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

REPLY BRIEF FOR PETITIONER

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

REPLY BRIEF FOR PETITIONER

The Petition demonstrated the need for this Court to make clear that federal courts, when allocating attorney's fees and expenses in mass actions, such as multi-district litigation proceedings (MDLs), must adopt procedures that guarantee due process and ensure that allocation decisions are transparent, jurisprudentially sound, fair, and reasonable. Further, the recommendations of court-appointed plaintiffs' fee committees (which are the recipients of the awards they recommend) must be closely scrutinized, and courts must engage in independent fact-finding as a check on self-interested plaintiffs' lawyers. The Brief In Opposition ("BIO") sidesteps these compelling issues.

Respondent concedes the Fourth Circuit failed to address substantively the merits of the appeal in this case, or even the merits of the motion to dismiss, which it granted in a terse sentence with no explanation. Pet. App. 5a ("Upon review of submissions relative to the motion to dismiss, the Court grants the motion."). This failure conflicts with precedent in the First, Third, and Fifth Circuits. All those Circuits have held that district courts overseeing MDLs and other mass actions must implement objectively fair procedures to determine fee and expense allocations.

The Fourth Circuit's decision fails to meet the standards for fee awards set by the Federal Judicial Center (which the Respondent does not deny). It also endangers the integrity of the federal judiciary, implicating concerns similar to those expressed by the Chief Justice, Justice Alito, Justice Kavanaugh, and other Justices regarding cy pres awards in *Marek v. Lane*, 134 S. Ct. 8 (2013) (opinion of

Roberts, C.J., respecting the denial of certiorari), and *Frank v. Gaos*, No. 17-961. Where attorneys can profit regardless of the adequacy of the settlements for their clients, and without scrutiny of their awards, litigants are harmed, and the integrity of the judicial system is undermined. That occurred here.

Tellingly, Respondent makes little effort to defend the process employed by the District Court below. The District Court in this case paid only lip service to due process and fairness and failed to address critical red flags, including unrebutted proof of self-dealing and falsification of billing records by fee committee firms and awards of tens of millions of dollars to one attorney by the same special master in two separate but concurrent litigations at the same time. Pet. App. 173a-177a; Pet. 26-27. The BIO offers no defense to these enormously troubling facts.

Instead, the BIO unwittingly underscores the need for this Court's review. The BIO argues that this Court should hold that Petitioner impliedly waived its right to appeal, including its right to seek *certiorari* from this Court, by participating in the common-benefit process in the MDL court. BIO i. But Respondent's argument simply proves the point of the Petition. The purported appellate waiver imposed by the District Court below is but a symptom of the overall problem. Inferring a waiver of appellate review *compounds* the lack of meaningful judicial scrutiny by the District Court and creates a perilous avenue for courts to evade their responsibility to ensure that mass action fee awards, especially self-interested fee and cost awards by heavily conflicted committees of plaintiffs' attorneys, comply with the law. If Petitioner

prevails on the overarching issue, the appellate waiver is swept away as a necessary consequence.

According to Respondent, courts can circumvent due process and eviscerate appellate rights simply by decreeing in case management orders, as a matter of routine, that any applicant seeking fees or costs waives the right to seek appellate review. If the Fourth Circuit's decision is permitted to stand, unreviewed by this Court, it will provide a blueprint for district courts in every MDL, class action, and complex litigation for avoiding meaningful judicial scrutiny of fee and expense awards. This would enable district courts to delegate unchecked power to self-interested, conflicted committees of plaintiffs' lawyers to direct massive awards to themselves. The Fourth Circuit's failure to scrutinize the award of hundreds of millions of dollars in attorneys fees here illustrates the need for review. The wider implications for cases in countless other contexts cannot be overstated. This Court's review is urgently needed.

ARGUMENT

1. Respondent's focus on the appellate waiver provision, which is but a further example of the lack of meaningful judicial review in this case, is a distraction from the fundamental issue here. The decision below creates a circuit split with decisions in the First, Third, and Fifth Circuits requiring close judicial supervision of fee and expense awards in mass actions:

- *In re Nineteen Appeals Arising Out Of The San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 614-15 (1st Cir. 1992) (reversing the district court's approval of a $36 million fee award to

the plaintiffs' steering committee and citing "the public interest in the integrity of court proceedings");

- *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 582 F.3d 524, 541 (3d Cir. 2009 ("trial courts must engage in robust assessments . . . when evaluating a fee request");

- *In re High Sulfur Content Gasoline Prods.*, 517 F.3d 220, 227 (5th Cir. 2008) (reversing district court's fee award that relied heavily on the recommendations of court-appointed lead counsel and did not allow judicial review, audit, or testing of the lead counsel's fee request: "the appointment of a committee does not relieve a district court of its responsibility to closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards. Here, the district court abdicated its responsibility to ensure that the individual awards recommended by the Fee Committee were fair and reasonable.").

The Fourth Circuit's decision not to address the merits of the objections here is inconsistent with these precedents. In this case, the District Court refused to permit any discovery into the documents considered by the FCC, including the time sheets at the heart of the fee awards, even though they had been submitted to the court for in camera review. The District Court also held no evidentiary hearing despite the disturbing facts indicating serious problems with the fee and expense awards. Pet. App. 173a-177a; Pet. 26-27. Instead, in a conclusory six-page opinion it approved the FCC's self-dealing while summarily rejecting the objections with no fact-finding or analysis.

The BIO focuses on Petitioner's ability to submit materials to the FCC and Petitioner's ability to "communicate[] directly with members of the FCC about the review and allocation process." BIO 15. This argument proves nothing. Petitioner's ability to make its case to the self-interested FCC, which suffered from an obvious and disabling conflict of interest and which was empowered by a process bereft of critical supervision, was no substitute for meaningful judicial review.

The BIO contends that there is no conflict with *In re Diet Drugs* because the Third Circuit noted (in dictum) that while the district court had allowed "limited discovery" below, "it need not have granted discovery at all." 582 F.3d at 538. But that dictum obscures the broader point. *In re Diet Drugs* provides a good example of a thorough and transparent district court process, which allowed the Third Circuit to conduct a meaningful appellate review. In stark contradiction to what occurred here, the district court in *Diet Drugs* conducted a close examination of the fee awards and allowed depositions of the lead counsel claiming fees:

> • the district court required all law firms to submit verified copies of their contemporaneously-maintained time records to a court-appointed auditor;
>
> • the requesting attorneys were also ordered to file a 30-volume compendium of the fee requests and supporting documents with the district court;
>
> • any party or objector was allowed to review the compendium, to propound discovery, and to take depositions of

> lead counsel claiming entitlement to fees;
>
> • following discovery, the district court held a two-day hearing;
>
> • the district court then required the auditor to submit a report, allowed supplemental compendiums of time sheets to be filed, and held three additional hearings on the issue of fee-shifting;

Id. at 533-38. None of this occurred here.

The BIO does not address the First Circuit's 1992 decision in *In re Thirteen Appeals*, but instead points to a subsequent decision in the same litigation: *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295 (1st Cir. 1995). To be sure, the First Circuit opined in 1995 that "[a] district court is not obliged to convene an evidentiary hearing as a means of resolving every attorneys' fee dispute." 56 F.3d at 301-02. But its reasoning supports Petitioner here. The First Circuit explained that an evidentiary hearing was unnecessary in that case because objectors could present their arguments in written form and had been afforded a "banquet of information": "all the data reasonably necessary to formulate their objections, including all the [steering committee] members' time-and-expense submissions, summaries thereof, detailed accounts of the procedures used by the [steering committee] to gather, review, and audit time records, and the working papers, correspondence, and documentation generated by the [steering committee's] accountants during the compilation process." *Id.* at 303. Thus, although a district court has a range of available

alternatives to provide a fair and transparent process, there is a procedural and constitutional minimum with which the court must comply in order to ensure due process and the public interest in the integrity of court proceedings. The Fourth Circuit failed to meet that standard.

Moreover, the BIO fails to mention the rigorous review in which the First Circuit engaged in its 1995 *In re Thirteen Appeals* decision, which reversed the district court's allocation of 70% of the common-benefit fund to members of the steering committee. *Id.* at 312 ("the fee allocation reflects a serious error of judgment, and therefore an abuse of discretion"). Here, by contrast, the Fourth Circuit inexplicably provided no appellate review at all.

The BIO's treatment of Fifth Circuit precedent is equally misleading. It fails to address the Fifth Circuit's 2008 decision in *In re High Sulfur Content Gasoline Prod. Liab. Litig*. and instead cites a 2010 unpublished decision involving fee objections by a single attorney who sought compensation for his work as class liaison counsel after the settlement in the case (rather than during the active litigation). *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 384 Fed. App'x 299 (5th Cir. 2010). The BIO fails to acknowledge that the 2010 decision concerned different issues from the 2008 case discussed in the Petition. In 2010, the Fifth Circuit upheld the denial of a hearing based on the specific record before it, which established that a hearing was unnecessary. *Id.* at 301 ("In this case, the district court declined to hold an evidentiary fee hearing because 'the Court has nothing before it upon which to hold [a full evidentiary] hearing.' The court determined that '[the objector] submitted 185

hours of attorney time in his fee application and the Special Master's recommendation reflects that amount. Now is not the time to discuss the considerable other work that [the objector] claims to have performed yet did not include in his fee application.'").

The instant case is completely different. Here, objectors raised a wealth of objections meriting an evidentiary hearing. For example, the special master found multiple disturbing acts of self-dealing and falsification of key records perpetrated by attorneys who awarded themselves the lion's share of the common-benefit fund. Pet. App. 173a-177a. Rather than take such misconduct into account, the special master admitted that he was not acting as a neutral but rather was acting on behalf of the fee committee. *Id.* at 174a. No acceptable standard would permit such glaring facts to remain unscrutinized.

2. Respondent errs in attempting to compare this case to No. 19-791, where the petitioner did not raise the circuit split or focus on the overlay of systemic problems of which the imposed purported appellate waiver was only a symptom. Simply put, the only similarity between the two petitions is criticism of the appellate waiver provision. The Petition here presents additional and significant questions that were not raised in No. 19-791.

Moreover, the petitioner in No. 19-791 had explicitly agreed to the appellate waiver provision, albeit because it had no choice, through its signing of the MDL participation agreement and its membership on the MDL plaintiffs steering committee. BIO 2, 6. In contrast to No. 19-791, the Petitioner here did not agree to an appellate waiver

provision. It was the only law firm with its own separate written agreement for participation and was not a member of the MDL steering committee.

The BIO concedes that Petitioner did not participate in the MDL. BIO 8 (Petitioner "chose not to participate in the MDL"). The BIO does not contest the undisputed record evidence that Petitioner's own agreement with the pelvic mesh MDL Common Benefit Fee and Cost Committee (FCC) did not contain an appellate waiver provision. Pet. 9-11. In fact, the BIO quotes from that agreement (BIO 8-9) without purporting to identify any appellate waiver provision in it.

Further, the BIO admits that Petitioner entered into its agreement with the FCC on August 28, 2012, before entry of the order containing a forced appellate waiver provision for common-benefit fee and cost awards. BIO 8, 10. In short, nothing in the agreement between Petitioner and the FCC prevented Petitioner from seeking appellate review of the FCC's fee and expense allocation decision or from seeking *certiorari* in this Court. A subsequently entered order could not legitimately impose that waiver.

3. Respondent's attempt to infer a waiver of appellate rights by operation of law would provide a model for district courts to shield fee and cost awards from judicial review. It confirms the need for this Court's review on an important question of federal law.

All of the cases involving appellate waiver provisions cited in the BIO (7-8) concern fully distinguishable *express* provisions contained in *consensual* contractual or similar agreements. *E.g.*, *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th

Cir. 2005) ("contractual provisions limiting the right to appeal from a district court's judgment confirming or vacating an arbitration award are permissible, so long as the intent to do so is clear and unequivocal"). None of the cases cited in the BIO involve a situation like this: a purportedly "implied" waiver supposedly effected by operation of law, on the basis of an after-the-fact case management order. Indeed, the cases cited in the BIO restate the rule that a waiver must be "knowing and voluntary." *Hill v. Schilling*, 495 Fed. App'x 480, 487 (5th Cir. 2012) (citation and internal quotation marks omitted). The cases confirm that "[t]hose who give up the advantage of a lawsuit in return for obligations contained in a negotiated decree, rely upon and have a right to expect a fairly literal interpretation of the bargain that was struck." *Brown v. Gillette Co.*, 723 F.2d 192, 192-93 (1st Cir. 1983) (citation and internal quotation marks omitted). Here, the "literal interpretation" of the "bargain that was struck" supports Petitioner.

Respondent's suggestion that an implied waiver can occur by operation of law also raises serious questions under this Court's precedent. Waiver is "the 'intentional relinquishment or abandonment of a known right or privilege.'" *Freytag v. C.I.R.*, 501 U.S. 868, 894 n.2 (1991) (Scalia, concurring) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

Finding an implied waiver here would stretch the notion of a knowing and intentional choice beyond the breaking point. Notably, Respondent never denies the argument in the Petition (at 33-34)

that an MDL common-benefit process is the only means for attorneys with cases consolidated into an MDL – as well as (potentially thousands of) additional state court cases as to which MDL firms may have an interest, all of which are typically assessed for the common benefit. No plaintiffs' attorney or firm with a common benefit claim has the meaningful choice of opting out of the MDL common-benefit process.

In similar circumstances, this Court has rejected "implied waiver" arguments. In *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972), this Court held that a putative waiver of judicial process in a consumer installment contract was unenforceable where it was not express, specifically negotiated, or knowingly agreed to, and the relinquishment of rights was voluntary, knowing, and intelligently made under the circumstances.

And in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), this Court held that a court may not compel arbitration on a classwide basis when an agreement does not expressly authorize such a procedure, because "[a]n implicit agreement to authorize class-action arbitration" is "not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* at 685.

Finally, references in the BIO to appellate waiver provisions in other orders (BIO 13-14) is of no moment. Those provisions were never enforced, including when an appeal was filed by the lone objector to the common-benefit order in the *In re Benicar (Olmesartan) Products Liability Litigation* MDL pending in New Jersey. Further, the district court in *In re Benicar* required a fully transparent

process, for example providing all plaintiffs' counsel in the litigation with access to all submissions by all common benefit firms. And there has never been anything paid into a New Jersey pelvic mesh common- benefit fund because of complete overlap with the MDL to date.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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