No. 18-_____

In The
Supreme Court of the United States

In Re: KENNETH P. KELLOGG, ET AL.,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF MANDAMUS

JOHN M. PIERCE
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
600 Wilshire Blvd., Suite 500
Los Angeles, CA 90017
(213) 262-9333

VANESSA M. BIONDO
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
20 West 23rd Street, Fifth Floor
New York, NY 10010
(212) 484-9866

DOUGLAS J. NILL
Counsel of Record
DOUGLAS J. NILL, PLLC d/b/a FARMLAW
2050 Canadian Pacific Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 573-3669
dnill@farmlaw.com

CAROLYNN K. BECK
PIERCE BAINBRIDGE BECK PRICE & HECHT LLP
One Thomas Circle NW, Suite 700
Washington, DC 20005
(213) 262-9333

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioners request a writ of mandamus under 28 U.S.C. §§ 1407(e) and 1651 and Rule 20 directing the United States Court of Appeals for the Tenth Circuit to reverse or clarify a November 20, 2018 Order denying Petitioners' request for a writ of mandamus directing the Judicial Panel on Multidistrict Litigation ("MDL Panel") to vacate an August 1 transfer order sending *Kellogg, et al. v. Watts Guerra, LLP, et al.*, from the District of Minnesota to *In Re: Syngenta AG MIR162 Corn Litig*. ("Syngenta MDL") in the District of Kansas.

Under 28 U.S.C. § 1407, the MDL Panel may only transfer "civil actions involving one or more common questions of fact" to any single district for "coordinated or consolidated pretrial proceedings." *Kellogg* does not meet any requirements for transfer. The Syngenta MDL is litigation against Syngenta for unreasonable marketing of a genetically-altered corn seed. Pretrial proceedings in the MDL are concluded and a final settlement approval and fee award hearing was held on November 15, 2018. *Kellogg* is a class action lawsuit by corn growers against their lawyers for racketeering, attorney deceit, and a breach of fiduciary obligations under Minnesota law. *Kellogg* has no common questions of fact and no shared claims with the cases previously transferred into the Syngenta MDL.

The questions presented are:

1. Whether the MDL Panel transfer of *Kellogg* from Minnesota to the Syngenta MDL for

QUESTIONS PRESENTED – Continued

"pretrial proceedings" is a "judicial usurpation of power [and] a clear abuse of discretion," *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004), that requires the Court to grant mandamus relief, when: (a) *Kellogg* shares "no common questions of fact" with the Syngenta lawsuits consolidated in the MDL; (b) the MDL pretrial proceedings are concluded; and (c) *Kellogg* presents Minnesota claims addressing Minnesota public policy, such as the regulation of attorney misconduct in Minnesota.

2. Whether the court administering the Syngenta MDL has jurisdiction under Fed. R. Civ. P. 23 to police individual contingent fee contracts between *Kellogg* class members and the Respondent lawyers when Rule 23 does not grant jurisdiction for a court to award fees to lawyers other than counsel who worked for the benefit of the class, typically as a percentage of the common fund.

3. Whether the court administering the Syngenta MDL can exercise inherent authority to police individual contingent fee contracts between *Kellogg* class members and the Respondent lawyers when there is another lawsuit in an appropriate forum – *Kellogg* in Minnesota – challenging the validity and ethics of the contracts.

PARTIES TO THE PROCEEDINGS

Petitioners are Kenneth P. Kellogg, Rachel Kellogg and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, John F. Heitkamp, Dean Holtorf, Garth J. Kruger, Charles Blake Stringer and Stringer Farms, Inc. Petitioners represent a proposed class of 60,000 corn growers who signed individual 40 percent contingent fee retainer contracts with Respondent Watts Guerra, LLP, and its joint venture partners.

Respondents are Watts Guerra, LLP, Daniel M. Homolka, P.A., Yira Law Office LTD, Hovland and Rasmus, PLLC, Dewald Deaver, P.C., LLO, Mauro, Archer & Associates, LLC, Johnson Law Group, Wagner Reese, LLP, VanDerGinst Law, P.C., Patton, Hoversten & Berg, P.A., Cross Law Firm, LLC, Law Office of Michael Miller, Pagel Weikum, PLLP, Wojtalewicz Law Firm, Ltd., Lowe Eklund Wakefield Co., LPA, Mikal C. Watts, Francisco Guerra, and John Does 1-250. Respondents are law firms and lawyers listed on individual retainer contracts signed by Petitioners, fee-splitting with Watts Guerra, LLP and sharing in the claimed 40 percent fee from each client.

Petitioners respectfully ask the Court to direct the Tenth Circuit to reverse or clarify a November 20 Order and direct the MDL Panel to vacate an August 1 transfer order sending *Kellogg* from the District of Minnesota to the Syngenta MDL in Kansas.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners submit this Corporate Disclosure Statement.

Kellogg Farms, Inc., is a North Dakota farm corporation engaged in the business of planting, growing, harvesting, gathering, distributing and selling corn in North Dakota. Kellogg Farms, Inc., is owned by Kenneth P. Kellogg and Rachel Kellogg and has no other owners.

Bromley Ranch, LLC, is a North Dakota farm corporation engaged in the business of planting, growing, harvesting, gathering, distributing and selling corn in North Dakota. Bromley Ranch, LLC, is owned by Roland B. Bromley and his wife Toni and has no other owners.

Stringer Farms, Inc., is a Texas farm corporation engaged in the business of planting, growing, harvesting, gathering, distributing and selling corn in North Dakota. Stringer Farms, Inc., is owned by Charles Blake Stringer and has no other owners.

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The Tenth Circuit Order denying Petitioners' petition for a writ to the MDL Panel is dated November 20, 2018 and reproduced at App. 1.

The Panel Transfer Order is dated August 1, 2018 and reproduced at App. 4.

The Panel Order Denying Reconsideration is dated October 3, 2018 and reproduced at App. 9.

STATEMENT OF JURISDICTION

Appellate review of a decision of the MDL Panel is obtained by extraordinary writ under the All Writs Act. *See* 28 U.S.C. § 1407(e): "No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code."

STATUTE INVOLVED

This Petition addresses the MDL Panel application of 28 U.S.C. § 1407, which is set out in the Appendix pursuant to Supreme Court Rule 14.1(f). App. 15. This Petition also addresses the appellate rights for an improper transfer under 28 U.S.C. § 1407(e).

INTRODUCTION

I. Rule 20.1 Criteria Are Met

Petitioners ("*Kellogg* plaintiffs" or "Farmers") request a writ of mandamus under 28 U.S.C. §§ 1407(e) and 1651 and Rule 20 directing the Tenth Circuit to reverse or clarify a November 20 Order denying Farmers' request for a writ of mandamus directing the MDL Panel[1] to vacate an August 1 transfer order sending *Kellogg* from the District of Minnesota[2] to the Syngenta MDL in the District of Kansas.[3]

Under 28 U.S.C. § 1407, the MDL Panel may only transfer "civil actions involving one or more common questions of fact" to any single district for "coordinated or consolidated pretrial proceedings." *Lexecon*, 523 U.S. at 28 (transferee courts have jurisdiction solely over pretrial matters). *Kellogg* does not meet any requirements for transfer. The Syngenta MDL is litigation against Syngenta for unreasonable marketing of a genetically-altered corn seed. Pretrial proceedings in the MDL are concluded and a final settlement approval and fee award hearing was held on November 15, 2018.

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[1] The Honorable Sarah S. Vance, Chair, the Honorable Marjorie O. Rendell, the Honorable Ellen Segal Huvelle, the Honorable Catherine D. Perry, the Honorable Lewis A. Kaplan, and the Honorable R. David Proctor. The Honorable Charles R. Breyer participated in the August 1 transfer decision.

[2] The Honorable Donovan W. Frank, Senior United States District Judge for the District of Minnesota, is assigned to *Kellogg* in Minnesota.

[3] The Honorable John W. Lungstrum, Senior United States District Judge for the District of Kansas, is assigned to the Syngenta MDL.

Kellogg is a class action lawsuit by 60,000 corn growers across the United States against a Texas law firm and co-counsel in multiple states ("Respondents") for racketeering, attorney deceit, and a breach of fiduciary obligations under Minnesota law. *Kellogg* has no common questions of fact and no shared claims with the cases previously transferred into the Syngenta MDL.

The MDL Panel transfer of *Kellogg* from Minnesota to the Syngenta MDL for "pretrial proceedings" is a "judicial usurpation of power [and] a clear abuse of discretion," *Cheney*, 542 U.S. at 380, that requires the Court to grant mandamus relief. *Kellogg* shares no "common questions of fact" with the Syngenta lawsuits consolidated in the MDL, the MDL pretrial proceedings are concluded, and *Kellogg* presents Minnesota claims addressing Minnesota public policy, such as the regulation of attorney misconduct in Minnesota.

The Panel has so clearly exceeded its authority by sending *Kellogg* from Minnesota to Kansas – no common questions, different claims and defendants, pretrial proceedings in the Syngenta MDL concluded – that if 28 U.S.C. § 1407 has *any* boundaries for transfer that matter, the Court should issue the writ. Congress through § 1407 did not grant unfettered discretion to the Panel to exceed the boundaries of the statute. Congress did not grant the Panel unbounded power.

As required by Rule 20.1, the writ sought is in aid of the Court's appellate jurisdiction. Exceptional circumstances warrant the exercise of the Court's discretion because 28 U.S.C. § 1407(e) authorizes a petition

for an extraordinary writ as the sole remedy for a Panel transfer that violates the *Kellogg* plaintiffs' and absent class members' substantive and procedural due process rights to litigate the merits of their claims in Minnesota. Because the Tenth Circuit denied a requested writ to the Panel to vacate its August 1 transfer order, the *Kellogg* plaintiffs have no other court or forum to address the violation of their due process rights.

The Court should direct the Tenth Circuit to reverse its November 20 order and remand to the Panel to vacate the August 1 transfer order and return *Kellogg* to the District of Minnesota. In the alternative, the Court should remand to the Tenth Circuit for clarification on the grounds for the denial of Farmers' petition for a writ of mandamus to that court. The Tenth Circuit set forth a three-part test for granting a petition for an extraordinary writ, but did not address whether any part of the test was met by Petitioners' petition. App. 2-3 ("three conditions must be met . . . [p]etitioners have failed to establish one or more of these conditions").

II. *Kellogg* Exposes How "Mass Tort . . . Individual Suit" Model Has Been Exploited By Some Lawyers In Class Action Litigation To Deceive Clients And Collect Unreasonable Fees

Kellogg addresses the interplay of mass torts with individualized injuries and class actions with common

claims and damages. It exposes how the "mass tort . . . individual suit" model has been exploited by some lawyers in class action litigation to procure contingent fee contracts from individual clients through deceptive marketing to collect unreasonable fees. *Kellogg* has received national attention by the media and legal commentators. *See* First Declaration of Douglas J. Nill, MDL 2591, ECF No. 15; Ex. 1 (*Reuters*); Ex. 2 (*Agweek*); Ex. 3 (*SE TexasRecord*); Ex. 4 (*Madison-St. Clair-Record*); and Ex. 5 (The *National Law Journal*); Third Declaration of Douglas J. Nill, MDL 2591, ECF No. 22; Ex.10 (*Reuters*) ("*Venue fight in Syngenta fees case highlights issue of MDL judges' police power*").

Kellogg asserts federal statutory claims under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq*.,[4] and Minnesota statutory claims under the Prevention Of Consumer Fraud Act, Minn. Stat. §§ 325F.68-70, False Statement In Advertising Act, Minn. Stat. § 325F.67, Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-48, and Misconduct by Attorneys/Penalties for Deceit or Collusion, Minn. Stat. §§ 481.071 and 481.07, and common law claims including breach of fiduciary obligations. The Minnesota statutory and fiduciary claims implicate Minnesota public policy.

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[4] "An attorney's license is not an invitation to engage in racketeering. . . ." *Handeen v. Lemaire*, 112 F.3d 1339, 1349 (8th Cir. 1997).

The litigation in the District of Kansas is a consolidation of class actions and individual lawsuits against Syngenta AG, a global seed company, for the unreasonable marketing of a genetically-altered corn seed. The Syngenta MDL was formed in December, 2014, and assigned to the Honorable John W. Lungstrum. On September 25, 2017, with pretrial proceedings concluded and a bellwether Kansas class action trial resolved favorably by a jury for corn growers, a "global settlement was reached" in the Syngenta MDL through a settlement term sheet with a common fund of $1.51 billion created in settlement of the plaintiff corn growers' claims in all the pending lawsuits in the United States. Those lawsuits include the MDL class action before Judge Lungstrum in Kansas, and about 60,000 individual lawsuits filed by Respondents in the Minnesota state courts.

On February 26, 2018, the $1.51 billion global settlement was finalized as a National Class Action Settlement Agreement ("Settlement Agreement") under the jurisdiction of the MDL court in Kansas. On April 10, 2018, Judge Lungstrum granted preliminary approval to the terms of the settlement. The final settlement approval and attorney fee award hearing was held on November 15 before Judge Lungstrum at the courthouse in Kansas City. The settlement was approved as fair and reasonable and Judge Lungstrum approved a $500 million attorney fee award to be shared by the lawyers who worked on the Syngenta litigation. A December 15 hearing is scheduled to address

the distribution of the fee award between different groups of lawyers.

III. *Kellogg* Does Not Challenge Syngenta MDL Settlement Fee Awards

On April 24, 2018, *Kellogg* was filed in the District of Minnesota. Respondents improperly tagged *Kellogg* after it was filed to send the complaint to the Syngenta MDL for reasons of delay. *Kellogg* and the Syngenta lawsuits consolidated in the MDL are different cases. The MDL Panel acknowledged in the October 3 order at p. 2 "that the *Kellogg* plaintiffs [are] not objecting to the MDL settlement or any fees awarded thereunder." App. 11.

An issue in the Syngenta MDL under Fed. R. Civ. P. 23 and the settlement agreement is whether lawyers and law firms who worked on the Syngenta case, including the Respondents, are entitled to a percentage of the $1.51 billion common fund for their work on Syngenta. Thus the issue in the MDL is whether Respondents are entitled to a fee for their work on Syngenta, as a percentage of the common fund. *Kellogg* will determine whether Respondents are allowed *to keep that fee*, as a result of racketeering, attorney deceit and a breach of fiduciary obligations.

Although Farmers do not contest the reasonableness of fees awarded as a percentage of the common fund, Farmers request that Respondents' fee award be held in escrow pending the resolution of *Kellogg* in Minnesota. *See* Minn. R. Prof. Conduct 1.15(b)

(disputed attorney fee funds must be held in escrow pending resolution of the dispute); *see generally* American Bar Association (ABA) Rule 1.15(e) (disputed attorney fee funds "shall be kept separate by the lawyer until the dispute is resolved"). The reason is that Farmers, through *Kellogg*, request a forfeiture of Respondents' fee award as a result of Respondents' racketeering and deceit and a breach of fiduciary obligations. *See Kellogg* Amended Complaint at ¶¶ 23-24. The Honorable Donovan W. Frank, Senior United States District Judge for the District of Minnesota, assigned to the *Kellogg* lawsuit in Minnesota, can efficiently issue an escrow order and direct Respondents, over whom he has jurisdiction by virtue of *Kellogg*, to comply with an order.

The MDL Panel's August 1 transfer order reduced *Kellogg* to an objection to the Respondents' fee award in the Syngenta MDL at the November 15 hearing. In doing so, the Panel improperly conflated the issue of whether Respondents and all other lawyers who worked on Syngenta are entitled to a fee for their work on Syngenta, with the issue of whether Respondents are allowed to keep their share of the fee award.

At the same time, the Panel avoided the critical determination under 28 U.S.C. §1407 of whether *Kellogg* shares common questions of fact and claims with the Syngenta lawsuits consolidated in the Syngenta MDL. It is plain that *Kellogg* and Syngenta are different lawsuits. By reducing *Kellogg* to an objection, the Panel order violates the *Kellogg* plaintiffs and absent class members' substantive and procedural due

process rights under the Fifth and Fourteenth Amendments to proceed with class certification and discovery and the merits of their claims – their "choses in action" property interest – in Minnesota. The Panel thus reduced *Kellogg* to the lowest common denominator; an objection by several individual *Kellogg* plaintiffs – the *Kellogg* class representatives – to Respondents' attorney fee award in the MDL. *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, And The Dangers Of Procedural Collectivism*, 95 B. U. L. Rev. 109, 110 (2015) ("The Procrustean Bed that is the MDL, whereby the claims of each individual are crudely and artificially reshaped into fitting some generic lowest common denominator, unambiguously violates the Fifth Amendment's Due Process Clause.").

Farmers further assert that the Syngenta MDL has no Rule 23 jurisdiction to police Respondents' individual contingent fee contracts with Farmers. Rule 23 does not allow a court to award fees to lawyers other than counsel who worked for the benefit of the class, typically as a percentage of the common fund. Fed. R. Civ. P. 23(g) and (h). The Honorable Charles R. Breyer, United States District Judge, Northern District of California, in *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation*, Case No. 3:15-md-02672-CRB, MDL No. 2672 – a national class action settlement – correctly acknowledged in an April 24, 2017 Order that an MDL court does not have the authority under Rule 23 to police individual contingent fee contracts between class members and

their individual lawyers: "*This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum*." See App. 19-31, quotation at App. 31 (emphasis added).

Nor can the Syngenta MDL exercise the inherent authority of the court – an authority premised on a court's power to police the conduct of lawyers as officers of the court – because *Kellogg* challenges the validity and ethics of the contracts in Minnesota, an appropriate forum with a strong public policy interest in addressing the claims, such as the regulation of attorney deceit and a breach of fiduciary obligations. In an April 5, 2018 Order, the Honorable Anita B. Brody, United States District Judge, Eastern District of Pennsylvania, like Judge Breyer, acknowledged in *In Re: NFL Football League Players Concussion Injury Litigation*, Case No. 12-md-02323-AB, MDL No. 2323 – a national class action settlement – that Rule 23 jurisdiction does not extend to the review of individual contingent fee contracts; however, she concluded that she had inherent authority to address the contracts, and she then capped the contracts at 22 percent. *See* App. 32-44. Although Judge Brody exercised her inherent authority to police the individual contingent fee contracts, she did so *by default*, as there was no pending litigation in another jurisdiction – like *Kellogg* – challenging the validity and ethics of the contracts.

In recognition of these arguments, the MDL Panel states in its August 1 transfer order that "we need not speculate about the precise contours of the [Syngenta MDL's] authority" to address Respondents' individual

contingent fee contracts. The statement respectfully misses the point. The MDL cannot address whether Respondents' individual contingent fee contracts with Farmers were procured through deceptive marketing and are void *without* class certification and discovery for Farmers and a jury trial on *Kellogg* jury claims. And 28 U.S.C. § 1407 does not authorize a jury trial for *Kellogg* in any court other than Minnesota. *Lexecon*, 523 U.S. at 28 (transferee courts have jurisdiction solely over pretrial matters).

Farmers argued in a motion for reconsideration of the August 1 transfer order that the Panel's disregard of Farmers' Fifth and Fourteenth Amendment substantive and procedural due process rights while transferring *Kellogg* to the Syngenta MDL, is an abuse of discretion and unconstitutional as applied to 28 U.S.C. § 1407. The Panel's October 3 order sidesteps Farmers' due process rights. The Panel switched gears from the August 1 order to assert a transfer of *Kellogg* to the MDL in Kansas for "pretrial proceedings."

However, as discussed, *Kellogg* shares no common facts or claims with the Syngenta lawsuits consolidated in the Syngenta MDL, and the *pretrial proceedings* in the MDL *are concluded*. The Panel did not acknowledge that the Syngenta pretrial proceedings are concluded and a final settlement approval and fee award hearing was scheduled for November 15. Thus the Panel transfers *Kellogg* to Judge Lungstrum in Kansas as a *new case*, and this violates the Panel's statutory mandate and is a "judicial usurpation of

power [and] a clear abuse of discretion." *Cheney*, 542 U.S. at 380.

Farmers addressed this possibility in a reply brief filed with the MDL Panel on Sept. 5, ECF No. 34 (emphasis in original):

> The Panel may respond that the Syngenta MDL can move forward with substantive motion practice addressing Farmers' claims and requests for class certification and discovery before a judicial or jury determination of the validity of the contracts. But the Panel should acknowledge this cannot occur before the final settlement hearing in the Syngenta MDL on November 15. And if the Panel decides to send *Kellogg* to the Honorable John W. Lungstrum in Kansas to be litigated as a separate case, after the Syngenta litigation is concluded, the Panel *should have good reasons* why Judge Lungstrum should address *Kellogg* – a class action with *Minnesota claims* addressing *Minnesota public policy* such as the regulation of attorney deceit in Minnesota – rather than Judge Frank in Minnesota.

The Panel did not acknowledge the November 15 final settlement hearing and did not address those "good reasons" because there are none.

Setting aside the Panel's transfer of *Kellogg* to the Syngenta MDL as a new case, a "judicial usurpation of power [and] a clear abuse of discretion," *Cheney*, 542 U.S. at 380, the Panel does no favors for Judge Lungstrum by transferring *Kellogg* to his Court. Consider,

for example, the motions pending before Judge Frank in Minnesota before a stay and transfer of *Kellogg* to Kansas by the Panel on August 1. *See* MDL 2591, ECF No. 22, Ex. 8 (*Plaintiffs' Notice Of Hearing On Motion For Partial Declaratory Judgment For Count VII Of The Complaint Or Certification Of Several Questions To The Minnesota Supreme Court*) and Ex. 9 (memorandum). Farmers ask Judge Frank to enter a declaratory judgment for Count VII of the *Kellogg* Complaint that:

1. Minn. Stat. § 481.071 (*Misconduct By Attorneys*) is an independent cause of action;

2. Minn. Stat. §§ 481.071 and 481.07 (*Penalties For Deceit Or Collusion*) apply to attempted, but unsuccessful, deceit; and

3. The treble damage remedies for §§ 481.071 and 481.07 apply to a forfeiture of an attorney fee.

Alternatively, Farmers ask Judge Frank to certify the three requests for declaratory judgment as questions to the Minnesota Supreme Court under Minn. Stat. § 480.065, subd. 3.

It is unclear why the Panel should burden Judge Lungstrum, after four years of Syngenta MDL litigation resolved by a settlement of all corn grower lawsuits against Syngenta, with *Kellogg*, an entirely different lawsuit, with claims requiring an interpretation of Minnesota law and requests for certification to the Minnesota Supreme Court. The *Kellogg* lawsuit

can be efficiently handled by Judge Frank in the District of Minnesota.

STATEMENT OF THE CASE

I. Racketeering And Attorney Deceit

The *Kellogg* class action addresses an attorney fee fraud scheme perpetrated by the Respondents, a Texas law firm and co-counsel in multiple states, against 60,000 corn growers across the United States in connection with GMO corn lawsuits against Syngenta AG, a global agricultural business, filed in federal and state courts in 2014-17.

Farmers were deceptively solicited to sign 40 percent contingent fee retainer contracts with Respondents to pursue individual lawsuits. Farmers were secretly excluded, without their knowledge and consent, from participating in class actions against Syngenta in the Syngenta MDL in Kansas and the Fourth Judicial District Court in Minnesota, where attorneys' fees are determined by the presiding courts as fiduciaries for the members of the class. Farmers were deprived of the opportunity to make an informed decision during the litigation as to whether to pursue an individual claim or a class action claim without representation by Respondents, thereby subjecting Farmers to Respondents' fraudulent scheme to extract unreasonable fees.

Farmers ask the presiding Minnesota court, the Honorable Donovan W. Frank, to declare that Respondents' retainer contracts with Farmers are void *ab initio* and that Respondents have forfeited their claim to any compensation from individual Farmers, and that Respondents have waived any quantum meruit claim against Farmers through their dishonest representations and omissions and conduct.

Syngenta is the world's largest seed supplier. At the start of the litigation there were four United States entities, including Syngenta Seeds, Inc., a Delaware corporation with its principal place of business in Minnesota.

Lawsuits were filed in multiple federal and state courts arising from Syngenta's commercialization of genetically-modified ("GMO") corn seed products known as Viptera and Duracade (containing the trait MIR162) without approval of such corn by China, an export market. The plaintiff corn growers alleged that Syngenta's commercialization of its products caused the genetically-modified corn to be commingled throughout the corn supply in the United States; that China rejected all imports of corn from the United States because of the presence of MIR162; that such rejection caused corn prices to drop in the United States; and that growers were harmed by that market effect. The federal and state court lawsuits include:

- *In Re: Syngenta AG MIR162 Corn Litigation*, the MDL proceeding in the United States District Court for the District of

Kansas, MDL No. 2591, Case No. 14-md-2591, before U.S. District Judge John W. Lungstrum and U.S. Magistrate Judge James P. O'Hara; and

- *In re Syngenta Litigation*, No. 27-cv-15-3785 (60,000 consolidated individual claims by corn growers across the United States including 9,000 Minnesota growers) and No. 27-cv-15-12625 (class claims on behalf of 23,000 Minnesota growers) in the Minnesota Fourth Judicial (Hennepin County) District Court before Judge Laurie J. Miller.

On June 23, 2017, the MDL court entered a Judgment following a $217.7 million Kansas class jury verdict (the first bellwether trial) in favor of the plaintiffs. On September 11, 2017, a Minnesota class trial began in Hennepin County District Court. On September 25, 2017 a "global settlement was reached" with a common fund of $1.51 billion created in settlement of plaintiff corn growers' claims in all the pending lawsuits in the United States.

There are about 643,000 corn growers in the United States. Over 83 million acres of corn were harvested in the United States in 2014, with an average yield of 174.2 bushels per acre, for a total 2014 corn harvest of almost 14.5 billion bushels. The damage to United States' corn growers caused by the price drop was estimated to be as much as $1.90 per bushel with a claimed damage of about $6-7 billion.

After China rejected U.S. shipments of corn and the corn futures price and delivery price of corn across the United States dropped, Farmers were deceptively solicited by Defendants to sign retainer agreements authorizing individual lawsuits against Syngenta with a 40 percent contingent attorney fee from any recovery. Farmers were dishonestly told through a barrage of television and internet advertising, direct-mail campaigns, and hundreds of in-person "town hall" community meetings from as early as December 4, 2014 and throughout 2015 and 2016 and into 2017 that a "*mass tort . . . individual suit*" is better than a class action. Farmers were dishonestly told that "*only those who sign up (with Defendants) are eligible to pursue claims*."

Farmers were dishonestly told that a "mass tort . . . individual suit" is better than a class action, because class actions only recover coupons for plaintiffs. Said defendant Mikal C. Watts at a meeting of corn growers in Storm Lake, IA on February 2, 2015, as quoted in the Storm Lake Pilot Tribune (emphasis added): "Some of the farmers asked about the difference between his mass suit and a class action. With a class action, Watts told them, "*lawyers will get all the money* and the *farmers may get a gift certificate.*"

Similarly, Bill Enyart, a co-counsel with the Watts Guerra law firm, told a meeting of farmers in Champaign, Ill. on September 23, 2015 (emphasis added):

> [Watts Guerra] is filing suits in Minnesota, where Syngenta Seeds is located, as opposed

> to filing in a federal court. . . . Enyart said the advantage to this was that *instead of getting a discount for seed corn* in the future, *as in a class-action case*, there would be a gross settlement fee and the firm would simply send the farmer a check.

Farmers were never told that they were putative class members in class actions filed in federal district courts in different states and consolidated by the MDL panel into a single proceeding in United States District Court in Kansas, the federal MDL, on December 11, 2014. Farmers were never told that the class actions consolidated in the MDL in Kansas brought claims on behalf of corn growers across the United States. Farmers were never informed that in a class action, the presiding judge is a fiduciary for the class members, and obligated to invite and consider objections from class members and award a reasonable attorney fee as a percentage of the common fund of monetary damages for the class.

Respondents thereupon filed some 60,000 individual lawsuits in Minnesota state district courts because Syngenta Seeds, Inc. then had its United States headquarters in Minnesota. Respondents pled only Minnesota state claims to avoid removal to the federal court in Minnesota by Syngenta and transfer to the consolidated MDL class action proceedings in Kansas. Respondents successfully had their individual lawsuits remanded back to Minnesota when Syngenta attempted to remove the cases to federal court and the MDL.

And then, knowing that the Farmers' 60,000 individual lawsuits would nevertheless effectively remain a part of the federal MDL class action and a tag-a-long class action in Hennepin County District Court for Minnesota growers, Respondents' counsel entered into Joint Prosecution Agreements with the lead class counsel in the MDL in Kansas and the Minnesota class action, with an explicit agreement to exclude the 60,000 Farmers from class certification proceedings in the MDL and Minnesota. The driving intent of the agreements, filed under seal, was to ensure the continuation of Respondents' 40 percent contingent attorney fee scheme, rather than allowing the Farmers to fall as a matter of law into the class actions where fee awards would be determined by the presiding judge.

Respondents never advised Farmers of the class action proceedings in federal and state court covering the Farmers and their claims. Respondents never advised Farmers of the merits of those proceedings and what is in the best interest of the Farmers. Respondents never informed Farmers that they entered into Joint Prosecution Agreements with lead counsel in class action lawsuits in the MDL and Minnesota to exclude Farmers from the respective classes. Respondents effectively opted Farmers out of the class proceedings without informing them of their options and rights. *See*, *e.g.*, *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1025 (9th Cir. 1998) (citing Newberg & Conte, *Newberg on Class Actions* § 16.16 (3d Ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class

member and may not be usurped by the class representative or class counsel.").

Respondents' exclusion of their 60,000 corn grower clients from class action proceedings through secret agreements, never disclosed to Farmers until sixteen months after the agreements were negotiated and signed, and never explaining why Farmers were automatically excluded from the federal MDL and Minnesota classes, is an epic fraud by omission and violates Respondents' fiduciary obligations to the Farmers and professional responsibility rules requiring that clients be reasonably informed of litigation options and consent to the selected option.

Although Respondents never disclosed the September 25, 2017 settlement term sheet to Farmers, the term sheet was attached to MDL motion pleadings on March 26, 2018. The term sheet envisioned a two-prong settlement: a nationwide class action and a separate parallel inventory settlement for Respondents' 60,000 cases filed in Minnesota. The term sheet established jurisdiction with the MDL court to administer the national class action settlement, and jurisdiction with the 23rd District Court of Brazoria County, Texas, to administer the settlement of Respondents' 60,000 individual lawsuits.

It is no surprise that Respondents never disclosed the term sheet to Farmers. After three years of Respondents' misuse of the Minnesota judicial system to perpetrate their "mass tort . . . individual suit" attorney fee fraud scheme, Respondents unashamedly

negotiated the transfer of Farmers' lawsuits to a Texas court in Respondent Watts Guerra's backyard, with no previous connection to the Syngenta litigation, to address Respondents' 40 percent contingent fee contracts.

The Hennepin County District Court judge did not appreciate Respondents' odious jurisdiction transfer, and the parties revised the term sheet as a National Class Action Settlement Agreement filed with the MDL court on February 26, 2018 with claim administration under the jurisdiction of the MDL court. When Respondents submit Farmers' claims through the national class action, Farmers, as class members, are subject to paying two sets of lawyers: (1) class counsel through a fee award as a percentage of the common fund; and (2) Respondents under the terms of the individual contingent fee contracts. A hypothetical within the *Kellogg* Amended Complaint at pp. 96-99, ¶¶ 251-56, shows that if class counsel are awarded 30 percent of the common fund as an attorney fee, individual members of the class will pay 30 percent of their claim payment for fees, whereas Farmers may pay 58 percent.

Respondents' "mass-tort . . . individual suit" attorney fee fraud scheme violates multiple rules of the Minnesota Rules of Professional Conduct (MRPC). *See Kellogg* Amended Complaint at pp. 104-10. Farmers are injured by Respondents' deceit and breach of fiduciary duties. *Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986) (*Perl III*) ("[W]e reaffirm that cases of actual fraud or bad faith result in total fee forfeiture.");

Perl v. St. Paul Fire and Marine Ins. Co., 345 N.W.2d 209, 212 (Minn. 1984) (*Perl II*) ("the client is deemed injured even if no actual loss results"); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (*Perl I*) ("an attorney . . . who breaches his duty to his client forfeits his right to compensation").

II. Minnesota Claims Implicating Minnesota Public Policy Such As Regulation Of Attorney Misconduct In Minnesota

Minnesota has a connection to the claims of each Farmer, and no state has a greater interest than Minnesota in having its own substantive law apply to *Kellogg*. Because Respondents used the Minnesota courts to litigate their 60,000 individual lawsuits against Syngenta in furtherance of their "mass tort . . . individual suit" attorney fee fraud scheme, Respondents' misconduct is governed by the Minnesota Rules of Professional Conduct. *See* Kellogg Amended Complaint at pp. 31-34.

Likewise, Minnesota has a strong public policy interest in providing the forum and enforcing laws addressing attorney misconduct by lawyers practicing law in Minnesota, which include criminal penalties under Minn. Stat. §§ 481.071 and 481.07 and Minn. Stat. § 325F.67. *See*, *e.g.*, *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756 (Minn. App. 2017) *rev. denied* (May 16, 2017) (invalidating a forum-selection clause that would have had the effect of evading Minnesota's champerty law and violating public policy

against champerty). Respondents' misconduct therefore falls under the governance of Minnesota statutory law such as the Prevention Of Consumer Fraud Act, Minn. Stat. §§ 325F.68-70, False Statement In Advertising Act, Minn. Stat. § 325F.67, Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-48, and Misconduct by Attorneys/Penalties for Deceit or Collusion, Minn. Stat. §§ 481.071 and 481.07, and common law such as fiduciary obligations. *See*, *e.g.*, *Mooney v. Allianz Life Ins. Co. of N.Am.*, 244 F.R.D. 531 (D. Minn. 2007) (Minnesota consumer protection law applies to claims of non-Minnesota class members when "allegedly fraudulent activities . . . emanated from Minnesota."); *City of Farmington Hills Employees Ret. Sys. v. Wells Fargo Bank, N.A.*, Civil No. 10-4372 (DWF/JJG) (D. Minn. March 27, 2012) (certifying class action with non-Minnesota class members under Minnesota breach of fiduciary duty law when Wells Fargo entered into the same contract with each putative class member and concealed the effects of mismanagement from each class member).

III. MDL Transfer Litigation

On April 24, 2018, Farmers filed a Rule 23 class action in the United States District Court, District of Minnesota, on behalf of 60,000 corn growers who were deceptively solicited by the Respondents, Watts Guerra, LLP and co-counsel in multiple states.

On April 30, Respondents tagged *Kellogg*, asserting the complaint "potentially impacts the MDL Court's

control over any award of attorneys' fees which is inextricably interwoven with the settlement approval process." The Panel issued a conditional transfer order on May 1.

On May 7, Farmers filed a Notice of Opposition to the conditional transfer order. On May 29, Farmers filed motion pleadings asking the Panel to vacate the conditional transfer order, and the parties exchanged briefs.

On August 1, the Panel denied Farmers' motion to vacate the conditional transfer order. App. 4. On August 8, Farmers filed an objection and motion for reconsideration, and the Panel issued a briefing schedule with a September 27 hearing on the motion. The Panel issued an October 3 order denying reconsideration. App. 9.

On October 17, Farmers filed a petition for a writ of mandamus with the Tenth Circuit. The Tenth Circuit issued a briefing schedule. On November 20, 2018, the Tenth Circuit issued an order denying the petition. App. 1.

REASONS WHY THE WRIT SHOULD ISSUE

The Court uses the writ of mandamus in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney*, 542 U.S. at 380. The Court in *Cheney* made clear that three conditions must be satisfied before such an

extraordinary writ must issue: (1) the party must have no other adequate means to attain the relief he deserves, (2) the party must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable, and (3) the issuing court must be satisfied that the writ is appropriate under the circumstances. *Id.* at 380-81. Farmers satisfy the three conditions set out in *Cheney*.

I. *Kellogg* Plaintiffs And Absent Class Members Have Protectable Interest Under Due Process Clause To Litigate *Kellogg* In Minnesota

Farmers have a protectable interest under the Due Process Clause of the Fifth and Fourteenth Amendments to proceed with class certification and discovery and the merits of their claims – their "choses in action" property interest – in Minnesota, an appropriate forum with a strong public policy interest in addressing the claims. U.S. Const. amends. V, VII, XIV; Minn. Const. art. I, § 7. The due process clauses were triggered for Farmers at the filing of the lawsuit in Minnesota on April 24, 2018, because their claims are deemed "choses in action" which are protected property interests. *Shutts*, 472 U.S. at 807 ("[A] chose in action is a constitutionally recognized property interest. . . ."); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("The . . . Due Process Clause[] protect[s] civil litigants who seek recourse in the courts, . . . as plaintiffs attempting to redress grievances."); *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 439

(1951) ("There is no fiction . . . in the fact that choses of action . . . are property."); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223, 240-42 (2d Cir. 2016) (Leval, Circuit Judge, concurring) (rejecting settlement class which did not address claims of absent class members as a violation of their due process right to have their claims adjudicated).

II. *Kellogg* Plaintiffs Cannot Obtain Relief From Any Other Court Or Forum

Exceptional circumstances warrant the exercise of the Court's discretion because 28 U.S.C. § 1407(e) authorizes a petition for an extraordinary writ as the sole remedy for a Panel transfer that violates the *Kellogg* plaintiffs' and absent class members' substantive and procedural due process rights to litigate the merits of their claims in Minnesota. Because the Tenth Circuit denied a requested writ to the Panel to vacate its August 1 transfer order, the *Kellogg* plaintiffs have no other court or forum to address the violation of their due process rights.

III. MDL Panel Transfer Of *Kellogg* From Minnesota To Kansas Is A "Judicial Usurpation Of Power [And] A Clear Abuse Of Discretion"

A. *Kellogg* Is Not An Objection

The MDL Panel transfer of *Kellogg* in the August 1 order is an abuse of power and unconstitutional as applied under 28 U.S.C. § 1407, because the transfer

order reduced *Kellogg* – a national class action racketeering and attorney deceit lawsuit on behalf of 60,000 putative class members against Respondents – to the status of an objection to a class action settlement attorney fee award in the Syngenta MDL, the transferee court, thereby: (1) depriving the *Kellogg* plaintiffs and absent class members of their due process rights to pursue class certification and discovery and the merits of their claims – their "choses in action" property interest – in Minnesota; and (2) wrongly subjecting Farmers to the risks of res judicata and collateral estoppel and law of the case.

The MDL Panel sent *Kellogg* to Kansas to grant the presiding Judge, the Honorable John W. Lungstrum, an opportunity to examine Farmers' allegation that the Syngenta MDL *and* Hennepin County (MN) District Courts were misled by Respondents to allow automatic opt-outs from class certification proceedings. *See Kellogg* Amended Complaint at ¶ 226 (emphasis added) and August 1 transfer order at p. 2, n. 1:

> [W]hen the *courts* approved class notice that automatically excluded Defendants' 60,000 clients from the class definition and the obligatory Rule 23 notice and opt-out requirements, the *courts* erred in accepting Defendants' sleight-of-hand claim that Farmers were never part of the class because they were excluded from the class by the JPA and MPA. The *courts* accepted Defendants' claim because they presumed, in orders approving class notice, that Defendants had satisfied their fiduciary and ethical obligations to

> procure informed consent from individual Farmers to be automatically excluded from the class proceedings.

Judge Lungstrum may surely be troubled by Respondents' deceit and misconduct if brought to his attention through a transfer of *Kellogg* to the Syngenta MDL, but he is not alone. The Hennepin County District Court judges handling the Minnesota class action and Respondents' 60,000 consolidated individual lawsuits – the Honorable Thomas M. Sipkins (retired) and the Honorable Laurie J. Miller – may likewise be troubled by Respondents' deceit and misconduct.

Whether Judge Lungstrum and the Hennepin County District Court were misled by Respondents is not an issue that can simply be decided by either court. A Minnesota jury in *Kellogg* – after class certification and discovery – is the best arbiter of whether Respondents engaged in racketeering, attorney deceit and a breach of fiduciary obligations. A Minnesota jury is the best arbiter of whether Respondents obstructed justice by misleading the presiding courts, a predicate act for a racketeering claim, 18 U.S. C. §§ 1503, 1512(c)(2).

B. *Kellogg* Shares No "Common Questions Of Fact" With Syngenta Lawsuits And Syngenta MDL "Pretrial Proceedings" Are Concluded

Congress grants the MDL Panel the authority under 28 U.S.C. § 1407 to consolidate cases with "common questions of fact" in a selected MDL court for

"coordinated or consolidated pretrial proceedings." *Lexecon*, 523 U.S. 26 at 28. As discussed, *Kellogg* shares no common facts or claims with the Syngenta lawsuits consolidated in the Syngenta MDL. The Syngenta MDL is a consolidation of lawsuits against Syngenta for unreasonable marketing of GMO seed corn. *Kellogg* is a lawsuit against the Watts Guerra law firm and its co-counsel conspirators for racketeering, attorney deceit and a breach of fiduciary obligations.

The MDL Panel had two mistaken attempts to find "common questions of fact" to justify the transfer of *Kellogg* from Minnesota to Kansas. In the August 1 order the Panel links *Kellogg* to an objection by Texas lawyers at the April 5, 2018 preliminary approval hearing. The Texas lawyers objected to the Settlement Agreement by claiming the Settlement Agreement should not replace the initial Term Sheet negotiated by settlement counsel for the corn growers and Syngenta on September 25, 2017. *See Kellogg* Amended Complaint, at ¶¶ 233-42 (Term Sheet finalized as national class action Settlement Agreement). The Texas lawyers' objection and *Kellogg* have no rational connection.

In the October 3 order the Panel claims authority under 28 U.S.C. § 1407 to transfer *Kellogg* to Kansas because "[e]ven if the global settlement resolves most cases . . . much work remains to be completed in . . . *four exporter cases*" that remain in the MDL. The four exporters assert claims against Syngenta for unreasonable marketing of the GMO corn seed. *Kellogg* asserts claims by corn growers against lawyers for

racketeering, deceit and a breach of fiduciary obligations. There are no common questions of fact and no shared claims between the "four exporter cases" and *Kellogg*. Again, there is no rational connection.

The Panel does not acknowledge that the Syngenta pretrial proceedings are concluded and a final settlement approval and fee award hearing was held on November 15. Thus the Panel transfers *Kellogg* to the Syngenta MDL in Kansas as a *new case*, and this plainly violates the Panel's statutory mandate and is a "judicial usurpation of power [and] a clear abuse of discretion." *Cheney*, 542 U.S. at 380.

C. *Kellogg* Does Not Challenge Syngenta MDL Fee Award Decisions

The Syngenta MDL will determine whether Respondents are entitled to a fee for work on the Syngenta litigation. *Kellogg* will determine whether Respondents are allowed *to keep that fee*, as a result of racketeering, attorney deceit and a breach of fiduciary obligations.

The MDL Panel acknowledged in the October 3 Order at p. 2 "that the *Kellogg* plaintiffs [are] not objecting to the MDL settlement or any fees awarded thereunder" but request "an *escrow order holding disputed funds* until the claims in [this lawsuit] have been resolved." *Id*. at p. 3, n. 4 (emphasis added). Farmers will ask Judge Frank in Minnesota through *Kellogg* to declare that Respondents' retainer agreements with Farmers are void *ab initio* and that Respondents have

forfeited their claim to any compensation from individual Farmers, and that Respondents have waived any quantum meruit claim against Farmers through their dishonest representations and omissions and conduct.

1. Terms Of Syngenta MDL Settlement Agreement

Before the Tenth Circuit, Respondents mischaracterized the terms of the Settlement Agreement. The Settlement Agreement grants jurisdiction to the Syngenta MDL under Fed. R. Civ. P. 23 to award attorneys' fees to lawyers who worked for the benefit of the class and address fee-share disputes between lawyers. The Settlement Agreement does *not* cover disputes between clients and lawyers, like the *Kellogg* class action claims of racketeering, attorney deceit and breach of fiduciary obligations alleged against the Respondents. *See Kellogg* Amended Complaint at pp. 92-95.

2. Forum Shopping Claim

Respondents' forum shopping claim alleged in litigation below has no merit. Farmers respect and admire both Senior United States District Court Judges, the Honorable John W. Lungstrum in Kansas and the Honorable Donovan W. Frank in Minnesota. And Farmers appreciate the dialogue with the MDL Panel. Although the Panel transfers *Kellogg* to Kansas as a new case, and this violates the Panel's statutory mandate and is a "judicial usurpation of power [and] a clear abuse of discretion, *Cheney*, 542 U.S. at 380, the Panel

has shown considerable respect for *Kellogg* and Farmers' requests for relief. Indeed, Farmers cite, as a compelling reason to return *Kellogg* to Minnesota, a ruling by one of the Panel members, the Honorable Charles R. Breyer, United States District Judge, Northern District of California, in *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation*, Case No. 3:15-md-02672-CRB, MDL No. 2672 (MDL court does not have the authority under Rule 23 to police individual contingent fee contracts between class members and their individual lawyers: "*This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum*.").[5]

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[5] Respondent Mikal C. Watts and his racketeering conspirators loved the Minnesota courts as a venue to file 60,000 individual lawsuits to advance Respondents' "mass tort . . . individual suit" contingent fee fraud scheme. Watts tries hard to now avoid Minnesota because he is not welcome in Minnesota. After three years of Respondents' misuse of the Minnesota courts to perpetrate their "mass tort . . . individual suit" scheme, Respondents unashamedly negotiated the transfer of Farmers' lawsuits to a Texas court in Watts Guerra's backyard, with no previous connection to the Syngenta litigation, to address Respondents' 40 percent contingent fee contracts. The transfer of jurisdiction for Respondents' 60,000 individual lawsuits, after three years of litigation in the Minnesota courts, was not well-received by the Hennepin County (MN) District Court. A January 11, 2018 email by a disgruntled lawyer indicates that a "*nuclear winter will follow* with a (very) uncooperative Judge M." Judge M is presumably the Honorable Laurie J. Miller, the Hennepin County District Court Judge handling the Minnesota class and Defendants' 60,000 consolidated individual lawsuits. *See Kellogg* Amended Complaint at ¶ 238.

D. Syngenta MDL Does Not Have Jurisdiction Under Rule 23 To Police *Kellogg* Plaintiffs' Contingent Fee Contracts

The Syngenta MDL, a national class action settlement, does not have jurisdiction to police individual contingent fee contracts between Farmers and Defendants under Fed. R. Civ. P. 23, because Rule 23 does not grant jurisdiction for a court to award fees to lawyers other than counsel who worked for the benefit of the class, typically as a percentage of the common fund. Fed. R. Civ. P. 23(g) and (h). The Honorable Charles R. Breyer, United States District Judge, Northern District of California, in *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, And Products Liability Litigation*, Case No. 3:15-md-02672-CRB, MDL No. 2672, a national class action settlement, correctly acknowledged in an April 24, 2017 Order that an MDL court does not have the authority under Rule 23 to police individual contingent fee contracts between class members and their individual lawyers: "This is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum." App. 31.

E. Syngenta MDL Cannot Exercise Inherent Authority To Police *Kellogg* Plaintiffs' Contingent Fee Contracts

The Syngenta MDL court cannot exercise inherent authority to police individual contingent fee contracts between Farmers and Defendants because there is *Kellogg*, a class action lawsuit in the United States

District Court, District of Minnesota, an appropriate forum challenging the validity and ethics of the contingent fee contracts. Although a court can exercise inherent authority to address the ethics of lawyers appearing before the court, the discretion for a court to exercise inherent authority is exceedingly limited. It is an abuse of discretion for a Rule 23 class action court to exercise inherent authority to police individual contingent fee contracts when there is an independent action, pursued by class members against their lawyers, addressing those very same contingent fee contracts and ethics questions. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1896 (2016) (district court judges "should not think they are generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law"); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)) ("Because of their very potency, inherent powers must be exercised with restraint and discretion"); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("[t]he extent of these [inherent] powers must be delimited with care").

In an April 5, 2018 Order, the Honorable Anita B. Brody, United States District Judge, Eastern District of Pennsylvania, like Judge Breyer, acknowledged in *In Re: NFL Football League Players Concussion Injury Litigation*, Case No. 12-md-02323-AB, MDL No. 2323 – a national class action settlement – that Rule 23 jurisdiction does not extend to the review of individual contingent fee contracts; however, she concluded that she had inherent authority to address the contracts, and she then capped the contracts at 22 percent. App.

32-44. Although Judge Brody exercised her inherent authority to police the individual contingent fee contracts, she did so *by default*, as there was no pending litigation in another jurisdiction – like *Kellogg* – challenging the validity and ethics of the contracts. There was no separate class action, like *Kellogg*, alleging that individual contracts were procured through racketeering, attorney deceit and breach of fiduciary obligations. Judge Brody would have abused her discretion by exercising inherent authority to police the contracts, if an independent action like *Kellogg* had already been filed in an appropriate forum.

CONCLUSION

Farmers respectfully ask the Court to direct the Tenth Circuit to reverse its November 20 Order and direct the MDL Panel to vacate the August 1 transfer order and return *Kellogg* to the District of Minnesota.

In the alternative, Farmers ask the Court to remand to the Tenth Circuit for clarification on the grounds for the denial of Farmers' petition for a writ of mandamus. The Tenth Circuit set forth a three-part test for granting a petition for an extraordinary writ but did not address whether any part of the test was met by Farmers' petition.

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Respectfully submitted,

DOUGLAS J. NILL (MN #0194876)
DOUGLAS J. NILL, PLLC
d/b/a FARMLAW
2050 Canadian Pacific Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 573-3669
dnill@farmlaw.com

JOHN M. PIERCE (CA #250443)
PIERCE BAINBRIDGE BECK
PRICE & HECHT LLP
600 Wilshire Blvd., Suite 500
Los Angeles, CA 90017
(213) 262-9333
jpierce@piercebainbridge.com

CAROLYNN K. BECK (CA # 264703)
PIERCE BAINBRIDGE BECK
PRICE & HECHT LLP
One Thomas Circle NW, Suite 700
Washington, DC 20005
(213) 262-9333
cbeck@piercebainbridge.com

VANESSA M. BIONDO (NY #4357489)
PIERCE BAINBRIDGE BECK
PRICE & HECHT LLP
20 West 23rd Street, Fifth Floor
New York, NY 10010
(212) 484-9866
vbiondo@piercebainbridge.com

Counsel for Plaintiffs-Petitioners and Proposed Class of Farmers