No. 19-440

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

IAN HEATH GERSHENGORN
Counsel of Record
ADAM G. UNIKOWSKY
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000
IGershengorn@jenner.com

CRAIG C. MARTIN
DANIEL J. WEISS
AMANDA S. AMERT
BRIENNE M. LETOURNEAU
JENNER & BLOCK LLP
353 North Clark St.
Chicago, IL 60654
(312) 222-9350

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

RULE 29.6 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

I. THE NINTH CIRCUIT'S DECISION IS INDEFENSIBLE 2

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE SIXTH AND EIGHTH CIRCUIT.. 5

III. THIS CASE IS AN IDEAL VEHICLE. 7

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Blair v. Commissioner, 300 U.S. 5 (1937) 4

Chadbourne & Parke LLP v. Troice, 571 U.S. 377 (2014) 1, 3

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 2

Salman v. United States, 137 S. Ct. 420 (2016) 4

SEC v. Zandford, 535 U.S. 813 (2002) 11

Segal v. Fifth Third Bank, N.A., 581 F.3d 305 (6th Cir. 2009) 5, 8

Segal v. Fifth Third Bank, N.A., No. 1:07-CV-348, 2008 WL 819290 (S.D. Ohio Mar. 25, 2008), *aff'd*, 581 F.3d 305 (6th Cir. 2009) 6-7

Siepel v. Bank of America, N.A., No. 05-2393 PAM, 2007 WL 679645 (E.D. Mo. Mar. 1, 2007), *aff'd*, 526 F.3d 1122 (8th Cir. 2008) 6

Siepel v. Bank of America, N.A., 526 F.3d 1122 (8th Cir. 2008) 5, 6

Taylor v. Mayo, 110 U.S. 330 (1884) 3

United States v. O'Hagan, 521 U.S. 642 (1997) 4

STATUTES

15 U.S.C. § 77p(b) 1, 2, 3, 10

15 U.S.C. § 78bb(f)(1) 8

15 U.S.C. § 78bb(f)(5)(B)(i)(I) 8

15 U.S.C. § 78bb(f)(5)(B)(i)(II) 8

15 U.S.C. § (f)(5)(B)(ii)(I) 8

OTHER AUTHORITIES

A. James Casner, *Estate Planning - Powers of Appointment*, 64 Harv. L. Rev. 185 (1950) 10

Fed. R. Civ. P. 23(c)(1)(C) 9

Mark R. Parthemer & Sasha A. Klein, *Client Dilemma-Whom Can I Trust?*, 31 Prob. & Prop. 48 (2017) 10

SLUSA bars state-law fraud claims that arise "in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b). The Ninth Circuit concluded that SLUSA's coverage turns on whether the "purchase or sale of a covered security" is by a stockbroker or by a trustee. That rule does not bear even a passing resemblance to the statutory text. The Ninth Circuit derived its rule not from the statute, but from out-of-context dicta in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014). As the Ninth Circuit acknowledged, its holding squarely conflicts with decisions of the Sixth and Eighth Circuits.

Respondents do not even attempt to ground the Ninth Circuit's holding in the statutory text. Like the Ninth Circuit, they rely solely on the counterintuitive theory that in *Troice*, a case having nothing to do with stockbrokers or trustees, this Court inadvertently added a stockbroker/trustee to the statutory text and inadvertently repudiated two court of appeals decisions along the way. That reasoning is untenable, and the Ninth Circuit's decision cannot stand. This Court's review is warranted to reverse a decision that is clearly wrong, creates a circuit split, and will wreak havoc on a $4 trillion industry.

Respondents attempt to avoid review of the Ninth Circuit's indefensible ruling by characterizing the denial of their own motion for class certification on December 6, 2019 as a "vehicle problem." Seeking to turn lemons into lemonade, Respondents argue that even if their state-law claims were precluded at the outset of the case, the denial of class certification caused them to become un-precluded. That is simply wrong. SLUSA's coverage

turns on the allegations in the *complaint*, and so the district court's ruling on the class certification motion is irrelevant. This case continues to be an ideal vehicle to resolve the circuit split, and the Court should do so in this case.

I. THE NINTH CIRCUIT'S DECISION IS INDEFENSIBLE

SLUSA bars class actions based on state-law claims alleging that, "*in connection with the purchase or sale of a covered security*," the defendant made "an untrue statement or omission of a material fact" or "used or employed any manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(b) (emphasis added). To recite that standard is to decide this case. Respondents allege that when Northern bought and sold covered securities, it committed fraud by buying Northern's own securities for its own pecuniary gain, to the exclusion of securities offered by Northern's competitors. *Of course* those allegations have a "connection with the purchase or sale" of covered securities. The very *mechanism* of the purported fraud *was* the "purchase or sale" of covered securities. Any doubt on this point is resolved by *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), which holds that the "connection" required is satisfied whenever the alleged fraud "'coincide[s]' with a securities transaction—whether by the plaintiff or by someone else." *Id.* at 85. Here, the alleged fraud coincided—indeed, was synonymous with—Northern's securities transactions.

The Ninth Circuit held that SLUSA does not apply based on its puzzling conclusion that SLUSA includes an unwritten exception for trades by trustees, as opposed

to stockbrokers. Respondents defend that reasoning, offering a disquisition on the "legal distinction between an agent and a trustee." BIO 5. They exhume *Taylor v. Mayo*, 110 U.S. 330 (1884), a case about "the relation of trustees and *cestui que trust*." *Id.* at 334. None of this has the slightest relevance to the words in the statute that the Ninth Circuit was charged with interpreting: "in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b).

Respondents make no effort to ground their argument in the statutory text. Instead, they argue that isolated phrases in *Troice*, wrenched from context, support their effort to rewrite SLUSA to enact a trustee/stockbroker distinction. They focus on the Court's statement that SLUSA applies when fraudulent conduct "is material to a decision by one or more individuals (other than the fraudster) to buy or sell a 'covered security.'" *Troice*, 571 U.S. at 387; BIO 10-11. Respondents contend that this statement reflects the Court's effort to distinguish between sales by a trustee, who technically holds legal title to stock, and sales by a stockbroker, who does not. In context, however, the Court's statement had nothing to do with trustees or stockbrokers. Rather, the Court was making clear that SLUSA does not apply when, as in *Troice*, the alleged fraud did *not* involve trading of covered securities—as later confirmed by the Court's unequivocal statement 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." *Troice*, 571 U.S. at 390. If the latter

statement is correct, the Ninth Circuit's decision is wrong—because the whole point of its decision is to subject Northern, which participates in securities trading on U.S. national exchanges, to state-law liability *based on those trades*.

United States v. O'Hagan, 521 U.S. 642 (1997), proves that Respondents' interpretation of SLUSA cannot be right. In *O'Hagan*, the *fraudster*, who engaged in insider trading, was the buyer and seller of covered securities—yet the Court had no difficulty finding he had violated Rule 10b-5. Respondents state that *O'Hagan* requires that the fraudster be the agent of a tipper who provided information. BIO 15. This is both wrong and irrelevant. It is wrong because an insider-trader can violate Rule 10b-5 even if he is not in a principal-agent relationship with the provider of information. *See, e.g.*, *Salman v. United States*, 137 S. Ct. 420, 424 (2016) (tippee was tipper's brother-in-law). It is irrelevant because *O'Hagan* definitively rebuts Respondents' position that *Troice* establishes some ironclad legal rule that SLUSA can never apply when the fraudster is the one that trades.

Respondents' insistence that the trustee held *legal* title to the trust assets is also disingenuous in view of the principle that the beneficiary is "the owner of an equitable interest in the corpus of the property" held in trust. *Blair v. Commissioner*, 300 U.S. 5, 13 (1937). It is this equitable interest that allows Respondents to press their claims in the first place; if they lack sufficient interest in the trust corpus to have been defrauded, they also lack standing to assert their claims. *See id.* (observing that "[b]y virtue of that [equitable

ownership] interest" the trust beneficiary "was entitled to enforce the trust, to have a breach of trust enjoined and to obtain redress in case of breach"). Respondents cannot simultaneously use their equitable interest in the trusts as both standing sword and SLUSA shield.

There is simply no principled way to fit Respondents' proposed trustee/stockbroker distinction into SLUSA's text. This Court should not allow its out-of-context dicta in *Troice* to be used as a pretext to rewrite federal law to make it more favorable to plaintiffs.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE SIXTH AND EIGHTH CIRCUIT.

As the Ninth Circuit correctly recognized, its decision squarely conflicts with *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305 (6th Cir. 2009), and *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008). Pet. App. 14a-16a. Those decisions were pre-*Troice*, but as just explained, nothing in *Troice* suggests that they were wrongly decided. Respondents' efforts to distinguish those cases—which eluded the Ninth Circuit—are not successful.

Respondents first argue, without citation, that in *Siepel*, the claims were "expressly based on federal securities violations." BIO 17. No. *Siepel* involved state-law claims—not a surprise, given that SLUSA is a statute that precludes state-law claims. Respondents are apparently referring to the fact that *in addition to* their state-law claims, the *Siepel* plaintiffs brought federal claims. The *Siepel* district court dismissed those

claims "[d]ue to the Plaintiffs' failure to oppose," 526 F.3d at 1125, and they played no role in the Eighth Circuit's decision.

Respondents' next effort to distinguish *Siepel* is that "there is no indication that the trusts involved in *Siepel* only involved irrevocable trusts whose sole investment discretion was vested in the trustee." BIO at 17. Nothing in *Siepel* remotely suggests that this factor was relevant. Rather, *Siepel* reasoned that "the Bank purchased securities as a trustee," and that the plaintiffs' allegations "clearly coincided with the Bank's purchase of shares," 526 F.3d at 1127—words that could have been written for this case. Moreover, the underlying district court decision makes clear that the trustee defendant did, in fact, have sole investment discretion. *Siepel v. Bank of Am., N.A.*, No. 05-2393 PAM, 2007 WL 679645, at *2 (E.D. Mo. Mar. 1, 2007) (observing that "Plaintiffs' alleged injury was linked directly to the ***'forced' purchase***" of proprietary funds "with fiduciary account assets" (emphasis added)), *aff'd*, 526 F.3d 1122 (8th Cir. 2008).

As to *Segal*, Respondents similarly claim that "no indication exists that the *Segal* plaintiff was a captive beneficiary of a trust where the trustee has sole and complete investment discretion." BIO 17-18. Like *Siepel*, *Segal* does not carve out any particular type of trust from its holding, and the underlying district court decision makes clear that the plaintiff was, in fact, a trust beneficiary who lacked control over the trustee defendant. *Segal v. Fifth Third Bank, N.A.*, No. 1:07-CV-348, 2008 WL 819290, at *1 (S.D. Ohio Mar. 25, 2008) (observing that the defendants were alleged to have

"force-placed" the plaintiff's trust account into proprietary funds (emphasis added)), *aff'd*, 581 F.3d 305 (6th Cir. 2009).

Respondents also state that "the *Segal* complaint, unlike Respondents' complaint, alleged 'misrepresentations, material omissions and manipulation.'" BIO 18 (citation omitted). This is a reference to an alternative argument by Respondents that the Ninth Circuit declined to decide. Pet. App. 18a ("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"). On the issue the Ninth Circuit did decide, *Segal* conflicts.

Finally, as to both *Siepel* and *Segal*, Respondents claim that "there is no analysis regarding the legally significant distinction between an agent and a trustee." BIO 17. That is because that distinction is, under SLUSA's text, not legally significant.

Siepel and *Segal* are irreconcilable with the decision below—and allowing for additional post-*Troice* percolation would be a pointless gesture, given that no plaintiff will ever file a similar state-law lawsuit outside the Ninth Circuit again. Pet. 22-23. The Court should resolve the circuit split now.

III. THIS CASE IS AN IDEAL VEHICLE.

Respondents' scattershot of "vehicle problems" miss the mark.

Respondents first assert that the district court's recent denial of Respondents' motion for class certification presents a vehicle problem because it "removes this case from SLUSA preclusion." BIO 18. Respondents offer no authority for this statement. Under SLUSA, preclusion turns on whether *the complaint* alleges, on behalf of a class, state-law fraud or deception claims involving federal securities transactions, not on interlocutory rulings during the litigation. 15 U.S.C. § 78bb(f)(1) ("No covered class action" under state law "may be maintained in any State or Federal court by any private party ***alleging***" fraud or deception in connection with a federal securities transaction (emphasis added)); *Segal*, 581 F.3d at 311 (SLUSA asks only "whether the complaint includes these types of allegations, pure and simple"). Moreover, a "covered class action" is defined as a lawsuit in which "damages *are sought*" on behalf of a class. 15 U.S.C. § 78bb(f)(5)(B)(i)(I); *accord id.* §§ 78bb(f)(5)(B)(i)(II), (f)(5)(B)(ii)(I). In their complaint, Respondents *seek* damages on behalf of a class for state-law claims alleging fraud or deception in connection with federal securities transactions, so SLUSA applies regardless of the District Court's ruling.

It makes perfect sense that Congress wrote SLUSA to make preclusion turn on the allegations in the complaint. This allows the district court to decide at the outset of the case whether SLUSA applies, rather than waiting until after a class-certification motion is decided. Moreover, under Respondents' position, a state-law claim that was previously held precluded could suddenly become un-precluded during, or even after, trial, if a

court decertifies a class that was previously certified. *See* Fed. R. Civ. P. 23(c)(1)(C) (courts may decertify a class at any time before final judgment). SLUSA avoids that result by ensuring that preclusion turns on the *complaint*, rather than on interlocutory rulings.

Of course, if Respondents were to file new lawsuits that exclude class action allegations, SLUSA would not apply. But Respondents are not doing that. To the contrary, as they acknowledge, they continue to litigate their claims in *this* lawsuit, and intend to appeal the class certification ruling at the conclusion of the case. BIO 7.[1] Thus, Respondents' legal strategy is a classic bait and switch. They assert that the class certification order is a vehicle problem impeding this Court's review, while simultaneously trying to get that order reversed—and if it is reversed, Respondents will doubtless argue that it is too late for Northern to challenge the Ninth Circuit's prior SLUSA ruling in this Court. The Court should not countenance this tactic.

Respondents next contend that this case is unimportant because the Ninth Circuit's ruling was "limited to claims involving a trustee-beneficiary irrevocable trust relationship in which the trust instrument does not grant the beneficiary financial management trustee powers," and did not address "other state-law claims." BIO 19 (quoting Pet. App. 17a n.6). But it is unusual for instruments of irrevocable trusts to grant the beneficiary trustee powers, in view

---

[1] The Ninth Circuit denied Respondents' Rule 23(f) petition on January 23, 2020. *Banks v. Northern Trust Corp.*, No. Case: 19-80178 (9th Cir. Jan. 23, 2020), ECF No. 6.

of the risk of undesirable legal consequences associated with doing so. *See*, *e.g.*, Mark R. Parthemer & Sasha A. Klein, *Client Dilemma-Whom Can I Trust?*, 31 Prob. & Prop. 48, 49 (2017) (noting that the risk of appointing a beneficiary as trustee "ranges from adverse taxation to exposure to creditors"); A. James Casner, *Estate Planning - Powers of Appointment*, 64 Harv. L. Rev. 185, 197 (1950) (observing that "from a tax standpoint the safe course is to exclude as a trustee any beneficiary under the trust"). Thus, the Ninth Circuit's decision will expose the mine run of trustees to state-law liability—a holding that will have enormous financial consequences, given that corporate trustees manage over $4 trillion in assets. *See* ABA Amicus Br. 10.

Respondents' remaining "vehicle problems" are throwaways. Respondents contend that this case "is missing the required second element for SLUSA to apply: allegations of fraud or a deceptive device." BIO 19-20. As noted above, the Ninth Circuit expressly refused to reach this argument. Pet. App. 18a ("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"). Respondents do not explain why their separate, unresolved argument makes this case a bad vehicle to review the issue the Ninth Circuit did decide.[2]

---

[2] In any event, Respondents' argument directly contradicts Supreme Court precedent. SLUSA applies to allegations of a "manipulative or deceptive device or contrivance." 15 U.S.C. § 77p(b). This Court has squarely held that self-dealing—precisely what Respondents allege in this case—constitutes a "manipulative

Respondents also state that the Ninth Circuit issued separate holdings relating to other, unrelated state-law claims that Northern does not challenge in this Court. BIO 21. Those holdings are irrelevant to this petition and are not "vehicle problems."

Finally, Respondents remark that trial on their individual claims is set for April 28, 2020. BIO 21. No matter what happens at the trial, however, this dispute will likely continue for several years as the losing party appeals to the Ninth Circuit. This Court could and should put an end to Respondents' state-law securities claims now by holding that they are barred by SLUSA.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

or deceptive device or contrivance" under federal securities law. *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting "manipulative or deceptive device or contrivance" standard); *id.* at 821 ("[E]ach time respondent exercised his power of disposition for his own benefit, that conduct, without more, was a fraud" (internal quotation marks omitted)).

Respectfully submitted,

IAN HEATH GERSHENGORN
Counsel of Record
ADAM G. UNIKOWSKY
JENNER & BLOCK LLP
1099 New York Ave. NW
Washington, DC 20001
(202) 639-6000
IGershengorn@jenner.com

CRAIG C. MARTIN
DANIEL J. WEISS
AMANDA S. AMERT
BRIENNE M. LETOURNEAU
JENNER & BLOCK LLP
353 North Clark St.
Chicago, IL 60654
(312) 222-9350

February 4, 2020