

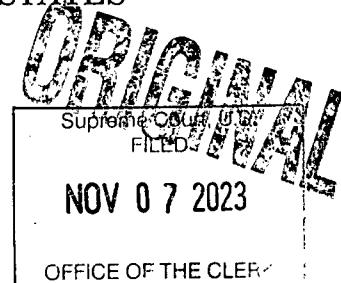
No 23-534

IN THE
SUPREME COURT OF THE UNITED STATES

PETER OTOH

Petitioner,

v.



US BANK TRUST NATIONAL ASSOCIATION, not in its individual capacity but solely as
owner trustee for VRMTG Asset Trust.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

PETER OTOH

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Lithonia GA 30058
678-520-0406

QUESTIONS PRESENTED

In *Navarro Savings Association v. Lee*, this Court held that “a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others”. *Navarro Savings Association v. Lee*, 446 U.S. 458, 464, 100 S.Ct. 1779, 1783, 64 L.Ed.2d 425 (1980)

The Fifth Circuit applied the *Navarro*’s rule in *Bynane v. Bank of N.Y. Mellon*, and held that “*Navarro*’s rule is still good law. Where a trustee has been sued or files suit in her own name, the only preliminary question a court must answer is whether the party is an active trustee” *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 355 (5th Cir. 2017)

Here, the Eleventh Circuit did not apply the *Navarro*’s rule to the Respondent, who is similarly situated as the trustee in *Bynane*. Instead, the Eleventh Circuit determined that the Respondent is the real party to the controversy for purposes of diversity jurisdiction by inferring that the Trust in this case is a *traditional trust*. The Eleventh Circuit cited no evidence on the record to support its conclusion but the Eleventh cited this Court’s holding in *Americold Realty Tr. v. Conagra Foods, Inc.*, 577 U.S. 378, 383 (2016) as its binding precedent; “when a trustee files a lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes. For a traditional trust, there is no need to determine its membership to determine diversity jurisdiction.”

The questions presented are: (1) Whether the Eleventh Circuit was required to apply *Navarro*’s rule to the Respondent, before concluding that the Respondent is the real party to the controversy for purposes of diversity jurisdiction. (2) Whether the Eleventh Circuit erred for concluding that the Respondent’s Trust is a *traditional trust* without citing support in the record

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Otoh v. Federal National Mortgage Association et al*, No. 22-A-04427-11, Superior Court of Gwinnett County. REMOVED June. 22, 2022.
- *Otoh v. Federal National Mortgage Association et al*, No. 22-cv-02488, U. S. District Court for the Northern District of Georgia. Judgment entered September. 1, 2022.
- *Otoh v. Federal National Mortgage Association et al*, No. 22-13279, U. S. Court of Appeals for the Eleventh Circuit. Judgment entered July. 19, 2023, Rehearing Denied: August 9, 2023.

Petitioner, Peter Otoh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1c-6c) is not published in the Federal Reporter. The district court's order granting motion to dismiss in favor of respondent (App. 1d-9d) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2023. A petition for rehearing was denied on August 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S. Code § 1332 Diversity of citizenship, amount in controversy and costs. 28 U.S. Code § 1441 Removal of civil actions.

STATEMENT

The case presents two exceptionally important questions (1) the Eleventh, refusal to apply this Court's *Navarro's* rule to the Respondent – trustee here, when the Fifth had already applied same *Navarro's* rule to a similarly situated trustee; (2) the Eleventh concluded that the Respondent's Trust is a *traditional trust*, but cited no evidence on the record to support its conclusion. Eleventh then cited *Americold* as its binding precedent.

This case started with Otoh filing an injunctive relief complaint in the Superior Court of Gwinnett County Georgia against four of the leading mortgage financing and mortgage

servicers in the country. US Bank Trust National Association, not in its individual capacity but solely as owner trustee for VRMTG Asset Trust (“USBank”) is one of the four defendants.

The four defendants removed Otoh’s state case to U. S. District Court for the Northern District of Georgia. USBank jurisdictional allegation in the “notice of removal” simply stated: “Defendant U.S. Bank is a national banking association and the trustee of the named trust”.

Otoh filed a motion to remand in the district court and then challenged USBank’s jurisdictional allegation in his reply to USBank’s response to motion to remand. Otoh, demanded for the production of the citizenship of the certificate holder of VRMTG Asset Trust. USBank did not response to Otoh’s demand.

The district court denied Otoh’s motion to remand and granted defendants motion to dismiss.

Otoh then filed an appeal with the U. S. Court of Appeals for the Eleventh Circuit. Otoh, argued that the district court lacked jurisdiction because there was not complete diversity of the parties. Otoh continued to challenged USBank’s jurisdictional allegation in his initial and reply brief.

On appeal, USBank had its mea culpa moment, requested for a do-over in the district court and for the court to hold the appeal in abeyance. USBank modified its jurisdictional allegation in its response brief. USBank alleged for the first time on appeal, its powers as trustee, that USBank is an active trustee and the Trust is a securitized trust that holds mortgage-backed securities. USBank also admitted that the Trust beneficiaries were it

certificateholders. However USBank did not provide the pooling and servicing agreement document that govern and declares the powers of the trustee.

The Eleventh affirmed the district court order and judgment. Otoh then filed a petition for rehearing. Where Otoh raised the issue of the Trust as a *traditional trust* but the court denied Otoh's rehearing petition. Otoh then filed a motion to recall mandate. Where Otoh raised this Court's jurisdictional allegation rule in *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936) but the court denied Otoh's motion to recall mandate.

REASONS FOR GRANTING THE PETITION

The questions presented in this case are of critical importance because (1) it calls for this Court to exercise its supervisory power, since the Eleventh refusal to apply the *Navarro's* rule to the Respondent is in conflict with this Court decision in *Navarro* and also in conflict with the decision of the Fifth in *Bynane v. Bank of N.Y. Mellon*, for a similarly situated trustee;(2) the general public whose mortgages are financed by real estate investment trust with trustee that are or similar situated to USBank or Bank Of New York Mellon ("BONYM") may be impacted by this Court's decision.

A. This Court should grant review to decide whether the Eleventh Circuit was required to apply Navarro's rule to the Respondent, before concluding that the Respondent is the real party to the controversy for purposes of diversity jurisdiction.

The Eleventh Circuit not only refused to apply Navarro's rule, but it also refused to apply two other precedents (1.) this Court McNutt's rule, requiring that the party attempting to invoke the federal court's jurisdiction must provide competent proof if the jurisdictional

allegations are challenged, see *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936) and (2) Eleventh's own precedent that "all doubts about jurisdiction should be resolved in favor of remand to state court" See *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999). Review of these precedents and their implications follows:

McNutt's rule required party to plead facts essential to show jurisdiction. If party fails to make the necessary allegations the party has no standing. If the jurisdictional allegations are challenged the party must provide competent proof.

Here according to *McNutt's rule* USBank has no standing. USBank jurisdictional allegation simply stated: "*Defendant U.S. Bank is a national banking association and the trustee of the named trust*". USBank did not allege its powers as trustee. Further when USBank jurisdictional allegation was challenged at the district court level. USBank did not provide competent proof or it's pooling service document to support its powers.

Navarro's rule required that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. *Navarro Savings Association v. Lee*, 446 U.S. 458, 464, 100 S.Ct. 1779, 1783, 64 L.Ed.2d 425 (1980). The Fifth Circuit applied *Navarro's* rule to BONYM and confirmed the powers of BONYM by examining the pooling and service agreement of the trust. "BONYM possesses the sort of real and substantial control over the trust's assets discussed in *Navarro*." see *Bynane v. Bank of N.Y. Mellon*, 866 F.3d 351, 357 (5th Cir. 2017)

Here according to *Navarro's* rule USBank is not the real party to the controversy for purposes of diversity jurisdiction. USBank control over the VRMTG Asset Trust's assets cannot be verified because USBank did not provide its pooling and service agreement document to confirm its powers.

Eleventh Circuit holding in *Univ. of S. Alabama v. Am. Tobacco Co.*, 168 F.3d 405, 412 (11th Cir. 1999) required that "all doubts about jurisdiction should be resolved in favor of remand to state court"

Here, according *Eleventh Circuit holding* in *Univ. of S. Alabama* the Eleventh Circuit should have remanded this case to state court. The Eleventh lacked jurisdiction because complete diversity of the parties did not exist. USBank is not the real party to the controversy for purposes of diversity jurisdiction. USBank powers as trustee is unknown and in doubt.

In sum, the Eleventh Circuit refusal to apply these Court's precedents and its own precedent requires further review from this Court.

B. This Court should grant review to decide whether the Eleventh Circuit erred for concluding that the Respondent's Trust is a traditional trust without citing support in the record.

The Eleventh Circuit determined that the Respondent is the real party to the controversy for purposes of diversity jurisdiction by concluding that the Trust in this case is a *traditional trust*.

Eleventh Circuit cited this Court's holding in *Americold Realty Tr. v. Conagra Foods, Inc.*, 577 U.S. 378, 383 (2016) as its binding precedent; "when a trustee files a lawsuit or is sued

in her own name, her citizenship is all that matters for diversity purposes. For a traditional trust, there is no need to determine its membership to determine diversity jurisdiction.”

However, within the meaning of *Americold* there is no evidence on record to support that Respondent’s trust is a *traditional trust*.

“Traditionally, a trust was not considered a distinct legal entity, but a fiduciary relationship between multiple people.” Id.

The district court did not make same factual findings that Respondent’s trust is a traditional trust in its order.

Furthermore, in the interest of justice and to garner support the Respondent *can* concede to this point and this point alone – that it did not use the term *traditional trust* in the record to describe VRMTG Asset Trust.

The Eleventh Circuit should not have the final word in this case. This Court’s review is indisputably warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


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November 6, 2023