No. 19-984

In the
Supreme Court of the United States

MAZIE SLATER KATZ & FREEMAN, LLC,
Petitioner,

v.

COMMON BENEFIT FEE AND COST COMMITTEE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Benjamin L. Bailey
Counsel of Record
Raymond S. Franks II
BAILEY GLASSER LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
bbailey@baileyglasser.com
rfranks@baileyglasser.com

Counsel for Respondent Common Benefit Fee and Cost Committee

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In accordance with Rule 15(2) of the Rules of the United States Supreme Court, Respondent Common Benefit Fee and Cost Committee objects to consideration of this Petition in that Petitioner, as Participating Counsel in the common benefit process authorized by the district court, knowingly and voluntarily waived its right to appeal, including its right to seek *certiorari* from this Court. The district court and the Fourth Circuit each enforced the appeal waiver against Petitioner. This Petition should be rejected on the same basis.

CORPORATE DISCLOSURE STATEMENT

Respondent Common Benefit Fee and Cost Committee was appointed by the district court, and it has no parent corporations or stock of which a publicly held corporation may own 10% or more. Respondent is not aware of any publicly held corporation having a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

STATEMENT OF RELATED PROCEEDINGS

- *Anderson Law Offices & Benjamin H. Anderson v. Common Benefit Fee & Cost Comm.*, No. 19-791, *cert. denied* (U.S. Feb. 24, 2020).
- *In re Ethicon, Inc. — Kline & Specter, P.C. v. Common Benefit Fee & Cost Comm.*, No. 19-1224(L) (*dismissed* 4th Cir. June 14, 2019), *rehearing and rehearing en banc denied* (July 15, 2019).
- *In re Ethicon, Inc. — Bernstein Liebhard LLP v. Common Benefit Fee & Cost Comm.*, No. 19-1892 (*dismissed* 4th Cir. Sept. 23, 2019).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

RULE

BRIEF IN OPPOSITION FOR RESPONDENT COMMON BENEFIT FEE AND COST COMMITTEE

OPINIONS BELOW

- ECF No. 14, *In re C.R. Bard, Inc. — Mazie, Slater, Katz & Freeman, LLC v. Common Benefit Fee and Cost Comm.*, No. 19-1943 (Summary Order of Dismissal) (4th Cir. Oct. 9, 2019), *rehearing and rehearing en banc denied* (4th Cir. Nov. 5, 2019).
- ECF No. 8453, *In re Ethicon, Inc.*, No. 2:12-md-02327 (Allocation Order) (S.D. W. Va. July 25, 2019).

* * * *

- ***RELATED*** ECF No. 21, *In re Ethicon, Inc. — Kline & Specter, P.C. v. Common Benefit Fee & Cost Comm.*, No. 19-1224(L) (Order), 2019 WL 4120999 (4th Cir. June 14, 2019).
- ***RELATED*** ECF No. 16, *In re C. R. Bard, Inc. — Anderson Law Offices, et al. v. Common Benefit Fee & Cost Comm.*, No. 19-1849(L) (Summary Order of Dismissal) (4th Cir. Sept. 23, 2019).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its Judgment Order on October 9, 2019, dismissing the appeal docketed by Petitioner Mazie, Slater, Katz & Freeman, LLC. The Fourth Circuit thereafter entered an Order on November 5, 2019, denying Petitioner's petition for panel rehearing and rehearing *en banc*. Petitioner thereafter filed the

instant Petition for a writ of *certiorari* on February 3, 2020. Jurisdiction in this Court is asserted pursuant to 28 U.S.C. §1254(1).

FEDERAL AUTHORITIES INVOLVED

Respondent Common Benefit Fee and Cost Committee ("FCC"), as explained in detail *infra*, disagrees with Petitioner's wholly unsupported assertions that the judgment of affirmance entered by the Fourth Circuit below evidences any conflict whatsoever with any other federal court of appeals. To the contrary, this matter presents no substantial question arising under the Constitution or laws of the United States.

STATEMENT OF THE CASE

Introduction

No different from its failed companion No. 19-791, the instant Petition stems from an attempted appeal, dismissed by the Fourth Circuit, from the district court's order allocating to Petitioner common benefit attorney fees and expenses in an amount less than Petitioner believed it deserved. This Court properly denied the petition in No. 19-791, and the same result is warranted here.

As in No. 19-791, the Fourth Circuit dismissed Petitioner's appeal on the basis of an appeal waiver set forth in an agreed order first entered by the district court in 2012. The same waiver applies here, and Respondent objects to this Petition on the ground that Petitioner forfeited its right to have any court — including this Court — consider its appeal.

Petitioner presents a snippet of background regarding "the MDL System" in general, and that of the pelvic mesh MDL in particular, *see* Petition at 3-7, basing much of its argument that the standard for *certiorari* review is met by virtue of the prevalence of MDLs in the federal judicial system. Petitioner also purports to speak to the relative contributions of MDL law firms who were awarded more in fees than Petitioner believes they should have been. Petitioner's focus is curious in light of its admission that "***Mazie Slater was not in the MDL***." *Id.* at 9 (emphasis added); *see also* App. at 51a-52a (recognition that "a great deal" of Petitioner's work "done in individual cases filed in the state courts of New Jersey"); ECF No. 11, *Mazie, Slater, Katz & Freeman, LLC v. Common Benefit Fee and Cost Comm.*, No. 19-1943(L) (Appellant's Brief in Opposition to Motion to Dismiss Appeal) (4th Cir. Sept. 23, 2019) [*hereinafter* "CA4 Resp."], at 58 (Petitioner explaining its choice to remain in state court to exclusion of MDL). Petitioner chose not to participate in the MDL, filed no cases in the MDL, and was not part of the MDL plaintiffs' leadership, yet it ultimately chose to seek compensation from the MDL common benefit fund and to be concomitantly bound by the MDL court's common benefit orders. One of those orders contains the waiver that foreclosed its attempted appeal.[1]

---

[1] The agreed Management Order was submitted to the district court and entered in each of the seven individual MDLs. *See* ECF No. 303, *American Medical Systems* MDL 2325 (Oct. 4, 2012); ECF No. 365, *Bard* MDL 2187 (Oct. 4, 2012); ECF No. 212, *Boston Scientific* MDL 2326 (Oct. 4, 2012); ECF No. 282, *Ethicon* MDL 2327 (Oct. 4, 2012); ECF No. 15, *Coloplast* MDL 2387 (Oct. 4, 2012); ECF No. 43, *Cook* MDL 2440 (Oct. 28, 2013); ECF No. 78, *Neomedic* MDL 2511 (Dec. 22, 2015).

The district court accurately found — and the Fourth Circuit affirmed — that Petitioner knowingly and voluntarily waived its right to appeal the district courts' award of common benefit attorney fees. For no other reason than it is dissatisfied with its award, Petitioner asks the Court to grant *certiorari* to allow it to pursue an appeal notwithstanding the waiver and despite the distribution to date of over $460 million to it and more than ninety other law firms. Confronted with the same operative facts and circumstances presented by another dissatisfied law firm in No. 19-791, the Court denied *certiorari*. There is simply no reason why the same result should not obtain here.

Factual and Procedural Background

On January 30, 2019, the district court, having presided for nearly nine years over one of the largest cases in this nation's history — seven related multidistrict litigation ("MDL") proceedings involving allegedly defective pelvic mesh products consisting of over 104,000 individual claimants — entered an order approving a unitary MDL common benefit fund for attorney fee and expense awards, funded by a five-percent "holdback" of each individual plaintiff's settlement or judgment. *See* Petition at 7; App. at 6a, 26a. On July 25, 2019, the district court entered its Allocation Order dividing the fund proceeds among the ninety-two law firms that provided services and incurred expenses for the common benefit of the MDL plaintiffs. *See* App. at 6a-13a. Although Petitioner worked almost exclusively in the significantly smaller

New Jersey state court litigation[2] and largely with respect to a single product — and not in the MDL, which included multiple defendants and dozens of products — it has received an allocation of more than $7.2 million in fees and over $1.8 million in expenses from the MDL common benefit fund. Going forward, Petitioner will continue to receive additional common benefit payments.

Of the ninety-two MDL common benefit applicant firms, only four asserted any objection to the district court's orders respecting the award or allocation of fees. The Fourth Circuit dismissed the appeals of each of the four objecting firms as barred by an appeal waiver contained within an agreed order entered by the district court at the outset of the MDL. *See In re Ethicon, Inc.* (*Kline & Specter, P.C. v. Common Benefit Fee & Cost Comm.*), No. 19-1224(L), 2019 WL 4120999 (4th Cir. June 14, 2019) (dismissing Kline & Specter appeal of Common Benefit Award); *In re C.R. Bard. Inc.* (*Anderson Law Offices, et al. v. Common Benefit Fee and Cost Comm.*), Nos. 19-1849(L) & 19-1892 (4th Cir. Sept. 23, 2019) (dismissing consolidated appeals of Allocation Order by Anderson Law Offices and Bernstein Liebhard LLP); *In re C.R. Bard, Inc. (Mazie, Slater, Katz & Freeman, LLC v. Common Benefit Fee and Cost Comm.)*, No. 19-1943 (4th Cir. Nov. 5, 2019)

---

[2] The New Jersey consolidated pelvic mesh litigation involved two manufacturers and included fewer than 7,000 cases. By comparison, there were seven pelvic mesh MDLs coordinated before the district court that involved more than seven manufacturers, multiple related defendants, and many dozens of pelvic mesh devices, ultimately encompassing more than 104,000 cases. *See* App. at 67a.

(dismissing Petitioner's appeal of Allocation Order). That agreed order established the comprehensive procedural mechanism whereby applications for common benefit reimbursement might eventually be considered.

Where further review was sought from the Fourth Circuit, the Court denied petitions for rehearing and rehearing *en banc* of each of its dismissal orders. Among the first three putative appellants, only Anderson Law Offices sought the Court's review by virtue of a petition for *certiorari*, No. 19-791, materially indistinguishable from the one at bar. The Court denied that petition less than a month ago, on February 24, 2020, and this petition should be consigned to the same fate.

ARGUMENT

The Court will grant a petition for a writ of *certiorari* "only for compelling reasons." SUP. CT. R. 10. The reasons deemed compelling enough for Court review typically arise from an irreconcilable conflict among the federal courts of appeals — or between one of those courts and a state court of last resort — on an "important federal question." *Id.* 10(a); *see id.* 10(b) (providing similarly for review of conflicting state-court decisions). Review may also be compelling when an important federal law question decided by a lower tribunal is unsettled or is in conflict with established Court precedent. *See id.* 10(c).

The keystones are "conflict" and an "important question of federal law," neither of which are present in this case. Indeed, the gravamen of Petitioner's

complaint is that the court-appointed External Review Specialist ("ERS") found on the facts before it that the various Participating Counsel were entitled to a particular allocation of the available common benefit funds; that the ERS's findings in that regard were erroneous; that the district court sanctioned those erroneous findings; and that the court of appeals erroneously found those findings unappealable. This Court's rules, however, expressly provide that "[a] petition for certiorari is rarely granted with the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10(c).

1. No circuit split exists regarding the enforceability of the appellate waiver underlying the dismissal of Petitioner's appeal.

Despite Petitioner's creative attempt to urge a split of legal authority where none exists, its appeal was dismissed because of its knowing and voluntary waiver. There is no split of authority regarding the appellate waiver that served as the ground for the Fourth Circuit's dismissal of Petitioner's appeal. Appeal waivers such as that agreed upon by Petitioner and every other common benefit fee applicant firm are a "common practice" enforced by "the great weight of authority," and are encouraged by courts in furtherance of the public policy of resolving disputes through negotiation and avoidance of protracted litigation. *Goodsell v. Shea,* 651 F.2d 765, 767 (C. C. Pat. App. 1981); *see Hill v. Schilling,* 495 Fed. App'x 480, 487 (5th Cir. 2012); *Slattery v. Ancient Order of Hibernians*

in Am., Inc., No. 97-7173, 1998 WL 135601, at *1 (D.C. Cir. 1998); *In re Lybarger,* 793 F.2d 136, 137 (6th Cir.1986); *Brown v. Gillette Co.*, 723 F.2d 192, 192-93 (1st Cir. 1983); *see also MACTEC, Inc. v. Gorelick,* 427 F.3d 821, 830 (10th Cir. 2005) ("[C]ourts routinely enforce agreements that waive the right to appellate review over district court decisions.")

Petitioner argued unsuccessfully below — and continues to urge — that among the more than ninety law firms that applied for MDL common benefit fees, *it alone* is not bound by the appeal waiver that served as the basis for dismissal of Petitioner's and the other three objectors' appeals. Petitioner contends that it had what it refers to as a separate "agreement" that did not contain an appeal waiver. *See* Petition at 9-11, 32-34. Petitioner's argument cannot withstand scrutiny.

Although it chose not to participate in the MDL, Petitioner knowingly and voluntarily ***chose*** to be bound by the MDL orders in exchange for the opportunity to submit time and expenses for potential compensation from the common benefit fund. On August 28, 2012, Petitioner entered an agreement with certain MDL counsel recognizing that the district court may subsequently enter an order "which will govern the receipt of funds necessary to fund the discovery work of the combined federal MDLs and which will further provide for the procedure for submission for common fund time and for reimbursement of common fund expenses." ECF No. 13, *Mazie, Slater, Katz & Freeman, LLC v. Common Benefit Fee and Cost Comm.*, No. 19-1943(L) (Appellee's Reply in Support of Motion

to Dismiss Consolidated Appeals) (4th Cir. Sept. 27, 2019) [*hereinafter* "CA4 Reply"], at 17; *see also* CA4 Resp. at 78-79. The agreement further stated that "[s]uch order will control the form of all common benefit submissions." CA4 Reply at 17. The agreement provided that "New Jersey counsel" would ***not*** be subject to the MDL court's common benefit orders or required to submit time and expenses for MDL common benefit compensation "***unless and until such NJ counsel chooses to make an application*** for common benefit fees and expenses ***pursuant to such Order***." *Id.* (emphasis added).

On October 4, 2012, MDL Plaintiffs' leadership submitted to the district court an "Agreed Order Regarding Management of Timekeeping, Cost Reimbursement and Related Common Benefit Issues" (the "Management Order"), which set forth procedures and guidelines for law firms' submissions of applications for potential reimbursement for common benefit fees and expenses.

The Management Order provides, in pertinent part:

> "Participating counsel" are counsel who subsequently desire to be considered for common benefit compensation and ***as a condition thereof agree*** to the terms and conditions herein and acknowledge that ***the court will have final, non-appealable authority*** regarding the award of fees, the allocation of those fees and awards for cost reimbursements in this matter. ***Participating counsel have (or will have) agreed to and therefore will be bound by the court's determination on***

> ***common benefit attorney fee awards, attorney fee allocations, and expense awards, and the Participating Counsel knowingly and expressly waive any right to appeal those decisions or the ability to assert the lack of enforceability of this Agreed Order or to otherwise challenge its adequacy.***

(emphasis added). The Management Order was expressly incorporated by reference in each of the three subsequent common benefit orders entered by the district court.[3] Neither Petitioner nor any other law firm or plaintiff asserted any timely objection to the Management Order, to any of its terms and provisions (including the appeal waiver), or to any of the multiple subsequent common benefit orders in which the Management Order was incorporated

On March 22, 2016, the Hon. Brian Martinotti, who then presided over the New Jersey state court pelvic mesh litigation in which Petitioner participated, entered an order drafted and submitted by Petitioner, establishing a separate common benefit process for New Jersey state court cases not subject to the MDL common benefit orders (the "NJ common benefit order"). *See* CA4 Reply at 21 (Mar. 14, 2016 letter from

---

[3] *See* ECF No. 747, *Ethicon* MDL 2327 ("Agreed Order Establishing MDL Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Common Benefit"), at 1; ECF No. 1845, *id.* ("Order Establishing Criteria for Applications to MDL Fund . . . and Appointment of Common Benefit Fee and Cost Committee"), at 2; ECF No. 4044, *id.* ("Fee Committee Protocol"), at 1. The same orders were entered in each of the MDLs.

Petitioner to J. Martinotti attaching proposed order); *id.* at 33 (order as signed and entered); *see also* CA4 Resp. at 79. The NJ common benefit order drafted and submitted by Petitioner provides in pertinent part:

> The Court recognizes that there is an Agreement in place between the New Jersey litigation and the MDL, whereby **law firms with no cases in the MDL <u>are permitted to subject their New Jersey cases to the MDL common benefit orders</u>**, in order to seek reimbursement/ payment for common benefit work and expenses. **Any such law firm <u>that elects to subject itself to the MDL common benefit orders</u>** or is otherwise subject to the MDL common benefit orders pursuant to their terms shall not be subject to assessment of its cases in New Jersey pursuant to this Order, for the reasons set forth herein.

CA4 Reply at 27 (emphasis added).

On the same day its NJ common benefit order was entered, Petitioner ***chose*** to submit time and expenses to the MDL court for consideration of common benefit compensation, and the firm has continued to submit its time and expenses in the MDL since then. By ***electing*** to seek compensation from the MDL common benefit fund, Petitioner made the choice to proceed as "Participating Counsel" under the Management Order.

Under the district court's Management Order, all "Participating Counsel" were deemed to agree to the appeal waiver as a condition for MDL common benefit consideration. No differently from every other firm

that sought MDL common benefit consideration, Petitioner is bound by the appeal waiver that led to dismissal of its appeal below.

To attempt to avoid the waiver, Petitioner cites to a February 2016 email and letter from the Chairman of the FCC, which it characterizes as a discrete "agreement" omitting an appeal waiver. *See* Petition at 9-11, 33. Petitioner's contentions defy logic: the appeal waiver is set forth in the district court's October 4, 2012 Management Order. Nothing in the cited correspondence with the FCC Chairman could be construed to allow Petitioner to avoid compliance with the Management Order entered years prior. Much to the contrary, the March 2016 NJ common benefit order reiterates Petitioner's August 2012 agreement that if it were to "choose" to seek common benefit compensation in the MDL, Petitioner would "subject itself" to the MDL common benefit orders. Petitioner plainly made that choice and, in exchange, received an allocation of nearly $9 million from the MDL fund to date, notwithstanding that it declined for years to participate in the MDL.

Petitioner's argument that it was not bound by the MDL's common benefit orders even though it sought compensation from the MDL common benefit fund is also contrary to its May 23, 2018 MDL Fee Affidavit, where a firm partner swore under penalty of perjury:

> I have complied with [the MDL common benefit orders] in all material aspects and the law firm identified herein has submitted true and correct

> time and expense submissions pursuant to the Court's Pretrial Orders.

CA4 Reply at 45.[4]

Petitioner professes opposition to the very concept of an appeal waiver in the common benefit context, and it asserts that "the use of a forced appellate waiver in the common benefit arena is . . . illustrative of a disturbing trend." Petition at 34. It is instructive to consider, then, that the common benefit order that Petitioner itself drafted, which was entered in the New Jersey state court, contains operative language materially indistinguishable from the language of the MDL Management Order that it decries here. Specifically, the NJ common benefit order drafted by Petitioner provides that "Participating Counsel" are counsel who, as a condition of being considered for common benefit compensation, agree by virtue of the submission of time and expenses that the state court will have "final authority" regarding any award or allocation of fees, and that they "will be bound by" the state court's determination on such matters. CA4 Reply at 35. Moreover, in the federal *In re Benicar (Olmesartan) Products Liability Litigation* MDL pending in the District of New Jersey, where Petitioner serves as co-lead counsel for the plaintiffs and as a member of the MDL common benefit committee, the court entered a case management order proposed by plaintiffs' leadership that contains precisely the same

[4] The MDL Pretrial Orders referenced in Petitioner's Fee Affidavit include the Management Order containing the appeal waiver. Each of the other cited Pretrial Orders incorporate the Management Order by reference.

appeal waiver language at issue here. *See id.* at 72; *see also id.* at 82 (Petitioner's February 5, 2019 letter to district court requesting appointment of *Benicar* Common Benefit Committee pursuant to case management and other orders). In light of its own conduct in this and other litigations, Petitioner's denunciation of the instant appeal waiver is especially disingenuous.

2. Petitioner's misguided "circuit split" argument is unsupported by the case law to which it cites.

Because the factual and legal bases supporting the Fourth Circuit's ruling cannot meet the traditional standard for *certiorari* review in this Court, Petitioner alleges that the Fourth Circuit's dismissal of its appeal somehow created a circuit split regarding the requisite procedure for allocating common benefit attorney fees in an MDL. As set forth above, Petitioner's appeal was dismissed because of an appeal waiver to which Petitioner knowingly and voluntarily agreed in exchange for the opportunity to seek compensation from the MDL fund. The appeal waiver that foreclosed Petitioner's appeal before the court of appeals likewise dooms this Petition. Moreover, the "circuit split" alleged by Petitioner simply does not exist, in law or in fact.

Petitioner's contention that the district court's process was unfair or lacked transparency is unfounded. The months-long, comprehensive review process undertaken by the FCC in relation to the common benefit time and expense submissions of every applicant firm has been explained to all applicants in

laborious detail. *See, e.g.*, App. at 9a-10a (district court outlining the FCC's "exhaustive" review process); *id.* at 34a-35a; 85a-99a. In addition to receiving extensive information about how all applications would be evaluated, time and expenses that may be questioned or disallowed, and every applicant firm's recognized hours together with the allocation for each, Petitioner and all other applicant firms had multiple opportunities to object and be heard, and to provide feedback to and receive feedback from the FCC and ERS. *See* ECF No. 7640-2, *In re Ethicon, Inc.*, No. 2:12-md-02327, (S.D. W. Va. Mar. 12, 2019) at ¶¶ 103-228; App. at 28a-32a; 35a-42a; 113a-114a.

In addition to its time and expense records, Petitioner's submissions to the FCC, the ERS, and to the district court in the common benefit process included the firm's biography, affidavits regarding the firm's common benefit contributions, and multiple motions, briefs, and responses together totaling hundreds of pages. *See* App. at 21a-22a, & n.3. Petitioner communicated directly with members of the FCC about the review and allocation process, the New Jersey state court litigation, and the contributions of it and other firms to that litigation. Petitioner appeared personally before the FCC and had the opportunity to address any issues it deemed appropriate, and to answer questions from the FCC regarding the contribution of other firms to the New Jersey litigation. *See* ECF No. 7816, *In re Ethicon, Inc.*, No. 2:12-md-02327, (S.D. W. Va. Apr. 8, 2019) at 23-24, 54-72; App. at 149a-150a. Petitioner also met personally with the ERS as well as with members of the FCC. *See* App. at 36a-37a.

Moreover, Petitioner had the opportunity to object to the district court. In its Allocation Order, the district court observed:

> [T]he composition of the FCC significantly contributed to a process that was structurally designed for transparency and equitable distribution of common benefit fund monies. …
>
> The procedural guidance to claimants assured fairness by offering multiple opportunities for each claimant to refine their claims, to object to preliminary conclusions, to advocate for changes, and to object to the penultimate recommendation of the FCC. Finally, each firm was entitled to pursue their objections by requesting a further evaluation from the External Review Specialist, Judge Stack, appointed by me. Each firm was then afforded the opportunity to object to the External Review Specialist's final recommendation by appealing to me.

App. at 8a-9a. The district court further noted that the FCC followed the court's orders and guidance, and that the same process and criteria were applied to every applicant firm. *See id.* at 9a-10a. Any contention that the district court's common benefit allocation process was anything other than open, fair and transparent is manifestly without merit.

Petitioner urges that a "circuit split" exists because it alleges other circuit courts would have required discovery of other applicant firms' time records and an "evidentiary hearing" that the district court did not

allow below. (Pet. at i., 3, 14, 16, 18, 27). Petitioner is wrong. The very cases upon which Petitioner purports to rely here expressly rejected arguments that discovery of other applicant firms' billing records and an evidentiary hearing are required in the common benefit allocation process.

Petitioner's contention that discovery of other firms' billing records is somehow required in the common benefit attorney fee allocation process is contrary to the authority it cites. In *In re Diet Drugs*, 582 F.3d 524, 538 (3d Cir. 2009), one of the three primary cases on which Petitioner relies, the court of appeals observed that although the district court had allowed "limited discovery" below, "it need not have granted discovery at all." In so noting, the panel adverted to its prior authority "recognizing that 'discovery in connection with fee motions should rarely be permitted,' and that 'whether to grant discovery is committed to the sound discretion of the [district] court.'" *Id.* (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 at 338, 342 (3d Cir.1998)). Likewise, in *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 872 (8th Cir. 2014), the court of appeals affirmed an MDL court's denial of a fee applicant firm's request for other firms' billing records, stating that "[a]lthough the court did not appoint an external auditor or permit discovery, *cf. In re Diet Drugs*, 582 F.3d at 533-34, discovery in connection with fee motions is rarely permitted, *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 338 (3d Cir. 1998), and a 'request for attorney's fees should not result in a second major litigation.' *Hensley v.*

Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)."

Similarly, Petitioner's contention that the MDL court should have conducted an evidentiary hearing was rejected in *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 301-302 (1st Cir. 1995), the second of the three cases on which its argument is grounded. In *Thirteen Appeals*, the First Circuit recognized that "[w]e need not tarry over the supposed error in refusing to hold an evidentiary hearing. A district court is not obliged to convene an evidentiary hearing as a means of resolving every attorneys' fee dispute." *Id.* at 301-302. "The controlling legal principle, then, is that parties to a fee dispute do not have the right to an evidentiary hearing on demand. When the written record affords an adequate basis for a reasoned determination of the fee dispute, the court in its discretion may forgo an evidentiary hearing." *Id.* at 303. Unsurprisingly then, in the third of the three cases cited by Petitioner, *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 384 Fed. App'x 299 (5th Cir. 2010), the court of appeal rejected the argument that the MDL court erred by failing to hold a hearing before allocating common benefit attorney fees. The court in *High Sulfur* expressly observed that "[a] district court is not required to hold a hearing on a motion for attorneys' fees in a class action." *Id.* at 301.

Because Petitioner's appeal was foreclosed by the appeal waiver to which it willingly agreed in exchange for the opportunity to seek compensation from the MDL fund, any argument regarding what types of

attorney fee allocation procedures may allegedly have been endorsed by other circuits in other cases is misplaced. However, even if Petitioner's appeal were not foreclosed by its waiver, its allegation of a "circuit split" is demonstrably unsupported by — and, indeed, contrary to — the very authority upon which it premises its argument. This petition should be denied.

CONCLUSION

For all the foregoing reasons, Respondent urges the Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

BENJAMIN L. BAILEY
Counsel of Record
RAYMOND S. FRANKS II
BAILEY GLASSER LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
bbailey@baileyglasser.com
rfranks@baileyglasser.com

Counsel for Respondent Common Benefit Fee and Cost Committee