No. 19-440

IN THE

Supreme Court of the United States

NORTHERN TRUST CORPORATION, *et al.*,

Petitioners,

v.

LINDIE L. BANKS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where an irrevocable trust mandates that the trustee, holding legal title to trust assets, has sole investment authority and the beneficiary has no authority or control over those assets, does an allegation by the captive trust beneficiary that the trustee breaches its state law fiduciary duties through the trustee's unilateral and disclosed favoring of its own affiliated funds over less costly non-affiliated funds, constitute either "a misrepresentation or omission of a material fact" or a "manipulative or deceptive device or contrivance" made "in connection with the purchase or sale of a covered security," and therefore precluded by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p(b), 78bb(f)(1)?

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INTRODUCTION

Petitioners contend the question presented is broadly whether SLUSA's[1] "in connection with" requirement is met "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[.]"

The Ninth Circuit made no such blanket ruling. The Ninth Circuit addressed a specific set trusts: irrevocable trusts where the trustee has sole investment authority and the captive beneficiary has no control over the investments or the trustee. The decision *expressly limited* its holding to only those types of trusts, leaving other issues for other days. Pet. 18a, fn.6. This narrow decision addressing a limited set of trusts is not an important issue warranting this Court's review.

This case also presently no longer implicates SLUSA. SLUSA only precludes state law claims involving "covered class actions," defined as more than 50 persons. 15 U.S.C. 78bb(f)(5)(B). Following the filing of the petition, on December 6, 2019, the District Court denied in its entirety Respondents' motion for class certification, leaving only the two Respondents' individual claims.[2] Accordingly, the case is presently not a "covered class action," rendering SLUSA inapplicable.

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1. The Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p(b), 78bb(f)(1).

2. *Banks v. Northern Trust Corporation, et al.*, Case No. 2:16-cv-09141-JFW-JCx (C.D. Cal.), at Dkt. 106. While Respondents have a pending petition for permission to appeal this order pursuant to Fed. R. Civ. P. 23(f) (Ninth Circuit Case No. 19-80178), the current case involves only Respondents and their individual claims.

The Ninth Circuit also correctly applied this Court's precedents, most notably *Merrill Lynch Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71 (2009) and *Chadbourne & Park LLC v. Troice*, 571 U.S. 377 (2014), concluding that SLUSA's "in connection with" requirement is absent under the complaint's specific allegations. Nor is there any true Circuit conflict, as the Ninth Circuit is the only Circuit since *Troice* to address the "in connection with" element for any trustee, much less the narrow class of captive beneficiaries here. Even without *Troice*, no split exists with the two cases Petitioners cite: there is no indication that those trusts only involve irrevocable trusts whose sole investment discretion is vested in the trustee; the legally significant distinction between an agent and trustee is not addressed; and those cases contain allegations of fraud, which are absent here.

Finally, this case presents a poor vehicle for reviewing the issue for several reasons. This case presently no longer implicates SLUSA in light of the District Court's denial of class certification. This case also involves only a limited class of trusts, not all of them, which is not of importance warranting this Court's attention. Moreover, the second SLUSA requirement of allegations of fraud are absent here, as Respondents do not allege fraud or a deceptive device. Respondents instead allege breaches of fiduciary duties in the context of the disclosed disproportionate investments in Petitioners' own funds. Respondents also have an entirely separate claim involving unlawful and inflated tax preparation fee charges, which are not subject to this petition, with a trial date on April 28, 2020.[3]

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3. *See Banks v. Northern Trust Corporation, et al.*, Case No. 2:16-cv-09141-JFW-JCx (C.D. Cal.), at Dkt. 86, p. 34. The district

For all these reasons, the petition should be denied.

STATEMENT OF THE CASE

The Lindstrom Trust is a pair of irrevocable trusts created decades ago which leave full and complete investment discretion with the trustee, currently Petitioner Northern Trust Company ("Northern"). Northern as trustee holds legal title to the trust assets. Under the terms of the trust, no one else – neither beneficiary Respondent Lindie L. Banks, nor remainder beneficiary Respondent Erica LeBlanc, nor anyone else other than Northern – has the power, authority, or discretion to make investments on behalf of the Lindstrom Trust. Under the complaint's allegations, Respondents are mere bystanders to any activity relating to the purchase, sale, or holding of any investment.

Respondents allege two independent breaches of state law fiduciary duties against Northern, neither involving securities fraud. First, on claims not subject to this petition, Respondents on behalf of themselves and a proposed Tax Preparation Fee Class allege that Northern has unlawfully charged inflated and unsupported fees for the preparation of routine, mandatory fiduciary tax returns. The Ninth Circuit's unanimous decision correctly held that these fee claims lacked any plausible

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court denied Respondents' request to stay proceedings pending the Ninth Circuit's decision on the Fed. R. Civ. P. 23(f) Petition. *Id.* at Dkt. 112; *see* fn. 2, *supra*. Respondents have a pending motion to stay the district court proceedings with the Ninth Circuit, along with the pending Fed. R. Civ. P. 23(f) Petition in the Ninth Circuit. Nevertheless, the current case status is two Respondents' individual claims with an April 28, 2020 trial date.

relationship to SLUSA's basic requirement of involving "covered securities," and that Respondents also plausibly pled these claims under Fed. R. Civ. P. 12(b)(6). Pet. 18a-21a. Northern does not seek this Court's review of those holdings.

Respondents also allege on behalf of themselves and a proposed Investment Class that Northern breached its state law fiduciary duties of loyalty and prudent administration by favoring its own Northern funds ("proprietary" or "affiliated" funds) over better performing and less costly non-proprietary funds. Although hidden in Northern's petition, but critical to the Ninth Circuit's decision, Respondents and this proposed Investment Class are *limited* to those trusts where the beneficiaries have no authority to make or even to delegate investment decisions. Trustee Northern is not an agent of Respondents, and Northern alone has the sole and complete authority to make investment decisions regarding the trust assets to which it holds legal title. Respondents are not involved, either directly or vicariously, in the purchase, sale, or holding of any investment.

Respondents' investment claims do not allege any fraudulent or deceptive conduct on behalf of Northern, which is *also* required for SLUSA to preclude a claim. Respondents are well-aware of Northern's investments, as they receive account statements disclosing the disproportionate investments in Northern's proprietary funds. Rather, Respondents, as captive beneficiaries of a trustee over whom they do not control, contend that Northern's favoring its own funds at the expense of other non-affiliated funds breaches the trustee's fiduciary duties.

This Court's *Troice* decision requires a connection between the alleged fraudulent conduct and the purchase or sale of a covered security in order for SLUSA to preclude the claim. Far from creating a "trustee exception" to SLUSA,[4] the Ninth Circuit correctly applied this Court's precedents to the allegations involving a limited set of trusts: irrevocable trusts where the trustee has complete investment discretion and the plaintiff-beneficiary has no control or authority over the trustee or trust assets. In applying this Court's precedents in conjunction with the legal distinction between an agent and a trustee, the Ninth Circuit correctly held that under the narrow allegations of the complaint, SLUSA's "in connection with" requirement was not met. The Ninth Circuit expressly acknowledged its limited holding went no further.[5]

Importantly, the investment claims in this case do *not* involve trusts where the grantor or beneficiary retains control over the investments or trust assets. The investment claims in this case also do *not* involve a grantor or beneficiary delegating their investment authority to the trustee or a third party. The petition thus does not address an issue of importance for this Court. In any event, the Ninth Circuit did not err in applying this Court's decisions to these facts.

Nor is there a true conflict amongst the Circuits. The Ninth Circuit is the only Circuit since *Troice* to

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4. Brief of *Amici Curiae* American Bankers Association and The Bank Policy Institute ("*Amici Curiae* Br."), 2, 8-9.

5. The Ninth Circuit therefore did not address whether Northern satisfied SLUSA's second required element of allegations of fraud or a deceptive device.

address SLUSA's "in connection with" element for any trustee, much less the specific class of trusts here. Even without *Troice*, no split exists. In the Sixth and Eighth Circuit cases cited by Northern, there is no indication that the trusts only involve irrevocable trusts whose sole investment discretion is vested in the trustee; the legally significant distinction between an agent and trustee is unaddressed; and those complaints contain allegations of fraud, which are absent here.

Finally, the petition should be denied because this case is a very poor vehicle to address the question for multiple reasons. Since the filing of the petition, the District Court has denied class certification, so there is presently no "covered class action" as required by SLUSA. The Ninth Circuit's decision does not involve an issue of widespread importance because the investment claims are limited to those trusts where the trustee has complete investment discretion; the Ninth Circuit expressly stated that its decision did *not* apply to *all* trusts. This case also does not involve securities fraud. Respondents do not allege fraud or deception, so the second SLUSA requirement Northern must establish is missing. There is an entirely separate claim not subject to this petition for unlawful and inflated tax preparation fee charges which is being pursued in the District Court, with a trial date of April 28, 2020.

For all these reasons, the petition should be denied.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Presently Implicate SLUSA As A Result of The District Court's Subsequent Denial of Class Certification

A threshold requirement for SLUSA to preclude a state law claim is that the claim involves a "covered class action," which requires "more than 50 persons or prospective class members," 15 U.S.C. 78bb(f)(5)(B)(i)(I).

After this petition was filed, on December 6, 2019, the District Court denied in its entirety Respondents' motion for class certification on both the tax preparation fee claims and the investment claims, leaving only Respondents' individual case. *See Banks v. Northern Trust Corporation, et al.*, Case No. 2:16-cv-09141-JFW-JCx (C.D. Cal.), at Dkt. 106. Accordingly, this case presently no longer meets the threshold SLUSA requirement of a "covered class action."

Respondents do have a pending petition for permission to appeal this order in the Ninth Circuit pursuant to Fed. R. Civ. P. 23(f). *See* Ninth Circuit Case No. 19-80178. If the Ninth Circuit denies Respondents' petition, the case will remain only two individual Respondents, for which SLUSA by its terms does not apply. If the Ninth Circuit grants the petition, the merits appeal will likely last over a year before a decision, which results in additional vehicle problems. *See* Section IV, *infra*. And even if the Ninth Circuit decides to hear the class certification denial on the merits, the Ninth Circuit could affirm the denial of class certification, again leaving only the two Respondents' claims.

Because SLUSA cannot apply to preclude the presently remaining individual claims in this case, the petition should be denied.

II. The Ninth Circuit Correctly Applied This Court's Precedents

Northern's petition presents a fundamental mischaracterization of the complaint's allegations and the Ninth Circuit's opinion. The Ninth Circuit applied the long-established legal distinction between an agent and a trustee to this Court's precedents, correctly concluding that where, as here, there is a trustee of an irrevocable trust who holds legal title to trust assets and controls all investment decisions, the plaintiff-beneficiary cannot as a matter of law buy, sell, or hold covered securities in connection with any purported fraudulent conduct.[6] This correct decision applying centuries old distinction between a trustee and agent and this Court's SLUSA precedent to a complaint's allegations involving a specific set of trusts does not meet the standards for this Court's review.

SLUSA's preclusive provisions amended the Securities Act of 1933 and the Securities Exchange Act of 1934: "No covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party alleging" that the defendant made "a misrepresentation or omission of a material fact in connection with the purchase or sale of a

6. *Amici Curiae*'s argument that the Ninth Circuit has created a broad "trustee exception" to SLUSA is also based on the erroneous contention that the Ninth Circuit's decision addresses *all* trusts, when in fact it is limited to this specific class of irrevocable trusts.

covered security" or "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)(A)-(B). In other words, if the plaintiff alleges either "a misrepresentation or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device," SLUSA precludes the claim if the misrepresentations, omissions or manipulative or deceptive devices occurred "in connection with the purchase or sale of a covered security." *Id.*

The Ninth Circuit held that the "in connection with" requirement was absent under the complaint's allegations where a trustee, holding legal title to trust assets, also has sole and complete investment authority over trust assets and the beneficiary has no power or control over the trustee or the investments. Pet. 6a-18a. The Ninth Circuit's decision is entirely consistent with this Court's SLUSA decisions of *Dabit,* 547 U.S. 71, and *Troice*, 571 U.S. 377.

In *Dabit,* this Court issued its first decision interpreting SLUSA, grappling with the definition of the "in connection with" requirement. In *Dabit*, it was not buyers or sellers of securities, but security holders that brought the class action. While instructing courts to apply a broad construction of SLUSA, *Dabit* held that class actions involving "holders" of covered securities fell within SLUSA. *Id.* at 85-86, 89.

Dabit's in-depth analysis of the necessary connection between SLUSA and the federal securities laws provided new guidance that the fraudulently induced "holding" of securities implicated SLUSA even though the violation

did not actually involve buying or selling. *Compare Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (plaintiff alleging a private right of action under securities laws must be an actual purchaser or seller of securities). Notably, however, this Court cautioned that the inclusion of "holding" was only a consistency, not to be considered as expanding the reach of SLUSA to preempt state law claims unrelated to securities fraud, stating that "[t]his is hardly a situation, then, in which a federal statute has eliminated a historically entrenched state-law remedy." *Id.* at 88.

Eight years later, *Troice* expanded on *Dabit*'s analysis. 571 U.S. 377. *Troice* involved the class action plaintiffs' purchase of uncovered securities sold by disgraced financier Allen Stanford and the Stanford International Bank. The plaintiffs brought a class action against entities and individuals who allegedly helped perpetrate the fraud. Because Stanford had falsely told the victims that the uncovered securities were backed by covered securities, *id.* at 380, the defendants brought a motion under SLUSA. The District Court dismissed the claims but the Fifth Circuit reversed the dismissal.

Holding that the claims were not precluded by SLUSA, this Court held (7-2) 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.* at 387 (emphasis supplied). The Court recognized that "the 'someone' making that decision to purchase or sell must be a party other than the fraudster." *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." *Id.*; *see also id.* at 396-97.

Troice is explicit: SLUSA *only* precludes a state law claim when the gravamen of the claim alleges misrepresentations or omissions of fact that are *material* to the decision to purchase or sell a covered security. *Id.* at 387-88, 393. The use of the term "material" is not an accident. The majority specifically rejected the two dissents' arguments that the majority was shrinking the scope of SLUSA preemption. *Id.* at 394-95.

In reaching this conclusion, this Court emphasized that the common thread in every securities case in which it found fraud to be "in connection with" a purchase or sale of a security involved "victims who took, who tried to take, who divested themselves of, who tried to divest themselves of, or who maintained *an ownership interest* in financial instruments that fall within the relevant statutory definition." *Id.* at 388 (emphasis in original) (citing, *inter alia*, *Dabit*, *S.E.C. v. Zandford*, 535 U.S. 813 (2002), and *United States v. O'Hagan*, 521 U.S. 642 (1997).)

Troice thus requires that the alleged misrepresentation be *material* to the decision to buy, sell, or hold a covered security by someone other than the fraudster. *Troice*, 571 U.S. at 380 ("Nothing in the regulatory statutes suggests their object is to protect persons whose connection with the statutorily defined securities is more remote than words such as 'buy,' 'sell,' and the like, indicate."); *id.* at 396-97. The Ninth Circuit faithfully applied this decision in concluding that Respondents, who did not have legal title to the trust assets, made no decision either directly or indirectly, to buy, sell, or hold anything, much less a covered security.

This correct application of this Court's precedent was made in the context of the legal distinction between an agent and a trustee. While Northern dismisses the distinction between a trustee and an agent as irrelevant, Pet. 18, the law does not. *See Taylor v. Mayo*, 110 U.S. 330, 334-35 (1884). While both involve fiduciary duties, there are significant differences between the two. An agent acts for and on behalf of the principal, subject to the principal's control. Pet. 12a (citing *N.L.R.B. v. United Bhd. of Carpenters & Joiners, Local No. 1913*, 531 F.2d 424, 426 (9th Cir. 1976), citing Restatement 2d, Agency § 14B and Restatement 2d, Trusts § 8). In contrast, 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.*

It is not only that the trustee holds legal title to the trust assets which distinguishes a trustee from an agent. Rather, as the Ninth Circuit correctly pointed out, a critical distinction is the degree of control that exists between an agent and a trustee. Pet. 12a-14a. The Ninth Circuit explained:

> 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).

Pet. 13a.

The Ninth Circuit recognized that "[u]nlike an agent-principal relationship, beneficiaries who are not also trustees of an irrevocable trust cannot direct Northern's actions as the trustee." Pet. 11a. Therefore, "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." *Id.*

Northern did not make the imprudent investments at the direction of Respondents. Nor did Northern, acting with authority from Respondents, make the imprudent investments. Rather, the complaint alleges that Northern, acting under its sole and exclusive investment authority, chose its own proprietary funds when managing trusts where it was not subjected to others' direction.

In arguing that the Ninth Circuit's decision conflicts with *Zandford* and *O'Hagan*, Northern makes similar arguments this Court rejected in *Troice*.

The Ninth Circuit correctly analyzed why *Zandford* is inapplicable to this complaint's allegations. Pet. 12a-13a. In *Zandford*, the stockbroker "duped" an elderly man into placing funds into a joint account over which Zanford had power of attorney. Zanford, without notice or authorization,

wrote checks misappropriating funds for his own personal benefit from a mutual fund account, which Zandford knew required that securities be sold to fund the checks. *Zandford*, 535 U.S. at 820-21. The fraud in *Zanford* was unauthorized and undisclosed sales of securities over which the victim-customer had an ownership interest. In finding a securities law violation, the Court cautioned that "the statute must not be construed so broadly as to convert every common-law fraud that *happens to involve securities* into a violation" of the federal securities laws. *Id*. at 820 (emphasis supplied).

Zandford was grounded in agency principles and the importance of having securities law apply to the scheme involved in that case. *Id.* at 822-23. This Court recognized that the stockbroker's fraud "undermines the value of a discretionary account" where customers "delegate authority to a broker who will make decisions in their best interests without prior approval" and "[i]f such individuals cannot rely on a broker to exercise that discretion for their benefit, then the account loses its added value." *Id.* at 822-23.

The allegations here are therefore not "*exactly* like *Zandord*" as Northern suggests. Pet. 4. In *Zandford*, the defraud victim was the principal who gave authority over its investments to the fraudster, who then misappropriated the funds without disclosure. Here, Respondents neither control the investments nor the trustee, but are at the mercy of Northern's investment decisions.

Additionally, *Zandford* found fraud based on a lack of disclosure. *Zandford,* 535 U.S. at 820-21. That is the opposite of the allegations here: Respondents do not allege

either misrepresentations or non-disclosure. Respondents allege that the breach of fiduciary duty occurs in the context of the disclosed disproportionate amount of Northern propriety funds, set forth on account statements, in relation to non-affiliated funds.

The Ninth Circuit's decision is also consistent with *O'Hagan*. *O'Hagan* involved criminal liability under the "misappropriation theory," which is holds that "a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information." 521 U.S. at 652. Liability under this theory turns on the agent-fiduciary's misappropriation of the principal's confidential information entrusted to the fiduciary. *Id.*

The Ninth Circuit's decision expressly distinguishes the irrevocable trust present here with the principal/agent relationship. Pet. 10a-14a. *O'Hagan* turns on the principal/agent relationship, as the misappropriation theory requires that the fiduciary misappropriate confidential information entrusted by the principal. *See id.* at 652, 653-54, 656. The defrauded principal, having an ownership interest in the confidential information, provides the confidential information to the agent/fiduciary, who in breach of its fiduciary duties and without disclosing to the principal, trades on that nonpublic information. *O'Hagan* recognized that in this situation, more than just the fraudster is involved: the defrauded principal who provided the fiduciary with confidential information as well as the investing public. *Id.* at 656.

Here, the trustee Northern is not defrauding anyone. Northern is not in an agency relationship with Respondents, nor is Northern using any nonconfidential information from Respondents in implementing its disclosed disproportionate investments in Northern's proprietary funds.[7]

The petition should be denied because the Ninth Circuit's opinion correctly applied and is consistent with this Court's precedents.

III. There Is No True Circuit Conflict

Although Northern contends the Ninth Circuit's decision conflicts with the Sixth and Eighth Circuits (Pet. 19-23), no actual Circuit conflict exists. Since *Troice*, the Ninth Circuit is the only Circuit to address whether SLUSA's "in connection with" requirement is met when a breach of fiduciary duty claim is brought against an irrevocable trustee with complete investment discretion and where the beneficiary has no authority or control.

Even in the absence of *Troice* there is no actual Circuit split. In *Siepel* v. *Bank of America*, 526 F.3d 1122 (8th Cir. 2008), the plaintiffs alleged both federal securities law

7. The Ninth Circuit also held that the District Court erroneously concluded as a matter of law at the pleading stage that Northern was an agent of Respondents. Pet. 17a-18a. The District Court's erroneous conclusion was not supported by the complaint's allegations; the complaint, in fact, alleges the opposite of agency. Pet. 17a. Moreover, the issue of whether agency exists is not proper on a motion to dismiss but as a factually intensive inquiry is reserved for summary judgment. Pet. 17a-18a. These rulings are not challenged in Northern's petition.

violations and breach of state law fiduciary duties. *Id.* at 1124. The state law claims were grounded in "failing to disclose conflicts of interest in its selection of nationally-traded investment securities." *Id*. The district court dismissed the federal securities claims on the merits and the state law claims as precluded under SLUSA. *Id. Siepel* affirmed, holding that "[g]iven the identical coverage of Section 10(b) and SLUSA, it follows that the Plaintiffs' state-law claims are preempted." *Id.* at 1127.

Siepel and *Banks* are entirely distinguishable. First, unlike the *Siepel* claims which were also expressly based on federal securities violations, Respondents' claims are not. Respondents' investment claims are not based on any non-disclosures but on disclosed disproportionate investments in Northern's proprietary funds. Second, there is no indication that the trusts involved in *Siepel* only involved irrevocable trusts whose sole investment discretion was vested in the trustee. *Siepel* indicates the opposite: "According to the Plaintiffs, the Bank purchased securities as a trustee on their behalf without disclosing that the Bank profited from the transactions." *Id.* at 1127 (emphasis supplied). The Ninth Circuit's decision is grounded on this critical missing element from *Siepel*. Third, there is no analysis regarding the legally significant distinction between an agent and a trustee.

Likewise, there is no conflict with the Sixth Circuit. In *Segal v. Fifth Third Bank* NA, 581 F.3d 305 (6th Cir. 2009), the plaintiff was the beneficiary of multiple "fiduciary accounts" for which the bank served as a corporate fiduciary. The same three differences with *Siepel* are present here. The first being that no indication exists that the *Segal* plaintiff was a captive beneficiary of a trust where

the trustee has sole and complete investment discretion. A second difference is the *Segal* complaint, unlike Respondents' complaint, alleged "misrepresentations, material omissions and manipulation." *Id.* at 309-10. Finally, as with *Siepel*, the important distinction between an agent and a trust is not addressed.

IV. Several Reasons Make This Case A Poor Vehicle to Address This Issue

Review should be also denied because this case is a poor vehicle to address the issue, for at least five reasons.

To begin, as noted above, the denial of Respondents' motion for class certification, presently leaving only individual claims, removes this case from SLUSA preclusion. Where there is no longer a "covered class action," it would be a poor vehicle to address the SLUSA issue presented, as SLUSA is only applicable to "covered class actions."

Even if the Ninth Circuit grants Respondents' pending Fed. R. Civ. P. 23(f) petition for permission to appeal that denial, which would be on both the denial of certification as to the tax preparation fee claims not subject to Northern's petition and the investment claims, it would likely be over a year before a decision on the merits issued. And, the Ninth Circuit could ultimately affirm the class certification denial, leaving in place the two Respondents' individual claims, which SLUSA could not preclude. All of this makes this case an inappropriate vehicle to address the issue.

Second, the Ninth Circuit's 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." Pet. 18a, fn.6. The Ninth Circuit left open "how *Troice* may affect other state-law claims." *Id.*

Northern and *Amici* both overstate the importance of this case. Pet. 22-25; *Amici Curiae* Br. 5. They ask this Court to review a decision that applies to only a specific set of trusts: those where the investment discretion lies solely with the trustee and the beneficiary has no control over the investments. The alleged impact on trustees and the statistics cited by Northern, Pet. 22-25, address all "personal trust accounts," not simply the limited class involved here. Similarly, the numbers cited by *Amici* apply to all corporate trustees. *Amici Curiae* Br. 10-11. Neither Northern nor *Amici* identify how many of those trusts are limited to the complaint's allegations here. Whether SLUSA applies to this specific class of trusts is not a compelling or important issue worthy of this Court's review. *See* Sup. Ct. R. 10(a).

In a similar vein, the claim that that litigants "will flock to the Ninth Circuit" (Pet. 22-23) rings hollow. *See also Amici Curiae* Br. 10-12. Neither Northern nor *Amici* identify a single case filed in the Ninth Circuit since the July 5, 2019 decision supporting their speculation. At best, more percolation is necessary to determine the actual effect, if any, of the Ninth Circuit's limited decision.

Third, this case is missing the required second element for SLUSA to apply: allegations of fraud or a deceptive device. SLUSA requires that Respondents' claim allege

that the defendant made "a misrepresentation or omission of a material fact" or "that the defendant used or employed any manipulative or deceptive device or contrivance," 15 U.S.C. §78bb(f)(1), in connection with the purchase or sale of a covered security.

Respondents have not alleged securities fraud. They have alleged the opposite: Northern breached its fiduciary duties of loyalty and prudent administration by favoring its own proprietary funds over better non-proprietary fund alternatives. Pet. 4a. The investments Northern made for the Lindstrom Trust were not done in secret, but were disclosed to Respondents in account statements received.[8] Resolving a SLUSA issue where the second requirement of SLUSA is absent is another reason why this case is a poor vehicle for the issue presented.

Further, given its self-constrained holding, the Ninth Circuit's ruling does not prevent "the SEC from enforcing securities laws against trustees who deceptively trade in securities, to the detriment of trust beneficiaries." Pet. 25. This Court has previously rejected similar hypothetical claims. *See Troice*, 571 U.S. at 393-94. Respondents' allegations do not allege deceptive trading in securities or any allegation remotely connected to securities fraud. Respondents, instead, allege that Northern's investment strategy is known, but due to the captive nature of the beneficiaries, they are without control to stop it absent a state law breach of fiduciary duty lawsuit. Pet. 4a.[9]

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8. *See, e.g.*, Dkt. 51 at ¶¶ 37-42, 278, 325-338, *Banks v. Northern Trust Corporation, et al.*, Case No. 2:16-cv-09141-JFW-JCx (C.D. Cal.).

9. In disregarding the complaint's allegations on a pleading motion, *Amici* discuss situations involving hypothetical beneficiaries

Fourth, Respondents also allege entirely separate and independent unlawful conduct involving the charging of excessive and unsupported fees for routine tax return preparation. Pet. 18a-21a. These tax preparation fee claims having nothing to do with "covered securities," much less causing a securities transaction to occur through fraud or deceit. *See id.* As the Ninth Circuit recognized, separate from the "in connection with" element missing, SLUSA did not bar these claims because "the fee claims also lack any plausible relationship to covered securities." Pet. 19a. Northern did not seek review of this ruling. Nor did Northern seek review of the Ninth Circuit's finding that Respondents had plausibly pled the tax preparation claims. *See id.*

Finally, while Northern argues there is no reason to wait for this case to proceed through discovery and trial (Pet. 26), that ignores the case schedule. Discovery *closes* on February 10, 2020, and trial is set for April 28, 2020.[10]

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that are neither in the complaint nor applicable to the complaint's allegations. *See Amici Curiae* Br. 16, fn.7. The Court should disregard these arguments. The entire First Amended Complaint is located at Dkt. 51 in *Banks v. Northern Trust Corporation, et al.*, Case No. 2:16-cv-09141-JFW-JCx (C.D. Cal.).

10. *See fns. 2* and *3, supra.* While Respondents have a pending petition for permission to appeal the order denying class certification pursuant to Fed. R. Civ. P. 23(f) and motion to stay the district court proceedings, the current case involves only Respondents' individual claims with an April 28, 2020 trial date. These imminent case proceedings unrelated to this petition in the Ninth Circuit *and* the district court further confirm that this is not the right vehicle to address the issue presented.

For all these reasons, this case presents an exceptionally poor vehicle to address the question presented.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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