No. 19-791

IN THE
SUPREME COURT OF THE UNITED STATES

ANDERSON LAW OFFICES, BENJAMIN H. ANDERSON, PETITIONERS
v.
COMMON BENEFIT FEE AND COST COMMITTEE, RESPONDENT

ON APPLICATION TO STAY THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

# APPLICATION FOR A STAY PENDING THE DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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To the HONORABLE JOHN G. ROBERTS, JR., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

Petitioners, Anderson Law Offices and Benjamin H. Anderson ("Collectively ALO"), have asked this Court to consider whether federal district courts possess the authority to require appeal rights to be waived as a condition for applying for a recovery otherwise available at law or in equity. The ALO Petitioners now request a stay of any further disbursements of the fund in dispute, which is estimated at $550 Million. *Order of the United States District Court for the Southern District of West Virginia dated July 25, 2019 ("Allocation Order"), Apx. p. 00014.* This Court's review of the petition for a writ of certiorari will be thwarted, and the lower courts may be left without the ability to order a meaningful remedy in the event of a remand, if these funds are lost or dissipated during the pendency of this appeal.

The United States District Court for the Southern District of West Virginia appears to be the first in the history of modern jurisprudence to refuse to consider granting a monetary recovery to any applicant that had not expressly or implicitly consented to a relinquishment of the right to appeal the decision. The ALO Petitioners possess an equitable interest in funds that are presently being administered by a court-appointed accounting firm, which will be at no risk of waste or dissipation if the stay is ordered. To the contrary, the secure deposits will continue to generate interest at a favorable rate if the status quo is maintained during the remainder of this appeal.

The prospect that this Court will accept this appeal for review appears to be high. The District Court's mandatory appeal waiver directive is not just unprecedented in federal jurisprudence, but it will also undoubtedly serve as a roadmap for like-minded jurists seeking a quick and conclusive resolution to complex and contentious issues. In this consolidated Multi-District Litigation ("MDL") proceeding, dozens and dozens of objections had been raised by several law firms to the distribution of the estimated $550 Million Fund that had been prepared by Respondent, Common Benefit Fee and Cost Committee ("FCC"). Although comprised of just eight of over eighty participating firms, the FCC members proposed paying themselves almost exactly two-thirds of the fund. And their effective hourly rate for all lawyers and paralegals was a staggering $783.02, compared to just $268.22 for the non-member firms.

Without specifically addressing any of the objections that were raised, the District Court approved the FCC's allocations in a six-page decision. *Apx., pp. 0009-14.* And the Fourth Circuit enforced the appeal waiver orders by promptly dismissing Petitioner ALO's appeal in a single sentence ruling. Both courts thus successfully avoided the fundamental due process protections that have been afforded to common fund applications, which were relegated instead to a committee comprised of attorneys who profited the most from the outcome. *In re High Sulfur Content Gasoline Prods. Liability Litig.,* 517 F.3d 220, 231 (5th Cir. 2008) ("Non-Fee Committee members were entitled to notice and an opportunity to be heard."); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 584 (3d Cir. 1984) ("Our equitable fund case

law also makes clear that the attorneys' claim for fees from a fund in court is a cause of action, belonging to the attorneys, for the reasonable value of their services, for which a hearing is required.").

For the reasons that follow, an order should be issued staying further enforcement of the District Court's Allocation Order.

## OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Fourth Circuit in Consolidated Docket Numbers 19-1849, 19-1850, 19-1851, 19-1853, and 19-1855 dismissing Petitioners' appeal and denying the motion for stay pending appeal are unpublished. The Order entered by the United States District Court for the Southern District of West Virginia denying ALO's Motion for Stay of Execution of the Allocation Order was issued on August 2, 2019, and it is unpublished. The Allocation Order entered by the United States District Court for the Southern District of West Virginia overruling all objections and approving Respondent FCC's common benefit fee allocations was issued on July 25, 2019, and it is unpublished. [1] Citations to these orders will refer to the attached appendix.

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[1] The Allocation Order on appeal to this Court was entered in five of seven consolidated multi-district litigation ("MDL") proceedings. *In re: C. R. Bard, Inc., Pelvic Repair System Products Liability Litig.*, S.D.W. Va. Case No. 2:10-md-02187 ("Bard"); *In re: American Medical Systems, Inc., Pelvic Repair System Products Liability Litig.*, S.D.W. Va. Case No. 2:12-md-02325 ("AMS"); *In re: Boston Scientific Corp. Pelvic Repair System Products Liability Litig.*, S.D.W. Va. Case No. 2:12-md-02326 ("Boston Scientific"); *In re: Ethicon, Inc. Pelvic Repair System Products Liability Litig.*, S.D.W. Va. Case No. 2:12-md-02327 ("Ethicon"); *In re: Coloplast Corp., Pelvic Support Systems Products Liability Litig.*, S.D.W. Va. Case No. 2:12-md-02387 ("Coloplast"). For ease of reference, the remainder of this Petition will refer

## STATEMENT OF JURISDICTION

The United States District Court for the Southern District of West Virginia issued its Allocation Order on July 25, 2019. *Apx., pp. 0009-14.* The ALO Petitioners sought an order from the District Court staying execution of the Allocation Order on July 26, 2019. *Doc#: 8455, ALO's Motion for Stay of Execution of Judgment; PageID#: 205805.* Respondent FCC opposed this request for a stay on July 31, 2019. *Doc#:8463, Response in Opposition to Motion for Stay of Execution of Judgment; PageID#:205886.* The District Court denied the requested stay on August 2, 2019. *Apx., pp. 0006-8.*

On August 2, 2019, the ALO Petitioners appealed the District Court's decisions in all seven MDLs to the United States Court of Appeals for the Fourth Circuit. *Doc#:8472, ALO Notice of Appeal; PageID#:205966.* The Court of Appeals filed a notice with the District Court on August 9, 2019, indicating that the seven appeals had been consolidated under case numbers 19-1849(L), 19-1850, 19-1851, 19-1853, 19-1855, 19-1856, and 19-1857. *Doc#:8527, Order; PageID#:206182.* That same day, the ALO Petitioners sought an order from the Court of Appeals staying execution of the Allocation Order. *Doc#:8-1, Motion for Stay Pending Appeal.* Respondent FCC opposed this request for a stay on August 19, 2019. *Doc#:12, Response in Opposition to Motion for Stay Pending Appeal.* The request was denied, and the appeal was

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only to the orders and entries issued in the Ethicon MDL. The documents reproduced in the attached appendix were filed in identical form in each MDL.

dismissed, on September 23, 2019. *Apx., pp. 0001-5.* On December 18, 2019, the ALO Petitioners sought a writ of certiorari from this Court.[2]

This Court possesses jurisdiction to stay the Allocation Order pending review on a writ of certiorari. *28 U.S.C. §§ 1254(1) and 2101(f).*

## STATEMENT OF THE CASE

In July 2012, a civil jury seated in Bakersfield, California rendered a verdict for $5 million in favor of Christine Scott as a result of serious and disabling internal complications she suffered following the surgical implantation of an Avaulta Plus Transvaginal Mesh ("TVM") device in her abdomen to correct urinary incontinence. *Kern County Superior Court (Ca.) Case No. CV-266034.* The judgment was upheld in an appeal that was commenced by the product manufacturer, C.R. Bard, Inc. *Scott v. C.R. Bard, Inc.*, 231 Cal. App. 4th 763, 180 Cal. Rptr. 3d 479 (2014).

Christine Scott's products liability action spawned a multitude of similar lawsuits against Bard in state and federal courts across the country, which were ultimately consolidated into the Bard MDL and assigned to the United States District

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[2] The ALO Petitioners have not appealed to this Court from two of the consolidated appeals before the United States Court of Appeals for the Fourth Circuit, Nos. 19-1856 and 19-1857. Each of these appeals are now moot. These appeals were taken from orders entered in *In re: Cook Medical Inc. Pelvic Repair System Products Liability Litig.*, S.D.W. Va. Case No. 2:13-md-02440 ("Cook"); and *In re: Neomedic Pelvic Repair System Products Liability Litig.*, S.D.W. Va. Case No. 2:14-md-02511 ("Neomedic"). The Cook MDL closed on August 6, 2019. *Cook, Doc#:751, Order, p. 1; PageID#:14194.* The Neomedic MDL closed on March 12, 2018. *Neomedic, Doc#:78, Pretrial Order#:20, p. 16; PageID#:514.* All common-benefit funds on hand as of July 25, 2019, have been disbursed consistent with the District Court's Allocation Order. *Apx., p. 00014.* Significant funds are still being assessed in the other five MDLs now on appeal, the first tranche of which is subject to disbursement on or before January 15, 2020. *Id.*

Court for the Southern District of West Virginia. Similar lawsuits against other TVM manufacturers were also consolidated and assigned to that same court in the AMS, Boston Scientific, Ethicon, Coloplast, Cook, and Neomedic MDL proceedings. Although each MDL retained its separate status throughout the proceedings, the District Court generally handled them collectively, with all MDLs subject to the same orders and directives.

Petitioner ALO was one of over eighty law firms representing women in the MDL lawsuits who had suffered debilitating complications from the TVM implants. But ALO's early introduction and extensive involvement in the proceedings had differed markedly from the other firms in several important respects. By approximately May 2011, Petitioner Benjamin Anderson, Esq. ("Attorney Anderson") had devoted his entire practice to this effort against the well-funded legal defense that had been organized by the TVM product manufacturers. *Affidavit of Benjamin H. Anderson, Esq. dated April 9, 2018 ("Anderson Aff."), ¶ 5(a).*[3] ALO was one of the first to undertake the mass-tort effort that was originally consolidated in the New Jersey state court system against Ethicon, a division of Johnson & Johnson. *Id., pp. 13-14.*

Modern federal jurisprudence has recognized that under principles of equity, special compensation is owed to the pioneering attorneys who have served the

[3] This document, among others cited without "*PageID#*" references in this application, would have been filed as a part of an *in camera* review of the FCC materials that was ordered by the District Court. *Doc#:7639, Pretrial Order#:332, pp. 2-3; PageID#:188217-18.*

common benefit of all by developing and establishing successful claims for recovery in mass tort litigation. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Typically in MDL proceedings, an order is issued requiring a small percentage of every settlement or judgment recovery to be paid into a common benefit fund to be distributed by the court to the deserving law firms near the conclusion of the litigation. *See, e.g., In re Genetically Modified Rice Litig.,* 835 F.3d 822, 825-26 (8th Cir. 2016); *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 617 F. App'x 136, 141 (3d Cir. 2015).

In anticipation of common benefit awards in the instant proceedings, a written agreement was entered on August 28, 2012, between representatives of both the New Jersey proceedings and the recently formed Federal Ethicon MDL action (S.D.W. Va. Case No. 2:12-md-02327) that required the state court common benefit work to be afforded full and fair consideration in the common-benefit fee-allocation process. The consolidated New Jersey action then merged into the federal MDL proceedings, in which the right to compensation for state-court common-benefit work already performed was judicially recognized. *Doc#:282, Pretrial Order#:18, pp. 11-12; PageID#:3892-93.*

The District Court followed the customary practice of establishing Respondent FCC, which was comprised of eight attorneys representing the TVM plaintiffs and a single non-attorney designee. *Doc#:4044, Pretrial Order#:262, pp. 2-5; PageID#:141778-81.* The FCC's responsibility was "to make recommendations to the Court for reimbursement of costs and appointment of attorneys' fees for common

benefit work and any other utilization of the funds." *Doc#:1845, Pretrial Order#:211, p. 5; PageID#:23550*. The Court remained obligated, however, to closely scrutinize the committee's proposals, particularly given the inherent conflict of interest that was present. *In re High Sulfur*, 517 F.3d at 227.

What was unconventional, however, was the District Court's unconditional requirement that attorneys seeking such common-benefit compensation forfeit specified rights to appellate review. A definition of "Participating Counsel" was fashioned and adopted in each of the seven MDL proceedings that included an acknowledgement "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." *See Doc#:282, Pretrial Order#:18, pp. 5-6; PageID#:3886-87*. No option was afforded that would allow a firm to secure payment for its common-benefit contributions while retaining the right to further review. By that point in time, ALO had already generated several thousand hours of such work in the consolidated New Jersey proceedings. *Anderson Aff., p. 14, ¶ 5(p)(4)* (noting that 2,643 hours of common-benefit work had been conducted in New Jersey by February 7, 2012).

These seven case-management orders were expressly endorsed by several of the attorneys who had been performing common-benefit work, nearly all of whom were either appointed to the FCC or later rewarded with generous fee allocations. ALO's electronic signature appeared on just two of the entries, which were adopted in the Cook and Neomedic MDLs that have now closed without producing significant common-benefit contributions. Neither of these moot MDLs have been included in

this appeal. ALO was not asked to, and did not, consent to the appeal waiver edicts in the other five MDLs at issue in this Petition.

The District Court also established the position of External Review Specialist (ERS), which was later filled by former Missouri State Court Judge Daniel J. Stack ("Stack"). *Doc#: 404, PTO#:262, p. 9; PageID#:141785*. Notably, he has received heavy criticism from a different district court judge while serving in the same capacity in a separate MDL proceeding, who rejected Stack's report and recommendations "due to several structural and procedural flaws." *In re Syngenta Mass Tort Actions*, No. 3:15-CV-01221-NJR, 2019 WL 3887515, at *5 (S.D. Ill. Aug. 19, 2019). The decision described Stack's approach as a "totally unprecedented methodology that runs contrary to Common Benefit principles" as well as the prior orders that had been issued. *Id.* at *5 n.4.

During the course of Respondent FCC's review of the eighty-nine participating law firms' time and expense submissions, there was nothing "external" about ERS Stack's involvement in the effort. According to the Chairperson, he attended and participated in "almost all" of the FCC's closed-door meetings. *Declaration of Henry G. Garrard III, dated November 19, 2018 ("Garrard Dec."), p. 20, ¶ 127*. Stack even served as the FCC's advocate at times, such as when he issued a lengthy and terse response just one day after ALO's seemingly unobjectionable request to be allowed to review the time and expenses data that purportedly justified the lopsided fee allocations.

Respondent FCC's Preliminary Recommendations were released on September

13, 2018, which proposed that its eight member firms should be paid almost precisely two-thirds (66%) of the Fund that was supposed to be shared with ALO and eighty-four other applicants.[4] *See FCC Preliminary Written Recommendation dated September 13, 2018, App. 174-78.*[5] Although their own time and expense entries were never openly disclosed, simple calculations revealed that they were proposing to pay themselves an average hourly rate of $783.02, while the average for the other firms was just $268.22.

Acting as a *de facto* member of the FCC, ERS Stack immediately signed and endorsed the FCC's Preliminary Recommendations before any objections could be raised. *FCC Preliminary Written Recommendation dated September 13, 2018, App. 178.*

While minor adjustments were made to the initial figures, neither the staggering two-thirds recovery nor the nearly three-to-one disparity in the hourly rates were significantly altered in the FCC's Final Written Recommendations of November 20, 2018. *FCC Final Written Recommendation, App. 58-173.* The FCC did disclose at that time that the allocations were no longer founded upon the detailed time entries that the attorneys had been required to submit to the court-appointed

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[4] While ALO and the other non-member firms were never allowed to review the FCC members' own time entries and expense receipts, Petitioners' counsel were still able to prepare spreadsheets detailing the total allocations that were recommended by the FCC, which were attached to Anderson Law Office's Objections to the Preliminary Recommendations of the Common Benefit Fee and Cost Committee dated October 5, 2018, at Apx. 0001-6.

[5] Citations to the appendix to the petition for a writ of certiorari will be made using the same "App." notation.

accountant. According to the Chairperson's sworn statement: "The FCC did not use an hourly rate method in arriving at its percent allocation for each applicant firm." *Garrard Dec., p. 33, ¶ 223* (emphasis added). Instead, "the Chairperson proposed a series of awards utilizing a percentage of the funds for each of the applicant firms." *Id., p. 30, ¶ 201.* This was the same purely subjective methodology that Chief District Judge Rosenstengel had found to be unacceptable in her criticism of ERS Stack's report in the other MDL proceeding. *In re Syngenta*, 2019 WL 3887515, at *3-5.

The Chairperson suggested that a lodestar analysis served some secondary role, commenting that "the FCC performed a review of the effective hourly rates resulting from its percentage award set forth in its Preliminary Written Recommendation." *Garrard, Dec., p. 33, ¶ 223.* But the same sworn statement had expressed: "The FCC did not request any information regarding billing rates utilized by applicant firms." *Id., p. 31, ¶ 207.* Rather obviously, billing rates are indispensable for any meaningful lodestar computation. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) ("A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable' fee is wholly consistent with the rationale behind the usual fee-shifting statute[.]").

On January 30, 2019, District Judge Goodwin approved the FCC's requests in the seven MDLs for five percent of the recoveries realized to date—totaling $7.25 billion—to be disbursed for common-benefit work performed and expenses advanced. *In re Cook Med., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 365 F. Supp. 3d 685

(S.D.W. Va. 2019). There was no suggestion in the ruling that the Court intended to follow the FCC's lead and abandon the time data as a basis for calculating the reasonable allocations to the applicant attorneys. To the contrary, a "blended" approach was adopted in which District Judge Goodwin would "verify the reasonableness of the 5% award with a lodestar cross-check." *Id.* at 695-96, *citing In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 652 (E.D. La. 2010).

Given that Respondent FCC had forsaken the traditional lodestar/multiplier calculations in favor of the percentage-of-the-funds approach that ERS Stack had attempted to employ in *In re Syngenta*, 2019 WL 38887515, at *3, it came as no surprise that he approved the FCC's Final Recommendations with only minor adjustments on March 11, 2019. *ERS Recommended Allocation, App. 19-57.* The eight member firms' collective share remained close to two-thirds of the fund, while the nearly three-to-one disparity in hourly rates ($738.02 *vs.* $268.22) was left intact. *See Doc#:7718-2, Fee and Expense Grid; PageID#:189431-34.*

The following day, the District Court directed the FCC to submit the original and adjusted time entries, the attorneys' objections, and additional information for an *in camera* review. *Doc#:7639, Pretrial Order#:332, pp. 2-3; PageID#:188217-18.* Petitioner ALO and several other non-member firms filed their comprehensive objections to the FCC's Final Recommendations on March 26, 2019. ALO observed *inter alia*: "It is not realistic to expect that all the flaws and errors in the fund allocation process can be identified and substantiated if the submitted time and expense data remains concealed." *Doc#:7718, ALO's Objections, p. 7;*

*PageID#:189399, App. 197.* In the seventy-five-page Omnibus Response that followed, the FCC members continued to insist that the allocations should be approved without any disclosure to objectors of the FCC members' own time and expense entries and supporting data. *Doc#:7816, FCC's Omnibus Response; PageID#:190025*.

On April 22, 2019, Petitioner ALO formally sought a hearing to present additional evidence and argumentation upon new criticisms that the FCC had leveled against the firm's billing statements in the Omnibus Response. *Doc#:7896, Motion to Schedule Hearing; PageID#:198956, App. 224-232.* Respondent FCC vigorously opposed the request. *Doc#:8005, FCC's Response; PageID#:58197*.

Despite the parties' submission of over 150 pages of briefing, the District Court remarked in the decision that was issued on July 25, 2019, that there had been "very few objections[.]" *Doc#:8453, Pretrial Order#:342, p. 1; PageID#:205790, App. 11.* The Court summarily overruled all objections in a six-page ruling without specifically addressing a single one. *Allocation Order, Apx. p. 0009-14.* And the Court furnished no indication that it had performed a lodestar cross-check with the eighty-nine applicant firms' submitted time entries multiplied by reasonable hourly rates as promised in the January 30, 2019, ruling. *See Id.*; *In re Cook Med., Inc.,* 365 F. Supp. 3d at 695-96.

As permitted by Fed. R. Civ. P. 59(e), Petitioner ALO requested on July 30, 2019, that the District Court modify the final order to reflect that there had been no waiver of any rights to appeal because (1) the firms had been justifiably relying upon

prior orders requiring the fee allocations to be based at least in part upon objectively verifiable lodestar calculations; and (2) no viable alternatives had been afforded to firms like ALO, which were already heavily invested in common benefit work. *Doc#:8460, Motion to Partially Alter, Amend, or Reconsider Judgment; PageID#:205873*. Respondent FCC's opposition followed two days later. *Doc#:8465, FCC's Response to Motion to Partially Alter, Amend, or Reconsider Judgment; PageID#:205916*. The Motion was denied the next day. *Doc#:8470, Memorandum Opinion and Order; PageID#:205960*.

On August 2, 2019, Petitioner ALO appealed the District Court's decisions in all seven MDLs to the United States Court of Appeals for the Fourth Circuit. *Doc#:8472, ALO Notice of Appeal; PageID#:205966*. The seven appeals were consolidated seven days later under case numbers 19-1849(L), 19-1850, 19-1851, 19-1853, 19-1855, 19-1856, and 19-1857. Wasting no time, Respondent FCC filed a Motion to Dismiss that same afternoon demanding enforcement of the District Court's appeal waiver orders. *Doc#:4*. ALO opposed this request on multiple grounds, and the FCC submitted a Reply. *Doc#:14, 20*.

On September 23, 2019, the United States Court of Appeals for the Fourth Circuit summarily dismissed all seven appeals. The order stated, in its entirety:

> Upon review of submissions relative to the motions to dismiss and the motion to stay pending appeal, the Court grants the motions to dismiss and denies the motion for stay pending appeal.
>
> Entered at the direction of Judge Agee, and with the concurrence of Judge King and Judge Diaz.

*Doc#:24, Order, p. 5, App. 5.*

On December 18, 2019, the ALO Petitioners sought a writ of certiorari from this Court.

## REASONS FOR GRANTING THE STAY

"The practice of the Justices has settled upon three conditions that must be met before issuance of a § 2101(f) stay is appropriate. There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Barnes v. E-Sys., Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

### A. A REASONABLE PROBABILITY THAT CERTIORARI WILL BE GRANTED AND THE PROSPECTS FOR REVERSAL

This Court has been asked to resolve whether a district court possesses the authority to require attorneys to waive their appeal rights before they will be permitted to vindicate a legal or equitable right in that court. Federal courts have properly enforced waivers of appeal rights that, for example, have been freely entered in binding settlement arrangements, arbitration agreements, and criminal pleas. But in contrast to those acceptable forms of appeal waivers, the District Court below embarked upon an unprecedented approach: It made a forfeiture of appellate review mandatory for any law firm seeking a share of the Common Benefit Fund. There were no exceptions. The absence of any viable alternatives was particularly and

acutely problematic for the ALO Petitioners, which had already devoted considerable common-benefit time to the consolidated TVM proceedings in New Jersey. Had the firm refused to acquiesce to the District Court's "take-it-or-lose-it" edict, Attorney Anderson would not have qualified as "participating counsel" and would have received nothing for the effort he had already expended.

As a result of the enforcement by the District Court and the Court of Appeals of the appellate waiver provisions, several novel issues have been raised that are subsumed within the primary question presented. Broadly, what are the elemental requirements for an enforceable waiver of the right to appellate review in federal proceedings? May assent to a forfeiture of appeal rights be implied from mere acquiescence to a district court's order? Or must an express and knowing consent to a forfeiture of appeal rights be established either through a valid written instrument or in open court? Assuming for the sake of argument that there has been a valid waiver, must the scope of an implied or involuntary waiver of appeal rights be narrowly construed against the forfeiture? Is there an enforceable, implied guarantee in an otherwise valid waiver of appeal rights that the federal court will still abide by its own rulings in the case as well as basic principles of due process? Each of these questions has come to this Court because, for seemingly the first time in American jurisprudential history, a federal district court has managed to order that its own rulings may not be appealed, and a federal court of appeals has blessed the exercise.

This is not an appeal that requires a fact-bound application of prior case law on appellate waivers. *See, e.g., Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302

(2010) (Scalia, J., in chambers) ("I would not be inclined to believe that this Court would grant certiorari to consider these fact-bound contentions that may have no effect on other cases."). Although the appeal to the United States District Court for the Fourth Circuit would have explored the numerous factual and legal objections lodged to the Allocation Order, those matters have not been ruled upon because the ALO Petitioners have been denied any appeal at all.

Rather, the appeal before this Court presents solely unanswered and novel legal questions. And if the orders of the lower courts are permitted to stand, the consequences will be grave. As but one example, a court following the approach of the District Court below may develop standard pre-trial orders directing that by filing a motion to suppress, a criminal defendant agrees to become a "participating defendant," which has been defined as a person who has waived their right to appeal all decisions on motions to suppress. Or a like-minded court could refuse to permit removal from state court unless the defendant agrees that there will be no appellate review of any rulings on dispositive motions. The mechanism employed by the District Court below simply closes the doors of the courthouse to any who refuse to close the doors of the appellate courts on themselves. And such an order can always be justified with Respondent FCC's backward notion that they "avoid the potential for expensive and prolonged disputes with disgruntled or disappointed" parties. *Doc#:4, Appellee's Motion to Dismiss Consolidated Appeals dated August 9, 2019 ("FCC's Motion to Dismiss"), p. 9.*

In light of the novelty and gravity of the issues presented by the petition for a writ of certiorari filed by the ALO Petitioners, there is "a reasonable probability that certiorari will be granted" and "a significant possibility" that the judgment of the United States Court of Appeals for the Fourth Circuit will be reversed. *Barnes*, 501 U.S. at 1302.

**B. THE LIKELIHOOD OF IRREPARABLE HARM**

The ALO Petitioners stand to suffer irreparable harm if the Fund is disbursed to the participating firms without any guarantee that the payments can be recouped if this appeal is wholly or partially successful. The Allocation Order has already been executed as to "all of the common benefit money on hand as of July 25, 2019," which totaled more than $350,000,000.00. *Allocation Order, Apx., p. 00014.* And yet, the Common Benefit Fund continues to grow through contribution of assessments in the five open MDLs. *Id.* The District Court ordered that seventy-percent of "all future common benefit money received after July 25, 2019" must be dispersed on a quarterly basis while the remaining thirty-percent shall be "be held in the common benefit fund for a final evaluation of common benefit compensation until a further order of the court." *Id.*

If these funds are cast to the wind through the court-ordered quarterly disbursement and are therefore subject to the disparate financial whims of almost 90 law firms, there will be no obvious legal mechanism to claw these payments back should this Court agree with the ALO Petitioners that a district court may not order that the parties must waive their basic right to appeal as a condition for asking for

and receiving the relief to which they are entitled. Put most bluntly, there is a serious and unacceptable risk that any further disbursements will be gone for good. *See also In re High Sulfur*, 517 F.3d at 231 ("[I]mmediate payments erect a serious obstacle to re-allocating fees, should the court later alter its award. The court, as its order acknowledges, would be placed in the difficult position of collecting pro rata sums from dozens of attorneys. Immediate payment essentially discouraged the court from trying to unscramble an unfair or erroneous initial allocation.").

Although financial loss is not typically considered to qualify as irreparable harm, Justice Antonin Scalia once observed that if "expenditures cannot be recouped, the resulting loss may be irreparable." *Scott*, 561 U.S. at 1304; *see also Mori v. Internat'l Brotherhood of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (remarking that escrowed funds would be difficult to recover if they were disbursed in an opinion announcing the decision to stay a mandate of the United States Court of Appeals for the Ninth Circuit). These are not the typical circumstances, identified by Justice Scalia, in which "money can usually be recovered from the person to whom it is paid." *Scott* at 1304. A portion of the fund has been preserved for later equitable adjustments to the allocations ordered by the District Court, but the flow of funds will eventually cease. *Allocation Order, Apx., p. 00014.* The ALO Petitioners have an *equitable* interest in *these specific funds*. *Mills*, 396 U.S. at 391-92; *Boeing Co.*, 444 U.S. at 478. Once these funds have been released and spent or commingled with the funds of the recipient firms, a remedy may no longer be possible. It is the irrevocability of the disbursement that warrants a stay. *Scott*

at 1304-05.

The necessity of securing an immediate stay to forestall irreparable harm was underscored in an analogous appeal to the United States Court of Appeals for the Third Circuit from a final award of attorneys' fees in a "landmark class action" that had been collected into a Federal MDL. *In re Diet Drugs*, 582 F.3d 524, 529-30 (3d Cir. 2009). Hundreds of millions of dollars were allocated in a master settlement to compensate attorneys, and a common benefit fund was created. *Id.* at 532. One firm challenged the allocation on the basis that it treated different classes of firms differently and it unfairly refunded common benefit assessments to some but not all firms. *Id.* at 548-49. When the Court of Appeals considered whether ordering relief to the appellant was even feasible, it was observed:

> Months later, those refunds are not likely to be sitting in the bank accounts of the law firms that received them. It seems likely that taxes have been paid, referral counsel has been compensated, and, generally speaking, the refunds have, in all or in part, worked their way through the channels of commerce and, accordingly, would be difficult for the Court to reclaim.
>
> We also find it significant—and surprising—that [appellant], who has argued so vigorously that the allocation is unfair, never sought a stay of the refund distribution pending appeal. Had [appellant] moved for a stay, and had the Court granted his motion, the practical difficulties associated with administering the redistribution that he requests would be alleviated.
>
> * * *
>
> Here, the assessments and fees awarded pursuant to the Settlement Agreement were maintained in escrow accounts under the District Court's control. It is therefore quite possible, perhaps even likely, that the Court would

> have waived the bond requirement or required a substantially reduced bond in this case.

*Id.* at 551-552. Unlike the *Diet Drug*s appellants, the ALO Petitioners have promptly undertaken every effort to avoid an irreparable wasting of the Fund.

Because the common benefit funds may not be recouped if they are disbursed, there is a significant "likelihood of irreparable harm" if a stay does not issue. *Barnes*, 501 U.S. at 1302.

**C. NO BOND IS NECESSARY**

Extraordinary circumstances are presented that justify a stay without bond until the appellate process has been completed. "The purpose of requiring the posting of a supersedeas bond is 'to preserve the status quo during the pendency of an appeal, [protecting the winning party] from the possibility of loss resulting from the delay in execution.'" *HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 512 (E.D. Pa. 1995) (quoting *Schreiber v. Kellogg*, 839 F. Supp. 1157, 1159 (E.D. Pa. 1993)); *see also Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 254 (N.D.N.Y. 2002). The concerns that typically justify such security simply do not exist in a case such as this, where no judgment at all has been imposed against the appealing party (i.e., ALO) and the funds in dispute will continue to remain safely preserved in an interest bearing account managed by a court-designated accounting firm, free from any threats of waste or dissipation. *Allocation Order, Apx., p. 00014.* The various interested law firms have—at most—an equitable claim to the specific funds that have been held by the District Court to compensate for work done for the common benefit. *Mills*, 396 U.S. at 391-92; *Boeing Co.*, 444 U.S. at 478. The only way the

*status quo* may be maintained is by ensuring that none of those funds are released until after this Court has had an opportunity to review the petition and issue a writ of certiorari.

None of the parties possess any interests or potential recoveries beyond those protected assets. This is precisely the sort of " 'alternative means of securing the judgment creditor's interest' " that has justified a stay of execution pending appeal without a supersedeas bond. *Holland v. Law*, 35 F. Supp. 2d 505, 506 (S.D.W. Va. 1999) (quoting *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, No. 86-5763, 1992 WL 114953, at *1-2 (E.D.P.A. May 18, 1992)). As long as the funds in dispute remain protected, the participating law firms will be "as well off during the appeal as [they] would be if [they] could execute at once, but no better off.' " *Alexander v. Chesapeake, Potomac, and Tidewater Books, Inc.*, 190 F.R.D. 190, 193 (E.D. Va. 1999) (quoting *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 800 (7th Cir. 1986) (Easterbrook, J., concurring)). If the ALO Petitioners are ordered to post a supersedeas bond, on the other hand, the interests of the parties will be secured by more funds than the parties are collectively entitled to, and in that sense the bond would be bald surplusage.

## CONCLUSION

For the foregoing reasons, the application for a stay pending the disposition of a petition for a writ of certiorari should be granted without the requirement of a supersedeas bond.

Respectfully Submitted,

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