

No. 21-1269

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IN THE  
**Supreme Court of the United States**

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HEIDI M. LOBSTEIN, *et al.*,

*Petitioners,*

*v.*

WASHINGTON MUTUAL MORTGAGE PASS-  
THROUGH CERTIFICATES WMALT SERIES  
2007-OC1, *et al.*,

*Respondents.*

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

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**BRIEF IN OPPOSITION**

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## **QUESTIONS PRESENTED FOR REVIEW**

- Whether Petitioners have demonstrated compelling reasons for this Court to grant the Petition in their case seeking to avoid a mortgage loan voluntarily obtained in 2006, and attacking Respondent U.S. Bank National Association as Trustee, Successor in Interest to Bank of America, National Association as Successor by Merger to LaSalle Bank NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OCI Trust's ("US Bank, as Trustee") authority to enforce the Deed of Trust.

**CORPORATE DISCLOSURE STATEMENT**

Respondent U.S. Bank National Association as Trustee, Successor in Interest to Bank of America, National Association as Successor by Merger to LaSalle Bank NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OCI Trust hereby certifies that U.S. Bank is a wholly-owned subsidiary of U.S. Bancorp. U.S. Bancorp is a publicly owned corporation whose stock trades on the New York Stock Exchange under the symbol “USB.” Other than U.S. Bancorp, no publicly held corporation holds more than 10% of U.S. Bank’s stock.

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**STATUTES INVOLVED IN THIS CASE**

Respondent disagrees with Petitioners' statement of the constitutional provisions, statutes, and regulations involved in this case, specifically the Fifth and Fourteenth Amendments are not at issue in this case.

## STATEMENT OF THE CASE

### A. Factual Background.

Petitioner Heidi M. Lobstein obtained a \$656,000.00 loan from lender Mortgage Store Financial, Inc. (“Mortgage Store”) that was secured by certain real property. The Deed of Trust was recorded on December 21, 2006, the original beneficiary was Mortgage Electronic Registration Systems, Inc. (“MERS”), and the original trustee was Chicago Trust Company. On October 27, 2009, an Assignment of Deed of Trust was recorded reflecting the Deed of Trust was assigned to Bank of America, National Association, as successor by merger to LaSalle Bank NA as trustee for Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OC1 Trust. Also on October 27, 2009, a Notice of Default was recorded on the property. Notices of Trustee’s Sale were recorded on January 29, 2010, February 2, 2011, and February 27, 2012. On May 10, 2012, a Corporate Assignment of Deed of Trust was recorded reflecting assignment of the Deed of Trust to Respondent US Bank, as Trustee. Another Notice of Trustee’s Sale was recorded on November 5, 2012.

On May 17, 2013, Petitioner Lobstein filed a state court case against US Bank, as Trustee, former loan servicer JPMorgan Chase, and other Defendants attacking their authority to enforce the Deed of Trust, in part based on the contention that the Assignment to US Bank, as Trustee, was purportedly invalid. Petitioner Lobstein voluntarily dismissed the case on September 25, 2014.

Further Notices of Trustee's Sale were recorded on May 26, 2015 and August 31, 2015. On October 31, 2016, the Notice of Default recorded on October 27, 2009 was rescinded. On October 24, 2018, a Substitution of Trustee was recorded, substituting National Default Servicing Corporation as successor trustee. Another Notice of Default was recorded on August 7, 2019.

## **B. Procedural Background.**

On September 3, 2019, Petitioner Lobstein filed the Complaint in the District Court claiming her mortgage was void and she was entitled to a variety of remedies. She alleged, in part, that her loan was void and foreclosure was improper because the loan “stemmed from the fraudulent operations” of her original lender, there was alleged robo-signing of recorded documents, and an invalid assignment into a closed securitized trust. On November 6, 2019, Petitioner Lobstein filed a motion to include Petitioner Marguerite Deselms as a plaintiff due to an assignment of the claims to Ms. Deselms.

On December 18, 2019, the District Court partially granted Respondent's Motion to Dismiss, dismissing her federal law claims for violations of the Fair Debt Collection Practices Act (“FDCPA”) and for mail and wire fraud, and declining to exercise supplemental jurisdiction over the state claims. On January 8, 2020, Petitioners filed the First Amended Complaint, pleading only state law-based claims for wrongful foreclosure, violation of California Civil Code Section 2924, breach of contract, civil conspiracy, and she sought declaratory relief. On March 17, 2020, the District Court granted US Bank, as Trustee's Motion to Dismiss the First Amended Complaint for lack of a pleaded basis for subject matter jurisdiction.

Petitioners filed a Second Amended Complaint on April 7, 2020, adding diversity jurisdiction allegations. Petitioners continued to allege the foreclosure was wrongful as US Bank, as Trustee purportedly had “no authority to act.” They also claimed a breach of contract, negligence per se, and a violation of the FTC Act, 15 U.S.C. § 5(a). Through the FTC Act claim, they contended that US Bank, as Trustee made “misrepresentations” that were “unlawful, unfair and/or fraudulent,” similar to claims purportedly settled in *In re Washington Mutual Mortgage-Backed Securities Litigation*, No. 09-0037, in the Western District of Washington. Petitioners alleged that their similar claim entitled them to damages for a violation of that Act.

On June 8, 2020, the District Court granted Respondent’s Motion to Dismiss finding the attack on foreclosure failed as it was improperly preemptive. Petitioners’ claim based on class action settlements failed as any securities law claim for fraud or misrepresentation “would accrue to the investors, and any settlement proceeds would be distributed to those investors,” not Petitioners. The District Court recognized “Plaintiff’s obligation to pay her mortgage arises from a wholly separate transaction from the securities sales that led to those lawsuits, and any investor recovery could not logically offset the amount due under Plaintiff’s mortgage.” The FTC Act claim failed for a lack of a private right of action, and the other claims failed for lack of sufficient facts.

Petitioners filed the Third Amended Complaint on June 29, 2020 again claiming US Bank, as Trustee lacked authority to enforce the Deed of Trust. They claimed

the Deed of Trust is a “sham” and “void” because it was “securitized into a closed trust”, and argued US Bank, as Trustee, was “not licensed to do business in this state.” Petitioners continued to allege a breach of contract claim, a civil conspiracy, and they sought declaratory relief that the Deed of Trust be declared void, and certain foreclosure documents and the Assignments be cancelled. Petitioners newly alleged a cause of action for a violation of the Trust Indenture Act, 15 U.S.C. § 77aaa, et seq, against several pension funds that allegedly collected under the settlement related to mortgage-backed securities. And, despite the District Court’s prior Order dismissing the FDCPA claim without leave to amend, Petitioners again pleaded a violation of that Act.

On August 27, 2020, the District Court entered its Order Granting Defendant’s Motion to Dismiss and Giving Notice of Intention to Dismiss Claims Against New Defendants Sua Sponte. The District Court again found the wrongful foreclosure claims failed because no foreclosure sale had taken place. Petitioners lacked standing to claim a violation of the Trust Indenture Act claim as they were consumers, not investors. The contract claims failed absent any allegations of a provision that was breached. And the FDCPA claim failed, as it was previously dismissed with prejudice, and because US Bank, as Trustee was not considered a “debt collector” for FDCPA purposes. The District Court did not permit leave to amend, citing futility and the three prior opportunities to amend. On September 23, 2020, the District Court entered an order dismissing the case in its entirety, as to all parties.

On November 18, 2021, the Ninth Circuit entered its unpublished Memorandum affirming the District Court. The Ninth Circuit found “US Bank is the proper defendant, not the WMALT Trust.” The attack on foreclosure was improperly preemptive as no sale had occurred. The Trust Indenture Act claim failed as Petitioners were not investors. The FDCPA claim failed as US Bank, as Trustee, was not alleged to be a “debt collector” in its acts enforcing the Deed of Trust. The contract claims failed as no violated provision was alleged, and Petitioners were not third-party beneficiaries of any mortgage-backed securities agreement. The conspiracy and declaratory relief claims failed as they were not “standalone claims.” The Ninth Circuit agreed that “further leave to amend would be futile.” The Ninth Circuit denied rehearing on December 27, 2021.

### **SUMMARY OF ARGUMENT**

The Petition for Writ of Certiorari (“Petition”) should be denied because it presents no issue worthy of the Court’s attention. In its unpublished Memorandum decision, the United States Court of Appeals for the Ninth Circuit held each of Petitioners’ claims against Respondent lack sufficient facts to survive a motion to dismiss. Petitioners claim this was erroneous and seek further review in this Court.

Petitioners fail to demonstrate the Ninth Circuit’s opinion conflicts with any decision of this Court or any other court. Indeed, Petitioners have alleged no split of authority whatsoever. The Ninth Circuit’s opinion also lacks extraordinary factors to justify review. To the contrary, the opinion is unpublished, fact specific to this

case, and provides no new or extended legal principles that may set precedent for other cases. Moreover, the Ninth Circuit correctly applied well-established precedent in analyzing the particular claims alleged in this case, and its decision comports with other sound authority on the issues. Therefore, this case does not merit review by this Court.

In sum, Petitioners have failed to carry their burden to show any compelling reasons for the Court to grant the Petition. Because none of the criteria warranting review on a writ of certiorari are present in the Petition, Respondent respectfully requests the Court deny the Petition.

## ARGUMENT

Review on a writ of certiorari is not a matter of right, but one of judicial discretion. *See* Sup. Ct. R. 10. As such, a petition for a writ of certiorari may be granted only where a petitioner demonstrates “compelling reasons” for such action. *Id.* Petitioners present no compelling reasons for the Court to grant the Petition.

### A. Petitioners Fail to Identify Any Conflict.

The Court should deny the Petition because Petitioners fail to identify any conflict among the lower courts. “A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.” *Braxton v. United States*, 500 U.S. 344, 347 (1991).

Petitioners do not contend a conflict exists among the lower courts that this Court should resolve. More specifically, Petitioners do not allege the Ninth Circuit “entered a decision in conflict with the decision of another United States court of appeals on the same important matter” or “decided an important federal question in a way that conflicts with a decision by a state court of last resort.” Sup. Ct. R. 10(a). Absent such a conflict, the Court should deny the Petition.

**B. The Ninth Circuit’s Decision Was Unpublished and Narrowly Tied to The Unique Facts of This Case.**

The decision below was unpublished and necessarily confined to this case with little precedential value. As an unpublished decision, it does not apply to anyone other than these Petitioners and this Respondent. In addition, as outlined below, this case presents unique facts and circumstances that make it a particularly poor candidate for review.

**1. Respondent Was the Right Party to Have Defended Petitioners’ Case.**

Petitioners contend that US Bank, as Trustee improperly appeared in the case because “US Bank cannot act as trustee.” (Petition, pp. 3-4). This argument was soundly rejected as the Ninth Circuit found “US Bank is the proper defendant, not the WMALT Trust.” Under Federal Rule of Civil Procedure 17(b)(3), California law governs the question of whether a trust can be sued in its own right in federal court. Under California law, “the trustee, rather than the trust, is the real party in interest in litigation involving trust property.” *Moeller v. Superior*



*Court*, 947 P.2d 279, 283 n.3 (1997). Petitioners named “Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OC1” as a Defendant. US Bank, as Trustee’s counsel filed a Notice of Interested Parties, certifying that US Bank is the trustee for that trust, as a successor in interest to Bank of America, as successor by merger to LaSalle Bank N.A. Accordingly, as the Ninth Circuit found, US Bank, as Trustee was properly a party to the litigation, as opposed to the trust itself.

Petitioners also argue that US Bank, as Trustee, is not licensed or registered to do business in California and is “not a valid California Corporation.” (Petition, pp. 4-5, 18-19.) They suggest that US Bank, as Trustee was thus not authorized to appear in the case, or enforce the Deed of Trust. (Petition, pp. 4-5). An entity like US Bank, as Trustee, however, as a foreign corporation, is exempt from the requirement to be licensed in California under California Corporation Code section 2105(a), due to Corporations Code Section 191(c), (d). Section 2105(a) provides “[a] foreign corporation shall not transact intrastate business without having first obtained from the Secretary of State a certificate of qualification.” However, the creation of “evidences of debt or mortgages, liens or security interests on real or personal property” are activities exempted by statute, as is conducting business relating to “[t]he ownership of any loans and the enforcement of any loans by trustee’s sale, judicial process or deed in lieu of foreclosure or otherwise.” Cal. Corp. Code § 191(c), (d).

US Bank, as Trustee is the beneficiary of the Deed of Trust. Accordingly, it is not considered to be doing business in the State of California by virtue of any

enforcement of the Deed of Trust which was the subject of this action. These activities do not constitute transacting business to require a license under section 2105(a). *See Derakhshan v. Mortgage Elec. Registration Sys., Inc.*, 2009 WL 10673155 at \*6 (C.D. Cal. June 29, 2009) (stating MERS’ “activities are exempted by statute,” and “Plaintiff thus cannot assert that Defendants committed fraud by representing that MERS had the ‘rights and standings of a beneficiary’ under California law.”); *Lomboy v. SCME Mortgage Bankers*, 2009 WL 1457738, at \*3 (N.D. Cal. May 26, 2009) (“Plaintiff has not established that MERS is conducting business in violation of section 191. MERS may defend itself in this action, and its lack of registration is no obstacle to foreclosure.”) US Bank, as Trustee is exempt from the registration requirements of Corporations Code Section 2105(a) under Corporations Code Section 191(d), and Petitioners’ contentions relating to a lack of a license were soundly disregarded.

## **2. The Decision Below Involved Limited Specific Facts as to One Particular Loan.**

The underlying dispute was focused entirely on whether US Bank, as Trustee, could enforce Petitioner Lobstein’s Deed of Trust. Petitioners argued a multitude of sweeping claims, and the case was limited to one loan, secured by one particular Deed of Trust on one parcel of real property.

## **C. The Ninth Circuit’s Decision Was Sound and Consistent with State and Federal Authority.**

Having failed to identify any split of authority or other compelling reasons warranting certiorari, the Petition

merely constitutes a challenge to the Ninth Circuit's application of well settled authority to the specific facts of this case. Because, as outlined below, the Ninth Circuit's decision did not depart from any well-established law, the Court should deny the Petition.

**1. The Ninth Circuit Soundly Disregarded Petitioners' Reliance on the Settlement in *In re Washington Mutual Mortgage-Backed Securities Litigation*.**

Petitioners argue that the loan was "satisfied" due to the settlement reached in *In re Washington Mutual Mortgage-Backed Securities Litigation*, No. 09-0037. (Petitioner, pp. 7-11). The District Court, affirmed by the Ninth Circuit found Petitioners' claim based on class action settlements failed as any securities law claim for fraud or misrepresentation "would accrue to the investors, and any settlement proceeds would be distributed to those investors," not Petitioners. The District Court recognized "Plaintiff's obligation to pay her mortgage arises from a wholly separate transaction from the securities sales that led to those lawsuits, and any investor recovery could not logically offset the amount due under Plaintiff's mortgage." *In re Washington Mutual Mortgage-Backed Securities Litigation* was simply inapplicable to Petitioners' attempts to avoid the loan.

**2. The Ninth Circuit Soundly Found the Attack on the Foreclosure Proceeding Was Improperly Preemptive.**

Petitioners argue that the Deed of Trust is "unenforceable" because it was securitized "into a closed

trust.” (Petition, pp. 13-14). They claim the securitized trust had a closing date of January 29, 2007, but the Assignment was not recorded until October 26, 2009. (Petition, pp. 13-14). The Ninth Circuit did not need to address this argument, as the attack on foreclosure was improperly preemptive as “Lobstein did not allege that a foreclosure sale had occurred.” Citing *Perez v. Mortg. Elec. Registration Sys., Inc.*, 959 F.3d 334, 339–40 (9th Cir. 2020).

In *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149, 1155 (2011), the California Court of Appeal determined no cause of action exists under California law for a claim challenging a foreclosing party’s authority to foreclose by the owner of a promissory note based on speculative facts. The court there stated “[t]he recognition of the right to bring a lawsuit to determine a nominee’s authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delay[.]” See also *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 260, 269 (2011) (the California Court of Appeal affirmed an order sustaining a demurrer of a case brought as a pre-emptive attack on authority to foreclose.) Petitioners’ attack on US Bank, as Trustee’s authority to enforce the Deed of Trust was soundly found to be improperly preemptive under California law, and Petitioners fail to address this entirely.

Even if Petitioners’ challenge were not preemptive, the theory regarding the validity of the Assignment could not have supported a cause of action. The theory that an assignment is void if recorded after the closing

date of a securitized trust has consistently been found to fail by California courts, and federal courts interpreting California law, including the Ninth Circuit. *See Yhudai v. Impac Funding Corp.*, 1 Cal.App.5th 1252, 1256-60 (2016) (a “postclosing assignment of a loan to an investment trust that violates the terms of the trust renders the assignment voidable, not void, under New York law.”); *see also Saterbak v. JPMorgan Chase Bank, N.A.*, 245 Cal.App.4th 808, 815 (2016) (“such an assignment is merely voidable” and “Saterbak lacks standing to challenge alleged defects in the...assignment of the DOT to the [securitized] trust.”); *In re Turner*, 859 F.3d 1145, 1149 (9th Cir. 2017) (citing *Yhudai* and *Saterbak* and affirming the dismissal of a case where plaintiff’s argued assignments of a Deed of Trust were made after the timeline required by the securitized trust’s pooling and servicing agreement); *Dahnken v. Wells Fargo Bank, N.A. Tr. of Wamu Mortg. Pass-Through Certificates, Series 2005-PR4, et al.*, 705 Fed. Appx. 508, 510 (9th Cir. July 19, 2017) (“The weight of authority now holds that an untimely assignment to a securitized trust, made after the securitized trust’s closing date, is not void but merely voidable.”) The attack on the timing of the Assignment’s recording does not implicate a void Assignment.

No reason exists for the Court to review the Ninth Circuit’s holdings on Petitioners’ particular claims. Because the Ninth Circuit’s decision did not “so far depart[] from the accepted and usual course of judicial proceedings,” the Court should deny the Petition. Sup. Ct. R. 10(a).

**D. Petitioners' Arguments that the Loan Was Satisfied by PMI or that Respondent Was Unjustly Enriched Are Not Properly Before the Court.**

Petitioners argue that the loan was “paid in full by PMI...so any action taken after that time was fraudulent.” (Petition, p. 6). They also claim US Bank, as Trustee was “unjustly enriched.” (Petition, pp. 11-13). These arguments are not properly before the Court. A fundamental rule of practice is that this Court does not decide questions that were never raised or decided in the court whose decision is under review. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (issues not raised or addressed by court of appeals ordinarily will not be considered). The Court, therefore, should refuse to consider Petitioners’ so-called PMI or unjust enrichment arguments on the basis they are improper and futile attempts to raise issues not asserted or passed upon by the District Court or the Ninth Circuit. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (“Although in some instances we have allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below . . . it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it.” (internal citation omitted)).

**CONCLUSION**

Petitioners have failed to establish any compelling reasons for the Court to grant the Petition. Respondent respectfully requests the Court deny the Petition.

Dated: April 20, 2022

Respectfully submitted,

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