from the federal securities laws. That misguided rule has no basis in the text or purpose of SLUSA or in any decision by this Court.

II. THE NINTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT THAT THIS COURT SHOULD RESOLVE.

As the Ninth Circuit acknowledged, its decision squarely conflicts with the rulings of the Sixth and Eighth Circuits. Pet. App. 14a-15a.

In *Segal v. Fifth Third Bank, N.A.*, the Sixth Circuit considered a substantively-identical case brought by the beneficiary of an irrevocable trust against a corporate trustee. 581 F.3d 305 (6th Cir. 2009). The plaintiffs in *Segal* alleged that the corporate trustee breached its fiduciary duties by automatically investing trust funds in its own proprietary mutual funds rather than lower-cost and better-performing funds offered by its competitors, for its own pecuniary gain. *Id.* at 308.

Applying this Court's precedents in *Dabit* and *Zandford*, Judge Sutton's opinion for the Sixth Circuit held that the plaintiffs' claims were precluded by SLUSA. The court explained: "All of Segal's counts—breach of fiduciary duty, unjust enrichment, breach of contract—revolve around Fifth Third's decision to buy mutual fund shares." *Id.* at 310. "Segal's allegations do not merely 'coincide' with securities transactions; they depend on them." *Id.*

Likewise, in *Siepel v. Bank of America, N.A.*, 526 F.3d 1122, 1124 (8th Cir. 2008), the Eighth Circuit considered the very question upon which the Ninth Circuit's ruling turned: "whether SLUSA preempts state-law claims that a trustee breached its fiduciary duty by failing to disclose conflicts of interest in its selection of nationally-traded investment securities." 526 F.3d at 1124. As in this case, the trust beneficiary plaintiffs in *Siepel* alleged that the corporate trustee favored its own mutual funds over the funds of its competitors, to the detriment of the plaintiffs. *Id.*

The Eighth Circuit held that under a straightforward reading of *O'Hagan* and *Zandford*, SLUSA barred the class action. The court observed that under *O'Hagan*, the "'in connection with' standard … applies to a fiduciary who misappropriates information, and then uses that information to gain no-risk profits through a securities transaction." *Id.* at 1127. Likewise, under *Zandford*, that standard "covers allegations that an agent made unauthorized sales of a customer's securities for his own benefit." *Id.* Distilling those cases, *Dabit* held that for SLUSA to bar a class action, "it is enough that the fraud alleged 'coincide' with a securities transaction — whether by the plaintiff or by someone else." *Id.* (quoting *Dabit*, 547 U.S. at 85). In the case at hand, the plaintiffs alleged that "the Bank purchased securities as a trustee on their behalf without disclosing that the Bank profited from the transactions." *Id.* The court explained that "[t]he Plaintiffs' complaint alleges nondisclosures that clearly coincided with the Bank's purchase of shares in the Nations Funds mutual fund." *Id.* As such, "it follows that the Plaintiffs' state-law claims are preempted." *Id.*

The Ninth Circuit did not and could not distinguish *Segal* and *Siepel*. Instead, the Ninth Circuit concluded that *Troice* implicitly abrogated these cases. For the reasons explained in detail above, that holding was wrong. *Troice* narrowly held that SLUSA did not preclude claims based on the defendants' alleged misrepresentations that non-covered securities purchased by the plaintiffs were backed by covered securities purchased by the defendant. 571 U.S. at 387; *supra*, at 15-16. *Troice* expressly declined to modify the broad "coincide with" standard announced in *Dabit*. 571 U.S. at 387 ("We do not here modify *Dabit*"). And *Troice* emphasized that the "*only*" members of the investment community affected by the decision would be those "who do not sell or participate in selling securities traded on U.S. national exchanges." *Id.* at 390. *Troice* thus cannot plausibly be read to overrule decisions like *Segal* and *Siepel* that, under *Dabit*, SLUSA applies to trustees whose very business and whose alleged fraud involves buying and selling covered securities.

This split, moreover, merits review now. First, the Ninth Circuit has issued an engraved invitation to forum-shopping. The decision concerns the preclusive scope of SLUSA, a statute that applies only to large class actions. As long as a single class member lives within the Ninth Circuit—which will almost always be true when the defendant is a deep-pocketed financial institution that is the typical target for class action suits—the plaintiffs will file suit in the Ninth Circuit and seek to certify a nationwide class, as respondents did here. This will allow class members within the Sixth and Eighth Circuits to avoid their own adverse circuit precedent and take advantage of the Ninth Circuit's more favorable rule. Federal law is supposed to be uniform nationwide; this Court resolves circuit splits precisely to prevent geography from becoming litigation destiny.

Second, and relatedly, awaiting further percolation will be futile because of the powerful incentive to file class actions in the Ninth Circuit. The Ninth Circuit suggested the Sixth and Eighth Circuits might reconsider their prior decisions in view of *Troice*. But even if this is true (which Northern strongly doubts), those circuits will never have the opportunity to do so because litigants will flock to the Ninth Circuit. From the perspective of a class-action lawyer, why take the risk that the Sixth or Eighth Circuit will adhere to its own prior opinion on this exact issue when a state-law claim in the Ninth Circuit is guaranteed to overcome a SLUSA preclusion defense? As such, if the Court adopts a wait-and-see approach as to how the Sixth or Eighth Circuits will resolve this issue after *Troice*, it will likely be waiting forever.

Third, more percolation is unnecessary because this case boils down to the interpretation of dicta in a decision by this Court. There is no serious doubt that, under the text of SLUSA, this suit is precluded: when a plaintiff alleges that the purchase or sale of securities is conducted unlawfully, as respondents do here, there is a "connection with" purchases and sales of securities. Although the precise scope of "in connection with" can be vexing, this case is at the core, not the periphery. The sole question then is whether this Court's dicta should be construed to abrogate the text. Additional opinions by other courts of appeals will not yield any additional insight into what this Court meant by its statements in *Troice*. This Court should grant certiorari now and reaffirm that the text of SLUSA, rather than extreme interpretations of ambiguous dicta in *Troice*, governs SLUSA's scope.

III. THIS COURT'S REVIEW IS WARRANTED IN VIEW OF THE IMPORTANCE OF THE QUESTION PRESENTED.

This Court should grant certiorari in view of the extraordinary importance of this case to corporate trusts and the securities industry as a whole. As this Court observed in *Dabit*, "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." 547 U.S. at 78. SLUSA and the PSLRA exist to protect "the entire U.S. economy" from the abusive class action securities litigation that were "being used to injure" it. *Id.* at 81 (quoting H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.)); *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 636 (2006).

The Ninth Circuit's ruling revives the "extortionate settlement[]" pressure on corporate trustees that Congress intended for SLUSA to eradicate. *See* 547 U.S. at 81. In 2018, more than 1,100 FDIC-insured banks exercised fiduciary powers over 630,187 personal trust accounts. *See* F.D.I.C., *Quarterly Banking Profile Fourth Quarter 2018*, at 14 (2018). Those accounts collectively hold over $4 trillion in assets, more than $3 trillion of which is invested in federally-regulated stocks and money market mutual funds. *Id.* FDIC-insured banks derived over $4.7 billion in revenue from managing personal trust accounts and the industry continues to grow, with revenues increasing by 1.9% in 2018. *Id.*

These numbers make large, deep-pocketed financial institutions attractive targets for plaintiffs' lawyers, who, under the Ninth Circuit's ruling, are now free to pursue the vexatious state-law securities strike suits that Congress intended the PSLRA and SLUSA to prevent. The ruling therefore will bring a windfall to plaintiffs' lawyers, while harming financial institutions, trust beneficiaries, and the investing public. As this Court said was true of the court of appeals' opinion in *Dabit*, the Ninth Circuit's ruling here will "chill[] any discussion of issuers' future prospects, and deter[] qualified individuals from serving on boards of directors" of banks and mutual funds. *See Dabit*, 547 U.S. at 81. The resulting exposure also will incentivize banks to invest personal trust assets in the lowest-risk, least-expensive securities regardless of their growth potential and the objectives of the trust, which will negatively impact trust beneficiaries by artificially depressing the trust's potential returns. In addition, the Ninth Circuit's decision will drive up legal costs for trustee banks, who now will be forced to defend against class actions invoking an unpredictable patchwork of state law claims. The ultimate result will be the creation of barriers to entry to the securities markets, because the increased costs of managing bank-owned mutual funds and providing fiduciary services inevitably will be passed to trust beneficiaries and the investing public, who are "the intended beneficiaries" of the federal securities laws. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

This Court's intervention also is urgently needed to preserve the ability of the SEC to fully enforce federal securities law—which, at a minimum, warrants an order inviting the Solicitor General to express his views. As this Court held in *Dabit*, the phrase "in connection with the purchase or sale" in SLUSA carries the same meaning as the same phrase in Rule 10b-5. As such, the Ninth Circuit's ruling bars the SEC from enforcing the securities laws against trustees who deceptively trade in securities, to the detriment of trust beneficiaries.

This creates a gaping hole in the SEC's enforcement authority, which is not filled by the ability of class action lawyers to file state-law suits against institutional trustees and extract a quick settlement. This Court has routinely reaffirmed the SEC's broad authority to enforce the securities laws, consistently rejecting efforts by Section 10(b) defendants to avoid liability by arguing that their misconduct was not perpetrated "in connection with" a securities trade by a victim. *Zanford*, 535 U.S. at 821-22; *O'Hagan*, 521 U.S. at 655-56. The Ninth Circuit's decision to narrow the interpretation of "in connection with" cannot be squared with those decisions.

This case also is an ideal vehicle for review, and there is no reason to wait for it to proceed through discovery to trial and final judgment on the merits of state law claims that have nothing to do with the application of SLUSA. The question presented, which was raised squarely by the Ninth Circuit's decision below, is a purely legal question of statutory interpretation. Further factual development in the district court will do nothing to resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 2019

APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 17-56025

D.C. Docket No. 2:16-cv-09141 – JFW-JC

Lindie L. BANKS, individually and on behalf of all others similarly situated; Erica LeBlanc,
Plaintiff-Appellee,

v.

NORTHERN TRUST CORPORATION; Northern Trust Company,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding
Argued and Submitted May 15, 2019
Pasadena, California
Filed July 5, 2019

Before JACQUELINE H. NGUYEN and JOHN B. OWENS, Circuit Judge, and JOHN ANTOON II,* District Judge.

SUMMARY**

Securities Litigation Uniform Standards Act of 1998

The panel reversed the district court's dismissal, as barred by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), of a putative class action brought against Northern Trust alleging violations of state law involving breaches of fiduciary duty by a trustee.

SLUSA deprives a federal court of jurisdiction to hear certain state-law class actions.

The panel held that SLUSA did not preclude plaintiffs' imprudent investment claims. Specifically, the panel held that SLUSA's "in connection" requirement did not preclude claims brought by an irrevocable trust beneficiary – who has no control over the trustee – alleging imprudent investments by that trustee. Here, the district court's dismissal relied entirely on its conclusion that Northern was an agent of the trusts' beneficiaries, a conclusion unsupported by the moving papers and First Amended Complaint.

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* The Honorable John Antoon II, United States District Judge for the Middle District of Florida, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court erred in dismissing plaintiffs' fee-related tax preparation and overcharging claims on SLUSA-preclusion grounds. The panel also held that plaintiffs' fee-related claims survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

Finally, the panel held that because plaintiffs' elder abuse claims and the claims against Northern's corporate parent were not precluded by SLUSA, and because the briefing provided no other basis for dismissal, the dismissal of those claims were reversed.

COUNSEL

Brian J. Malloy (argued) and Thomas J. Brandi, The Brandi Law Firm, San Francisco, California; Derek G. Howard, Derek G. Howard Law Firm, Mill Valley, California; for Plaintiffs-Appellants.

Craig C. Martin (argued), Brienne M. Letourneau, Amanda S. Amert, Daniel J. Weiss, and Craig C. Martin, Jenner & Block LLP, Chicago, Illinois; for Defendants-Appellees.

OPINION

OWENS, Circuit Judge:

Lindie Banks and her daughter Erica LeBlanc ("Banks"), hoping to represent a class of plaintiffs, appeal from the dismissal of their putative class action lawsuit against Northern Trust Company and Northern Trust Corporation ("Northern") for violations of state law involving breaches of fiduciary duty by a trustee. The district court interpreted the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") to bar the case from proceeding in federal court. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Banks is the beneficiary of the irrevocable Lindstrom Trust, created under California law. As trustee, Northern has sole discretion on how to manage the trust's assets; Banks cannot participate in, direct, or be involved in those decisions.

According to the First Amended Complaint ("FAC"), Northern invested the trust's assets in Northern's own affiliated "Funds Portfolio," rather than seeking superior investments outside its financial umbrella. This practice allegedly led to the trust suffering suboptimal returns, which would not have happened if Northern prioritized the interests of the trust beneficiaries (and not merely its own). Banks argues that favoring these inferior affiliated funds — over better-performing non-Northern funds — put money in the pockets of Northern, which thereby violated its duties of prudent investment and loyalty to Banks.

The FAC also alleges that Northern, as part of an "undisclosed internal decision to create a new profit center," charged improper and excessive fees for "routine preparation of fiduciary tax returns" and failed to maintain records to justify these expenses. These new fees, which previously were "part of the base fee and a fundamental duty for a trustee," allegedly breached Northern's duty of prudent administration.

In addition, the FAC alleges elder abuse and unfair competition claims under California law, both premised on the same factual allegations underlying the investment and fee-related claims.

Northern filed a Rule 12(b)(6) motion to dismiss, contending that SLUSA prohibited these state-law claims from proceeding in federal court. Over Banks' objection, the district court agreed with Northern and dismissed the FAC without leave to amend. The court reasoned that the allegedly imprudent investments were in connection with the purchase or sale of covered securities and featured material misrepresentations or omissions. The court concluded that SLUSA precluded Banks from bringing state-law fiduciary duty claims as a class action in federal court.

The district court dismissed the fee, elder law, and unfair competition claims without directly addressing them.

II. DISCUSSION

Although Northern moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the parties now agree that Rule 12(b)(1) — lack of subject matter jurisdiction — is the proper rule to challenge a complaint under SLUSA. *See Hampton v. Pac. Inv. Mgmt. Co.*, 869 F.3d 844, 846–47 (9th Cir. 2017) (holding that Rule 12(b)(1), and not Rule 12(b)(6), governs SLUSA motions to dismiss).

We review de novo whether the district court should have dismissed this case under Rule 12(b)(1). *See U.S. ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1126 (9th Cir. 2015) (en banc).

A. SLUSA does not preclude Banks' imprudent investment claims.

1. SLUSA

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA"), which limited the filing of federal securities class actions in federal court. Pub. L. No. 104-67, 109 Stat. 737. "[T]o avoid PSLRA's heightened pleading requirements for class-action securities lawsuits, plaintiffs began asserting what were essentially federal securities law claims as state law causes of action in state courts. Congress sought to end this practice by enacting SLUSA." *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 904 F.3d 821, 828 (9th Cir. 2018) (citation omitted). SLUSA prohibits certain state-law class actions:

> (1) Class action limitations.
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

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

15 U.S.C. § 78bb(f)(1).

To simplify, SLUSA deprives a federal court of jurisdiction to hear "(1) a covered class action (2) based on state law claims (3) alleging that the defendants made a misrepresentation or omission or employed any manipulative or deceptive device (4) in connection with the purchase or sale of (5) a covered security." *Northstar*, 904 F.3d at 828.[1]

When applying SLUSA to a complaint, courts must "look to the substance of the allegations" to ensure that "artful pleading" does not "remove[ ] the covered words ... but leave[ ] in the covered concepts." *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1115 (9th Cir. 2013) (second alteration in original) (quoting *Segal v. Fifth Third Bank N.A.*, 581 F.3d 305, 311 (6th Cir. 2009)). With that important principle in mind, we recognize that this case turns primarily on the "in connection with" requirement.[2] Even assuming Banks adequately alleged that Northern made a

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[1] SLUSA does not preclude a plaintiff from filing an individual (i.e., non-class action) state-law securities claim in state court.

[2] Northern's attempt to differentiate between subsections A and B of SLUSA is unpersuasive because the "in connection with" requirement is an element of both. See 15 U.S.C. § 78bb(f)(1)(A), (B).

misrepresentation or omission or employed a manipulative device or contrivance, we must decide if Northern's alleged activity was i*n connection with* the purchase or sale of a covered security.

2. The "in connection with" requirement

The Supreme Court twice has spoken about SLUSA and its "in connection with" requirement. In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006), the Court stressed that the "in connection with" requirement should be interpreted broadly, as "[a] narrow reading of the statute would undercut the effectiveness of the [PSLRA] and thus run contrary to SLUSA's stated purpose," which is to prevent state-law class actions from end-running the PSLRA. *Id.* at 86, 126 S. Ct. 1503. The Court explained that "it is enough that the fraud alleged 'coincide' with a securities transaction — whether by the plaintiff or by someone else" — to meet the "in connection with" requirement. *Id.* at 85, 126 S. Ct. 1503.

In *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 134 S. Ct. 1058, 188 L. Ed. 2d 88 (2014), the Court revisited the "in connection with" requirement. The plaintiffs in *Troice* alleged that the defendants induced victims to purchase uncovered securities (certificates of deposit that are not traded on any national exchange) by falsely stating that covered securities (securities traded on a national exchange) backed the uncovered securities. *Id.* at 380, 134 S. Ct. 1058. The Court held that SLUSA did not preclude the claims because the statute required "misrepresentations that are material to the purchase or sale of a covered security." *Id.* at 387, 134 S. Ct. 1058. In discussing materiality, the Court addressed the "in connection with" requirement, which demands "a connection ... where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security." *Id.* at 387, 134 S. Ct. 1058 (citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 36–40, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011) (stating that a misrepresentation or omission is "material" if a reasonable investor would have considered the information significant when contemplating a statutorily relevant investment decision)).

The Court also held that, under SLUSA, "[a] fraudulent misrepresentation or omission is not made 'in connection with' ... a 'purchase or sale of a covered security'" unless that fraudulent conduct "is material to a decision by one or more individuals (*other than the fraudster*) to buy or sell a 'covered security.'" *Id.* at 387, 134 S. Ct. 1058 (emphasis added). The Court stressed that "the 'someone' making that decision to purchase or sell must be a party other than the fraudster." *Id.* at 388, 134 S. Ct. 1058. "If the only party who decides to buy or sell a covered security as a result of a lie is the liar, that is not a 'connection' that matters." *Id.*

The Court was careful to state that *Troice* did not overrule *Dabit*, noting:

> [I]n *Dabit*, we held that [SLUSA] precluded a suit where the plaintiffs alleged a "fraudulent

> manipulation of stock prices" that was material to and "'coincide[d]' with" third-party securities transactions, while also inducing the plaintiffs to "hold their stocks long beyond the point when, had the truth been known, they would have sold." We do not here modify *Dabit*.

Id. at 387, 134 S. Ct. 1058 (citations omitted). Nevertheless, the Court distinguished *Dabit* and other dissimilar cases because they "involved a victim who took, tried to take, or maintained an ownership position in the statutorily relevant securities through 'purchases' or 'sales' induced by the fraud." *Id.* at 389, 134 S. Ct. 1058. The Court emphasized that "[e]very one of these cases ... concerned a false statement (or the like) that was material to *another* individual's decision to purchase or sell a statutorily defined security." *Id.* at 393, 134 S. Ct. 1058 (emphasis added) (internal quotation marks and alteration omitted).

This case presents a question of first impression in this circuit: whether allegations concerning a trustee's imprudent investments constitute activity "in connection with" the purchase or sale of securities when those allegations are brought by the beneficiaries of an irrevocable trust. Banks argues that any false statements or deceptive activity by Northern could not have been material to a beneficiary's individual decision to purchase or sell a covered security for two reasons: (1) a beneficiary who is not also a trustee of an irrevocable trust cannot make an individual decision to purchase or sell securities for the trust, and (2) Banks has no control over Northern's decision to do so.

Applying *Troice* here, we agree with Banks. Unlike an agent-principal relationship, beneficiaries who are not also trustees of an irrevocable trust cannot direct Northern's actions as the trustee. Accordingly, even if Northern engaged in fraudulent conduct, that conduct does not change the fact that its beneficiaries are unable to purchase or sell covered securities.

Northern contends that this difference between an agent and a trustee is a meaningless one. But if Northern were acting as an agent — similar to a stockbroker — Northern's statements and allegedly deceptive conduct could meet SLUSA's "in connection with" requirement because Banks (and other beneficiaries) could have relied on Northern's statements to induce the purchase of the affiliated funds. Conversely, if Northern was in fact acting as a trustee, and if Banks did not have control over investment of trust assets, Northern's deceptive or manipulative conduct resulted only in Northern — and no other party — purchasing affiliated funds. As *Troice* specifically notes, SLUSA does not preclude cases where "the only party who decides to buy or sell a covered security as a result of a lie is the liar" because "that is not a 'connection' that matters." 571 U.S. at 388, 134 S. Ct. 1058; see also *O'Donnell v. AXA Equitable Life Ins. Co.*, 887 F.3d 124, 130 (2d Cir. 2018) (holding in a non-trust case that even if plaintiffs allege fraud, that fraud must be material to the plaintiffs' decision to buy, sell, or hold a covered security to meet the "in connection with" requirement for SLUSA preclusion).

Caselaw and secondary sources support our conclusion that preclusion turns on the distinction between a trustee and an agent. As we previously have explained, while "both agents and trustees are fiduciaries ... there are significant differences between the two." *N.L.R.B. v. United Bhd. of Carpenters & Joiners*, Local No. 1913, 531 F.2d 424, 426 (9th Cir. 1976). Simply put, "[a]n agent acts for and on behalf of his principal and subject to his control," while a "trustee acts for the benefit of the beneficiaries of the trust; he is an agent only if he agrees to hold title for the benefit and subject to the control of another." *Id.* (citing Restatement 2d, Agency § 14B; Restatement 2d, Trusts § 8).

In contrast to the beneficiary-trustee relationship, an agent acts subject to the control of his or her principal. This degree of control explains the difference between this case and *S.E.C. v. Zandford*, 535 U.S. 813, 822, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002), upon which Northern heavily relies. In *Zandford*, the Supreme Court held that a broker could still be liable under § 10(b) of the Securities Exchange Act without making an affirmative misrepresentation because his principals granted him full discretion to trade stocks on their behalf. *See id.* at 822, 122 S. Ct. 1899. Each time the broker "exercised his power of disposition for his own benefit, that conduct, without more, was" actionable under § 10(b). *Id.* at 821, 122 S. Ct. 1899 (internal quotation marks omitted) (quoting *United States v. Dunn*, 268 U.S. 121, 131, 45 S. Ct. 451, 69 L. Ed. 876 (1925)). Northern argues *Zandford* shows that the level of control between an agent and a trustee does not matter because a principal can give full control to an agent — just like a trustee has full control of a trust.

Northern overlooks the fact that the principal controls and directs the agent, who the principal likely has chosen. Unlike in the irrevocable trust context, a principal can revoke control from an agent in the course of their relationship. In the irrevocable trust context, by contrast, unless otherwise specified in the trust instrument, a beneficiary cannot alter the powers of a trustee or remove the trustee without petitioning a court of law. *See* Cal. Prob. Code § 17200(10) (providing removal power to probate courts); Arnold H. Gold et al., California Civil Practice Probate and Trust Proceedings § 24:47, Westlaw (database updated May 2019) (explaining trustees can be removed only in accordance with the trust instrument or by a court).

Here, the FAC does not allege that beneficiaries made any investment decision based on Northern's conduct or statements. Quite the opposite: the FAC alleges that Banks had no control over how Northern invested the trust's assets because Banks was only the beneficiary of an irrevocable trust. *See* FAC ¶¶ 16 ("[U]nder the governing trust instrument, all investment discretion lies exclusively with the trustee ..."), 41 ("[A]s a legal matter, under the terms of their trust, [Northern] has sole discretion with regard to any and all investments."), 359 — 60 (Northern "had the power and responsibility to administer and invest the trust assets in the best interests of the trust beneficiaries ... [who] had no control over the investments"). The FAC also alleges that Northern conducted all the relevant purchases of covered securities without direction from Banks or other beneficiaries. Accordingly, *Troice's* discussion of SLUSA's "in connection with" requirement is directly on point. The FAC does not allege that Northern's activities as trustee were "in connection with" any purchase or sale of covered securities by anyone other than Northern.

Northern's strongest support against our application of *Troice* — and its discussion of the "in connection with" requirement — are two pre-*Troice* cases: *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009), and *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122 (8th Cir. 2008). In *Segal*, trust beneficiaries alleged that the trustee breached its fiduciary and contractual duties by investing in proprietary and higher fee accounts that benefited the trustee. 581 F.3d at 308. The Sixth Circuit affirmed the dismissal of the complaint, holding that SLUSA precluded the claims. *See id. a*t 309–10. In *Siepel*, the trust beneficiaries alleged state-law fiduciary duty claims against the trustee because it failed to disclose conflicts of interest in its selection of nationally traded securities. *See* 526 F.3d at 1124. The Eighth Circuit similarly held that SLUSA precluded the state-law claims because the fraud "coincided" with the trustee's purchase of shares in the mutual funds. *See id.* at 1127.

But the post-*Troice* decision in *Henderson v. Bank of N.Y. Mellon Corp.*, 146 F. Supp. 3d 438 (D. Mass. 2015), explains why Northern's reliance on *Segal* and *Siepel* is misplaced:

> [E]ven if the self-dealing allegations amount to a fraud claim, the fraud was not in connection with the purchase or sale of the covered securities except by the fraudster, i.e., the trustee. Here, the plaintiff, as a trust beneficiary, was powerless to buy or sell covered securities ....
>
> ....
>
> The analysis in both [*Segal* and *Siepel*] is foreclosed by *Troice*, because both cases rely on *Dabit's* broad holding that for SLUSA to preempt, the fraud may merely "coincide" with the purchase or sale of covered securities. *Siepel*, 526 F.3d at 1127; *Segal*, 581 F.3d at 312.

146 F. Supp. 3d at 443.[3]

In *Henderson*, the plaintiff-beneficiaries brought similar fee and imprudent investment claims against the defendant-trustee. *See id.* at 440–41. The court held that in light of *Troice*, SLUSA did not preclude the claims. *See id.* at 443–44. Northern argues *Henderson* directly contradicts *Dabit* and construes the "in connection with" requirement too narrowly. But *Henderson*'s understanding of *Troice* conforms with the Supreme

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[3] Similarly, Northern's reliance on *Fleming v. Charles Schwab Corp.*, 878 F.3d 1146, 1155–56 (9th Cir. 2017), and *Holtz v. JPMorgan Chase Bank, N.A.*, 846 F.3d 928, 929, 933–34 (7th Cir. 2017), is misplaced because both cases involved an agent-principal relationship. *See also Taksir v. Vanguard Grp.*, 903 F.3d 95, 98 (3d Cir. 2018) (noting that *Fleming* and *Goldberg v. Bank of America, N.A.*, 846 F.3d 913 (7th Cir. 2017) (per curiam), were factually distinguishable because those plaintiffs conceded that the alleged misconduct "was plainly material to brokerage customers").

Court's explanation of the "in connection with" requirement: it must be read broadly, but not so broadly that the connection between a defendant's conduct and the covered security becomes immaterial.[4] As we already concluded after *Dabit*, the claims should "have more than some tangential relation to the securities transaction." *Fleming*, 878 F.3d at 1155 (quoting Freeman, 704 F.3d at 1116).[5] And as the Third Circuit explained in Taksir, "the Supreme Court in *Troice* made clear that ... *Troice* clarifies — rather than modifies — *Dabit*." 903 F.3d at 97.

Northern would like us to read *Dabit* without considering its clarification in *Troice*. But we will not render *Troice* meaningless the way that Game of Thrones rendered the entire Night King storyline meaningless in its final season. *Troice* directly supports

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[4] Northern asserts that we have cited *Segal* with approval multiple times. But those citations were only for the proposition that the substance and gravamen of the complaint govern in a preclusion inquiry. *See Freeman*, 704 F.3d at 1115; *Fleming*, 878 F.3d at 1153; *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 705 F. App'x 558, 560 (9th Cir. 2017). We have not cited Segal for its application of SLUSA to state-law trust claims.

[5] Northern also contends that we disavowed this application of *Troice* in *Fleming*, where in a footnote we rejected the argument that *Troice* "amended the *Dabit* 'coincide' standard." 878 F.3d at 1155 n.5. This argument fails for two reasons. First, we agree that *Troice* did not amend Dabit, but simply clarified its application. *Fleming*'s holding — that the "in connection with requirement" should "have more than some tangential relation to the securities transaction" — supports our conclusion. *Id.* at 1155. Second, *Fleming* considered SLUSA preclusion in a situation involving brokers as agents, not the trust context.

our conclusion that a trustee's misconduct — over which a beneficiary of an irrevocable trust has no control — cannot constitute misconduct "in connection with" the sale of covered securities where "the only party who decides to buy or sell a covered security as a result of a lie is the [trustee]." *Troice*, 571 U.S. at 388, 134 S. Ct. 1058. To use the language in *Troice*, the trustee is both the buyer and the "fraudster"; because the trustee can deceive only itself with any alleged misconduct, its misconduct does not require SLUSA preclusion. *See also Bernard v. BNY Mellon Nat'l Ass'n*, No. 2:18-cv-00783-CRE Dkt. 58 (W.D. Pa. June 14, 2019). *Troice* confirms that SLUSA's "in connection with" requirement does not preclude claims brought by an irrevocable trust beneficiary — who has no control over the trustee — alleging imprudent investments by that trustee.[6]

Here, the district court's dismissal relied entirely on its conclusion that Northern was an agent of the trusts' beneficiaries, a conclusion unsupported by the moving papers and the FAC. Not only did the district court fail to consider Banks' allegations that the beneficiaries lacked any control over the trustees — an allegation supported by caselaw and secondary sources — but courts generally determine the existence of an agency relationship at the summary judgment stage, not in determining a motion to dismiss. *See Rookard v.*

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[6] Our opinion is limited to claims involving a trustee-beneficiary irrevocable trust relationship in which the trust instrument does not grant the beneficiary financial management trustee powers. We do not opine on how *Troice* may affect other state-law claims.

Mexicoach, 680 F.2d 1257, 1261 (9th Cir. 1982). Moreover, the district court's brief discussion of *Troice* did not acknowledge *Troice*'s holding that the "in connection with" requirement is not met if the fraudster alone bought or sold the covered securities. The district court erred in concluding SLUSA precluded Banks' imprudent investment claims.

Because we conclude Banks' imprudent investment claims do not meet the "in connection with" requirement for SLUSA preclusion, we need not decide whether the claims meet SLUSA's fraudulent conduct requirement, i.e., whether Banks adequately alleged Northern (1) engaged in misrepresentation or omission of a material fact or (2) used or employed any manipulative or deceptive device or contrivance. We reverse and remand all of Banks' imprudent investment claims.

B. Banks' fee-related claims

1. SLUSA does not preclude Banks' fee-related claims.

The FAC alleged three claims related to management fees, asserting that Northern: (1) improperly charged tax-preparation fees, (2) failed to maintain records justifying those costs, and (3) overcharged fixed-fee trusts. The district court dismissed these claims as precluded by SLUSA but did not explain how the alleged activities were "in connection with" securities transactions. The same concern that animates our holding as to the imprudent investment claims — that a trustee's misconduct, without more, cannot constitute misconduct "in connection with" the purchase or sale of covered securities — applies equally to Banks' fee claims.

Northern argues that the fee claims should be precluded because they are "inextricably intertwined" with the investment claims. Not only are the fee claims not precluded by SLUSA because of the "in connection with" requirement, the fee claims also lack any plausible relationship to covered securities. Unlike the investment claims, Banks' fee claims do not allege conduct in relation to any securities transactions.

The Third Circuit's recent decision in *Taksir*, which held that SLUSA did not bar investors' almost identical overcharging claims against their broker, is instructive. *See* 903 F.3d at 99. *Taksir* concluded SLUSA did not apply because the overcharges were "not the result of a material misrepresentation about securities transactions, but rather a contractual breach ... tangentially related to the securities transactions." *Id.* *Taksir* relied on *Troice* for its holding that the fee-related claims were not "in connection with" transactions involving a security, because the fees were not plausibly material to the sale or purchase of a security. *See id.* Additionally, Taksir recognized our dicta in *Fleming* that "a claim that [the broker] charged Plaintiffs $10 for executing a trade, despite a contract providing for a $5 charge, would not be barred" by SLUSA. *Id.* at 98 (alteration in original) (quoting *Fleming*, 878 F.3d at 1153).

The district court's order did not address these considerations or discuss the fee claims in any substantive manner, nor did it explain why SLUSA would preclude these claims. Because we agree with the reasoning in both *Taksir* and *Fleming*, we conclude the district court erred in dismissing the tax-preparation and overcharging claims on SLUSA-preclusion grounds.

2. Banks' fee-related claims survive 12(b)(6).

Separately from its SLUSA-preclusion argument, Northern's motion to dismiss the FAC also contended that Banks did not sufficiently plead the fee-related claims under Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must offer "more than labels and conclusions," and instead contain "enough factual matter" indicating "plausible" grounds for relief, not merely "conceivable" ones. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Northern argues that because its fees were reasonable, Banks failed to state a claim. Northern also contends the FAC consists of conclusory allegations. The district court did not rule on these arguments because it held SLUSA precluded the fee-related claims.

A trustee must administer a trust according to its instrument and the laws of trusts, *see* Cal. Prob. Code § 16001, and may only incur appropriate and reasonable costs. *See* Cal. Prob. Code § 16050. Trustees are under a continuing duty to account for dealings with trust property and to provide those accountings to the beneficiaries on demand. *See In re Estate of De Laveaga*, 50 Cal.2d 480, 326 P.2d 129, 133 (1958); *see also* Cal. Prob. Code § 16062. A trustee's violation of its duty is a breach of trust. *See* Cal. Prob. Code § 16400.

The FAC alleged which specific fees were at issue — tax-preparation fees and fees in excess of the fixed-fee allowed by the trust — and explained why those fees allegedly breached Northern's duty of loyalty. The FAC also alleged that the $900 tax-preparation fee was previously part of the regular trust administration fee but subsequently became a separate cost, without approval by a probate court. The FAC alleged that, "[a]s time has progressed, and despite the benefits of computerization and technology capabilities at Northern Trust, the fees charged have increased" without explanation. The FAC also asserted that Northern did not provide any information about when, how, or why it began charging tax-preparation fees. The FAC contended these combined allegations amounted to breach-of-trust violations: "[t]his uniform practice of charging excessive and improper fees violates the duties of loyalty and prudent administration by placing [Northern's] own financial interest above the interest of Plaintiffs and members of the proposed Tax Preparation Class."

These detailed allegations meet *Twombly*'s plausibility requirement and amount to more than conclusory labels.

C. Banks' elder abuse claims and claims against NT Corp.

Finally, Northern argues that Banks' opening brief did not address the district court's dismissal of the elder abuse claims and the claims against NT Corp., Northern's corporate parent. Banks responds that the district court dismissed all those claims based solely on SLUSA preclusion, which is why its opening brief focused on the inapplicability of SLUSA preclusion. Further, Banks' opening brief argued the district court erred by summarily dismissing the complaint because it should have considered the FAC on a claim-by-claim basis. *See Proctor v. Vishay Intertech., Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009) (holding that "SLUSA does not require the dismissal of all non-precluded claims appearing in the same complaint as a precluded claim"). As SLUSA does not preclude the elder abuse claims or the claims against NT Corp., and because the briefing provides no other basis for dismissal, we also reverse the dismissal of those claims.[7]

REVERSED AND REMANDED.[8]

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[7] We decline to reach whether the district court erred by dismissing the claims without leave to amend, as our analysis renders that issue moot.

[8] We decline to reassign this case to a different district court judge. *See United States v. Paul*, 561 F.3d 970, 975 (9th Cir. 2009) (per curiam) (noting the three-factor test for reassignment).

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES -- GENERAL
Case No. **CV 16-9141-JFW (JCx)**

Date: July 14, 2017

Lindie L. Banks, et al. -v- Northern Trust Corporation

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly Courtroom Deputy	None Present Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
None	None

PROCEEDINGS (IN CHAMBERS):

ORDER DENYING AS MOOT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [filed 6/5/17; Docket No. 52]; and

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT [filed 6/19/17; Docket No. 63]

JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

On June 5, 2017, Plaintiffs Lindie L. Banks and Erica LaBlanc, individually and on behalf of all others similarly situated (collectively, "Plaintiffs") filed a Motion for Class Certification. On June 12, 2017, Defendants Northern Trust Corporation ("NT Corp.") and Northern Trust Company ("Northern") (collectively, "Defendants") filed their Opposition. On June 19, 2017, Plaintiffs filed a Reply. On June 19, 2017, Defendants filed a Motion to Dismiss First Amended Class Action Complaint ("Motion to Dismiss"). On June 26, 2017, Plaintiffs filed their Opposition. On July 3, 2017, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7–15, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for July 17, 2017 is hereby vacated and the matters taken off calendar. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are beneficiaries of the "Lindstrom Trust." First Amended Complaint ("FAC"), ¶ 16. Northern is a financial services company that serves as the trustee for the Lindstrom Trust and retains sole discretion to invest the Trust's assets. *Id.*, ¶¶ 16, 179, 187, 323, and 333. NT Corp. is Northern's parent company.[1] Plaintiffs purportedly represent a putative class consisting of beneficiaries of trusts for which Northern serves as trustee and has exclusive investment discretion. *Id.*, ¶ 349.

On December 9, 2016, Plaintiffs filed a Complaint against Defendants, alleging causes of action for: (1) breach of fiduciary duty in connection with fund selection; (2) unjust enrichment or restitution; (3) accounting as to the fund-related claims; (4) breach of fiduciary duty in connection with tax preparation fees; (5) accounting as to the tax preparation claims; (6) unfair competition under California Business and Professions Code § 17200; and (7) elder abuse under California Welfare and Institutions Code §§ 15600, *et seq.* In their Complaint, Plaintiffs alleged that Defendants undertook a "plan" or "program" to enrich themselves by investing trust assets in Northern-affiliated investment funds, violating their fiduciary duties. Complaint, ¶¶ 25, 33, and 179. According to Plaintiffs, those investments were not in the best interest of the trust beneficiaries and were made solely to benefit Defendants. *Id.*, ¶¶ 38, 66–97, and 169–222. On June 2, 2017, the Court dismissed Plaintiffs' Complaint, and concluded that all of Plaintiffs' claims were precluded by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Although the Court expressed "serious reservations" as to Plaintiffs' ability to amend their Complaint to avoid SLUSA claim preclusion, the Court, in light of the Ninth

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[1] Plaintiffs allege claims against NT Corp. on the ground that NT Corp. "directs and approves the actions of its subsidiaries." *Id.*, ¶ 29.

Circuit's liberal policy favoring leave to amend, granted Plaintiffs an opportunity to amend their Complaint.

On June 5, 2017, Plaintiffs filed their First Amended Complaint. In their First Amended Complaint, Plaintiffs allege the same seven claims for relief against Defendants as alleged in their original Complaint. Plaintiffs again allege that Defendants breached their fiduciary duties by engaging in a surreptitious "internal business plan" of investing trust assets in Defendants' "own financially related investment vehicles." FAC, ¶¶ 29 and 274. Specifically, Plaintiffs allege that "[i]n regard to Defendants' investments in mutual funds, none of the choices made by Defendants were untainted by their own pecuniary self-interest," that defendants do not invest in competitors' funds "because there is no financial incentive for [Defendants] to do so," and that "[t]he financial benefits" Defendants receive from investing trust assets primarily in affiliated securities "are significant and [to] the detriment [of] the Plaintiffs." *Id.*, ¶¶ 58, 161, 311. Plaintiffs also contend that Defendants engaged in a practice of rebating mutual fund management fees to the trusts, which "allowed [Defendants] to use and retain the money, and profit by that use, without returning an appropriate additional money for the use of the trust assets" or advising beneficiaries "that they were entitled to an additional remedy." *Id.*, ¶¶ 74–75, 81, 85. Plaintiffs allege that Defendants' practices reduced the "rate of return" on trust investments. *Id.*, ¶ 231.

II. LEGAL STANDARD

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High–Line Medical Instruments Co., Inc.*, 922 F. Supp. 299, 304 (C.D. Cal. 1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F. Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) *cert. denied*, 454 U.S. 1031 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for summary judgment. *See, e.g., id.*; *Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir. 1994).

Where a motion to dismiss is granted, a district court must decide whether to grant leave to amend. Generally, the Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g., DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a Court does not need to grant leave to amend in cases where the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

III. DISCUSSION

SLUSA compels the dismissal of any "covered class action" that alleges (1) that the defendant made "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" or (2) "that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1). The Ninth Circuit has held that SLUSA bars any state-law class action brought on behalf of 50 or more putative class members, "whether styled in tort, contract or breach of fiduciary duty, that in essence claim[s] misrepresentation or omission in connection with certain securities transactions."[2] *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1114 (9th Cir. 2013); *see also Stoody–Broser v. Bank of Am., N.A.*, 442 F. App'x 247, 249 (9th Cir. 2011) (holding that SLUSA applies where a covered class action "allege[s], either expressly or implicitly, misrepresentations, omissions, or fraudulent practices").

In their Motion, Defendants argue that Plaintiffs' First Amended Complaint should be dismissed because all of Plaintiffs' claims are precluded by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA").[3] Defendants argue that the only changes Plaintiffs made to the allegations of their First Amended Complaint were to remove "securities law buzzwords" and delete "paragraphs from the original [C]omplaint that obviously triggered SLUSA preclusion, while leaving

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[2] It is undisputed that the putative class in this case includes more than 50 people.

[3] Defendants also make other arguments as to why Plaintiffs' First Amended Complaint should be dismissed, but because the Court agrees with Defendants that all of Plaintiffs' claims are precluded by SLUSA, the Court need not address those arguments.

the substance of their claims intact." Defendants' Statement of Decision, 4:10–12. The Court agrees. Plaintiffs "cannot avoid the application of SLUSA by removing covered words from its complaint but leaving in the covered concepts." *Zweiman v. AXA Equitable Life Ins. Co.*, 146 F. Supp. 3d 536, 546–48 (S.D.N.Y. 2015) (dismissing complaint in subsequent action that was "selectively edited ... to delete 'magic words' or 'red flags' identifying [plaintiff's previous] claim to be a securities fraud claim precluded by SLUSA"); *Araujo v. John Hancock Life Ins. Co.*, 206 F. Supp. 2d 377, 384–85 (E.D.N.Y. 2002) (holding that a plaintiff cannot "artfully avoid SLUSA" by amending their complaint to excise "the allegations that the defendant engaged in fraudulent conduct" where the "crux of the amended complaint" continues to allege a deceptive scheme in connection with covered securities); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095–96 (11th Cir. 2002) (affirming dismissal of amended complaint where plaintiff "delete[d] all claims and allegations that might be deemed to fall within the scope of the SLUSA," but nevertheless "implicitly alleged" concealment); *Felton v. Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 693 (S.D.N.Y. 2006) (affirming dismissal of amended complaint that pled "a securities fraud wolf dressed up in a breach of contract sheep's clothing").

In this case, the substance of Plaintiffs' allegations in the First Amended Complaint is no different from the substance of their original Complaint. The First Amended Complaint still contains multiple allegations that Defendants engaged in a "manipulative or deceptive device or contrivance" with respect to the "purchase or sale of a covered security" by systematically favoring their own pecuniary interests to Plaintiffs' detriment which, as this Court previously held, is conduct covered by SLUSA. *See* 15 U.S.C. §§ 77p(b) and 78bb(f)(1). Plaintiffs also continue to allege express and implied "misrepresentations or omissions of material fact" in connection with the investment of trust assets in Northern-affiliated funds, which independently triggers SLUSA. *See* 15 U.S.C. §§ 77p(b), 78bb(f)(1). Therefore, the claims in Plaintiffs' First Amended Complaint, like those in their original Complaint, are precluded by SLUSA.

A. Plaintiffs' Challenge Conduct Was Undertaken "In Connection With" The Purchase or Sale of Covered Securities.

The threshold element required for SLUSA preclusion of state law class action claims is that the challenged conduct was undertaken "in connection with the purchase or sale of a covered security."[4] 15 U.S.C. §§ 77p(b), 78bb(f)(1). The Supreme Court has specifically held that the "in connection with" requirement is to be given a "broad interpretation." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006).

In the First Amended Complaint, Plaintiffs continue to allege that Northern, as Trustee of the Lindstrom Trust, rather than Plaintiffs, made the

[4] Plaintiffs do not dispute that the mutual funds in which Defendants invested trust assets are covered securities. *See* 15 U.S.C. §§ 77r(b)(2), 77p(f)(3), 78bb(f)(5)(E); *Holtz v. JPMorgan Chase Bank, N.A.*, 846 F.3d 928, 929 (7th Cir. 2017) (holding that "mutual funds are securities" covered by SLUSA).

investment decisions. However, as this Court discussed in its June 2, 2017 Order dismissing Plaintiffs' original Complaint, numerous federal courts have held that investments made by a plaintiff's agent meet SLUSA's "in connection with" requirement. *See, e.g., Holtz*, 846 F.3d at 933 ("That some of the investment decisions were made by investment advisers as [the plaintiff's] agent does not take [the case] out of the 'in connection with' domain"); *Siepel v. Bank of America, N.A.*, 526 F.3d 1122, 11247 (8th Cir. 2008) (concluding that SLUSA prohibits "state-law claims that a trustee breached its fiduciary duty by failing to disclose conflicts of interest in its selection of nationally-traded investment securities"); *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009) ("All of Segal's counts—breach of fiduciary duty, unjust enrichment, breach of contract—revolve around Fifth Third's decision to buy mutual fund shares. Segal's allegations do not merely 'coincide' with securities transactions; they depend on them"); *Goodman v. AssetMark, Inc.*, 53 F. Supp. 3d 583, 590 (E.D.N.Y. 2014) (rejecting the suggestion that "SLUSA cannot apply whenever the defendant accused of fraud, instead of the plaintiff, was the one who purchased the covered securities").

Therefore, Plaintiffs' claims easily fall within the SLUSA's broad "in connection with" requirement.

B. Plaintiffs Have Alleged A "Manipulative or Deceptive Device or Contrivance."

SLUSA precludes state law class action claims that allege a "manipulative or deceptive device or contrivance" otherwise covered by Section 10(b) and Rule 10b–5. 15 U.S.C. §§ 77p(b)(2), 78bb(f)(1)(B).

However, for SLUSA to apply, allegations of "manipulative or deceptive device or contrivance" need not involve a misrepresentation or omission. Instead, an allegation that the defendant "exercised [its] power of disposition for [its] own benefit" is sufficient. *SEC v. Zandford*, 535 U.S. 813, 821 (2002) (holding that the broker "was only able to carry out his fraudulent scheme without making an affirmative misrepresentation because the [customers] had trusted him to make transactions in their best interest without prior approval"); *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 577–79 (S.D. Tex. 2002) (collecting examples of the type of conduct held to violate Section 10(b), and noting that they are "not merely limited to the making of an untrue statement of material fact or omission").

In their First Amended Complaint, as in their original Complaint, Plaintiffs allege that Defendants have undertaken an "internal business plan" to favor its own affiliated mutual funds when investing trust assets. FAC, ¶ 29. In addition, Plaintiffs allege that, under this plan, "[i]n regard to Defendants' investments in mutual funds, none of the choices made by Defendants were untainted by their own pecuniary self-interest." *Id.*, ¶ 311. Plaintiffs also allege that "[t]he recurring theme of Defendants' conduct ... is that Defendants allowed their own financial interest.... to influence their decision-making process in regard to investing trust assets" (*id.*, ¶ 330), and that defendants "approv[ed] investments for trust assets under their management because they were financially related to Defendants." *Id.*, ¶ 362. Moreover, Plaintiffs newly allege that Defendants improperly charge mutual fund management fees to the trusts and then rebate those fees so that they can "use and retain the money, and profit by that use, without returning an appropriate additional money for the use of the trust assets." *Id.*, ¶¶ 74–81. These are precisely the type of "deceptive device" claim that SLUSA was intended to preclude. *See, e.g., Montoya v. New York State United Teachers*, 754 F. Supp. 2d 466, 472–73 (E.D.N.Y. 2010) (holding that claims that a fiduciary made investment recommendations based on its own pecuniary gain rather than "based upon the best interests of the Plaintiffs" alleged a "manipulative or deceptive device" covered by SLUSA); *see also Zandford*, 535 U.S. at 821 (holding that liability under the securities laws attached when the defendant "exercised his power of disposition for his own benefit").

Therefore, Plaintiffs' claims easily fall within the SLUSA's "manipulative or deceptive device" requirement, and, because Plaintiffs' claims also meet the "in connection with" requirement, they are precluded by SLUSA.

C. Plaintiffs Have Alleged A Material Misrepresentation or Omission.

SLUSA precludes state law class action claims alleging "misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." *Stoody–Broser*, 442 F. App'x at 247. "[M]isrepresentation need not be a specific element of the claim to fall within [SLUSA]'s preclusion." *Id.* Instead, courts ask "whether the complaint includes these types of allegations, pure and simple." *Segal*, 581 F.3d at 311; *Miller v. Nationwide Life Ins. Co.*, 391 F.3d

698, 701–02 (5th Cir. 2004) ("[T]he only question before us is whether Miller's breach of contract claim alleged that Nationwide made untrue statements.... Miller's complaint clearly does include such allegations.... We thus conclude that Miller's state law claim falls within the prohibition of [SLUSA]").

In determining if a particular state law class action claim includes an allegation of a misrepresentation that falls within SLUSA preclusion, courts routinely dismiss state law class action claims alleging that the defendant failed to disclose its conduct and practices in relation to investment of client assets in proprietary mutual funds. For example, in *Segal*, 581 F.3d at 309–10, the Sixth Circuit affirmed dismissal of state law breach of fiduciary duty and breach of contract claims alleging that the trustee bank "failed to inform trust beneficiaries that their trust accounts would be invested in proprietary mutual funds." Observing that courts "have no license to draw a line between SLUSA–covered claims that must be dismissed and SLUSA–covered claims that must not be," the Sixth Circuit held that whether the plaintiff's state law claims "depend on allegations of misrepresentation or manipulation" was irrelevant—the only question was "whether the complaint includes these types of allegations." *Id.* at 311. Similarly, in *Spencer v. Wachovia Bank, N.A.*, 2006 WL 3408043, *4 (S.D. Fla. May 10, 2006), the court held that SLUSA preempted breach of fiduciary duty claims involving allegations that the bank trustee "attempt[ed] to conceal" investments in proprietary funds and engaged in misleading marketing, because such allegations of nondisclosure involved "misrepresentations" that triggered the statute. *See also Stoody–Broser*, 442 F. App'x at 248 (affirming the dismissal of a complaint alleging that a trustee engaged in "omissions of material fact and deceptive practices" regarding investments in proprietary mutual funds).

In their First Amended Complaint, Plaintiffs continue to allege a variety of express and implied misrepresentations and omissions in connection with investment of trust assets in Northern-affiliated funds. For example, Plaintiffs allege that Defendants have "an internal policy"—a policy that is not disclosed to trust beneficiaries—"of not using competitor's [*sic*] mutual funds in lieu of the Northern Trust Family of Funds." FAC, ¶ 168; *see also id.*, ¶¶ 283–84 (alleging that Defendants "routinely and uniformly favor and direct investment of trust assets into financially related instruments" to serve their "internal goals" of "retain[ing] investment in Defendants' own proprietary funds"). In addition, Plaintiffs allege that Defendants follow "an internal business plan which requires and instructs [Defendants'] officers and employees to select funds from a '[Northern] Guidance List' that causes man[a]gers to invest personal trust assets in the Northern Trust Family of proprietary funds to the exclusion of the rest of the markets." *Id.*, ¶ 29. Plaintiffs also allege that "Defendants have stated verbally to certain beneficiaries"—though not to Plaintiffs—"that there is an internal policy of forced investment only in the Northern Funds Portfolio affiliated funds for trusts with assets under a value of $5,000,000." *Id.*, ¶ 144. Plaintiffs' allegations that Defendants wrongfully invested trust assets in affiliated funds to satisfy purportedly disloyal "internal" plans, policies, and goals necessarily imply that Defendants concealed those plans, policies, and goals from trust beneficiaries. *See, e.g., Rayner v. E*TRADE Fin. Corp.*, ––– F. Supp. 3d –––, 2017 WL 1232730, *5 (S.D.N.Y. Apr. 3, 2017) (holding that plaintiff alleged misrepresentations or omissions because "plaintiff's claims necessarily challenge what E*TRADE told the plaintiff about its execution practices, and the nature of E*TRADE's [disclosure] obligations to the plaintiff"). Moreover, Plaintiffs have now added allegations that Defendants "did not advise the putative class that they were entitled to an additional remedy" beyond a rebate of fund management fees, and that this alleged "silence is an additional breach of the duty of loyalty." FAC, ¶¶ 85–86.

Because Plaintiffs have alleged a variety of express and implied misrepresentations and omissions in connection with investment of trust assets in Northern-affiliated funds in their First Amended Complaint, and, because Plaintiffs' claims also meet the "in connection with" requirement, their claims are precluded by SLUSA.

IV. CONCLUSION

For all the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**. Plaintiffs' First Amended Complaint is **DISMISSED without leave to amend**, and this action is **DISMISSED with prejudice**. Plaintiffs' Motion for Class Certification is **DENIED as moot**.

IT IS SO ORDERED.