No.

In the Supreme Court of the United States

PARKER WAICHMAN, LLP, ET AL., *Petitioners*

v.

ARNOLD LEVIN, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions concern three subjects: (1) the authority of a court sitting in diversity jurisdiction to allocate contractual attorney fees from individual settlements following remand from an MDL; (2) the contours of the equitable common fund doctrine; and (3) the standard for findings to support an award of attorney fees following remand from an MDL.

The questions presented are:

1. Does state law govern under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) and *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975), or does inherent federal equitable power allow the fashioning of an award by the transferor court?

2. If the use of equity is proper, what standard governs: the common fund doctrine as defined by *Boeing Co.* v. *Van Gemert,* 444 U.S. 472 (1980) and *Alyeska*, or the common benefit doctrine developed for MDL fee awards?

3. Does *Hensley* v. *Eckerhart*, 461 U.S. 424, 438 (1983) allow a transferor court sitting in diversity to allocate contractual fees from *individual* settlements based on findings by an MDL-transferee court involving a *class action* settlement, or is the transferor court required to provide its own "clear explanation" of its award?

PARTIES TO THE PROCEEDING

Petitioners (appellants-individual counsel for plaintiffs below) are Parker Waichman, LLP; Milstein Jackson Fairchild & Wade, LLP; and Roberts and Durkee, PA.

Respondents (appellees-"class counsel" for plaintiffs below) are Arnold Levin, Stephen J. Herman, Richard J. Serpe, Patrick S. Montoya, and Sandra S. Duggan. Respondents also include Eduardo Amorin (appellee-plaintiff below); and Whitfield Bryson & Mason, LLP; Mracheck Fitzgerald Rose Konopka Thomas & Weiss, PA; and Levin Papantonio Thomas Mitchell Rafferty Proctor, PA (appellants-individual counsel for plaintiffs below).

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporation, and no publicly held company owns 10% or more of petitioners' stock.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

Eduardo Amorin, et al. v. *Taishan Gypsum Co., LTD., f.k.a. Shangdong Taihe Dongxin Co., LTD,* et al., Case No. 1:11-cv-22408 (May 22, 2020; respondents' Mot. to Enforce Judgment Awarding Common Benefit Counsel 45% of the Total Fees (Paid by Both Taishan and Clients) Received by Individual Counsel from the Florida Individual Settlement, filed Aug. 19, 2021, pending decision)

United States District Court (E.D. La.):

In re Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 2:09-md-02047 (petitioners' Mot. to Stay Order Transferring and Allocating Common Benefit Fees from the Florida Individual Settlement Pending Decision by the Southern District of Florida on Class Counsel's Motion to Enforce Judgment Awarding Common Benefit Counsel 45% of the Total Fees Received by Individual Counsel from the Florida Individual Settlement, denied Oct. 27, 2021)

United States Court of Appeals (11th Cir.):

Eduardo Amorin, et al. v. *Taishan Gypsum Co., LTD., f.k.a. Shangdong Taihe Dongxin Co., LTD,* et al., No. 20-12100 (June 9, 2021)

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INTRODUCTION

Multidistrict litigation (MDL) has revolutionized civil procedure, leaving courts and scholars puzzled by an assortment of issues, including the high-stakes attorney fee compensation system at issue here.[1] At present, it cannot be reconciled with "the bedrock principle known as the American Rule" under which "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 125 (2015). The MDL compensation system is "totally out of control," as Judge Chhabria recently observed in the Roundup MDL while urging the Court to adopt "a rule that brings some semblance of order and predictability" to the process.[2]

Although "the law governs an MDL court's decisions just as it does a court's decisions in any other case," *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) (Kethledge, J.), MDL courts have relied on federal equity power to develop a unique fee authority to evade the limitations of the

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[1] See generally Abbe R. Gluck and Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1 (April 2021) (Discussing the "extraordinary procedural exceptionalism" employed by MDL judges to settle cases and the tension it has caused with "[s]ubstantive state laws, personal jurisdiction, transparency, impartiality, reviewability, federalism, and adequate representation").

[2] Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage, *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741, 2021 WL 2531084, *1 (N.D. Cal. June 6, 2021), *opinion corrected and superseded*, No. 16-md-02471, 2021 WL 3161590 (N.D. Cal. June 22, 2021).

common fund doctrine prescribed in *Boeing Co.* v. *Van Gemert*, 444 U.S. 472 (1980), and *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). Courts outside of MDLs are following that path. This case is the most extreme example yet.

Unlike in the Roundup MDL, where the court avoided a jurisdictional dilemma by refusing to issue an order beyond the MDL, or in the Genetically Modified Rice MDL,[3] where the Eighth Circuit affirmed a fee order reaching state court settlements for plaintiffs participating in an MDL global settlement, the case here presents MDL fee authority in full, unchecked bloom. It involves:

- Multiple common benefit awards by the MDL court, totaling roughly $226,000,000, for overlapping services both in and out of the MDL;
- An MDL remand order reserving jurisdiction to approve settlements and fee awards in the transferor court;
- MDL-appointed attorneys controlling hundreds of individual claims on remand without formal authority from the transferor court and despite glaring conflicts;
- A claim by MDL attorneys to a share of contractual fees paid to private attorneys for the settlement of individual claims by plaintiffs excluded from a global class action settlement;

[3] *In re Genetically Modified Rice Litig.*, 835 F.3d 822 (8th Cir. 2016).

- Overlapping fee demands in both courts involving different recoveries, resulting in a double recovery for the same work;
- A district court borrowing findings from an MDL fee proceeding without explaining its own calculation of an award or the relationship between the award and the outcome achieved;
- A circuit court embracing the use of MDL fee authority outside of an MDL to support an award of fees not meeting the requirements of the common fund doctrine; and
- An order by the transferee court (Oct. 27, 2021) acting on the Eleventh Circuit's mandate, compelling petitioners to transfer privately-escrowed funds into the registry of the transferee court for allocation to Class Counsel, *while an opposed motion to enforce the judgment is pending in the transferor court.*

This is the bottom of a slippery slope decades in the making. It began with a broad statement from a pre-*Erie*[4] decision in *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939), about the "power of equity" to support the limited use of a "variant" of the common fund exception when no actual common fund exists, but the litigation produces a "benefit" to others through *stare decisis*. Post-*Erie*, the common benefit rationale was applied by the Court in limited circumstances involving federal statutes. See *Mills* v. *Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970) (applying to litigation that "corrects or prevents an abuse which would be prejudicial to the rights and interests of [those others]"); *Hall* v. *Cole*, 412 U.S. 1, 9 (1973)

[4] *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

(applying to litigation that "simply shifts the costs of litigation" to those who benefit).

But in *Alyeska* the Court rejected the equitable "private attorney general" theory to support an award of fees to enforce a federal statute (30 U.S.C. § 185) and cautioned that "courts are not free to fashion drastic new rules" for awarding fees "depending upon the courts' assessment of the importance of the public policies involved in particular cases." 421 U.S. at 269.[5] *Alyeska* further emphasized that fee awards in diversity cases are primarily governed by state law, not federal equity power. 421 U.S. at 259 n.31. Next, *Boeing* returned the focus for all variants of the common fund doctrine to the core rationale for the exception—avoiding "the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigants expense." 444 U.S. at 478.

MDL courts nevertheless continued unabated to fashion increasingly more novel common benefit awards by combining the power of equity described in *Sprague*, 307 U.S. 161, with the inherent managerial authority of MDL courts.[6] Hence, the *Sprague* variant of the common fund exception emerged in MDL jurisprudence as a doctrine in and of itself—a variant to a variant of the common fund exception. It now

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[5] See also *Baker Botts L.L.P.*, 576 U.S. at 125 ("Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us 'roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted'") (quoting *Alyseka*, 421 U.S. at 260).

[6] See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371 (2014).

dominates within MDLs[7] and is often used interchangeably with the common fund doctrine outside of MDLs.[8] Effectively, a sub-variant of an exception is swallowing the American Rule, at least in complex litigation. And it is reaching into diversity jurisdiction, encroaching on what was traditionally a state-law domain.

The circuit decision below reflects the ease with which the "rigid eligibility requirements" for an award of fees under traditional standards can be overcome by equity administered under "broad managerial power" to accomplish public policy. App., *infra*, 8a-9a.[9] Further, it omits any discussion of the jurisdictional boundaries between the MDL court and the district court sitting in diversity or of the district court's borrowed findings from an MDL class action fee award in lieu of an explanation for how its *contractual* fee allocation was calculated.

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[7] See William B. Rubenstein, 5 *Newberg on Class Actions* § 15:117 (5th ed. Supp. 2021) (*Newberg*) (empirical evidence on common benefit use); *id.* § 15:113 ("While there is significant debate about, and opposition to, common benefit fees, that controversy has done little to rein in their perpetuation.").

[8] See 5 *Newberg* § 15:112 ("Courts sometimes refer to a distinct legal doctrine entitled the 'substantial benefit doctrine' as the 'common benefit doctrine,' causing confusion in the law[]" and "courts sometimes confuse the basic 'common fund doctrine' … with the common benefit doctrine").

[9] See *id.* at 8a ("Recognizing the purpose and importance of these [MDL] fee awards, our precedent maintains that common benefit fees—grounded in the court's equity—need not satisfy rigid requirements.") (citing *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1019 (5th Cir. 1977)).

Instead, the court simply melded the common benefit doctrine into the common fund doctrine to support a "common benefit-like award" (App., *infra*, 7a) from contractual fees recovered by six law firms from 497 individual settlements governed by 497 individual contracts. App., *infra*, 10a. The stated objective of this broad-brush was not to prevent unjust enrichment or spread the costs of litigation, as *Boeing* dictates, but to assure that appointed counsel continue to "reap the rewards of their efforts" and thus enable courts "to find capable and competent lawyers" to do the important work of MDLs. *Id.* This Court has never endorsed such sweeping policy rationale as a basis for awarding fees, in or out of an MDL, and certainly not in a diversity proceeding.

The Eleventh Circuit's novel embrace of the common benefit doctrine conflicts with controlling precedent and creates a circuit split over the use of equitable fee authority in a diversity proceeding, while adding to an existing highly-complex circuit split over the scope and application of the common fund exception under *Boeing*.

At bottom, this case presents a rare opportunity for the Court to address not only the limitations on equitable fee power, but the scope of MDL fee authority on review of an award by a transferor court—from the outside in. Relief should start with a bright jurisdictional line, as in *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998), where "a unanimous Court stopped in its tracks the MDL courts' nascent practice of conducting trials in cases" beyond the jurisdictional limitations of 28 U.S.C. § 1407. *In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 844. The next step is to return the MDL common benefit theory to "its special use as a fee

allocation mechanism in MDL cases," as urged by Professor Rubenstein. William B. Rubenstein, 5 *Newberg on Class Actions* § 15:112 (5th ed. Supp. 2021) (*Newberg*) ("The law would be clearer if the term 'common benefit fees' was reserved for its special use as a fee allocation mechanism in MDL cases."). From there, the Court may then provide long-overdue standards for MDL fee proceedings, as urged by Judge Chhabria.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is not published but is available at 2021 WL 2349920. The order of the district court (App., *infra*, 13a-29a) is not published but is available at 2020 WL 11232641.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2021. A petition for rehearing and rehearing en banc was denied on August 5, 2021 (App., *infra*, 30a-31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1407 provides in pertinent part: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation … Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred…" 28 U.S.C. § 1407(a).

28 U.S.C. § 1332 provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

STATEMENT OF THE CASE

This matter concerns an award of attorney fees to court appointed attorneys from contractual fees paid to private attorneys for the settlement of individual cases remanded from a multidistrict litigation, MDL 2:09-2047. See Appellants' App. Doc. 13 ("Remand Order").[10] The dispute is rooted in the transferee court's attempt to retain jurisdiction for the sole

[10] The 497 individual cases were part of a class action certified in the transferee court as the "Amorin Class." These claims, along with more than 1100 others, were remanded to the Southern District of Florida for adjudication on the merits. Appellants' App. Doc. 33, at 10 (Suggestion of Remand, Opinion and Order).

purpose of awarding fees to attorneys appointed in the MDL. Directly, it concerns the fracturing of jurisdictional lines when the transferor court and a panel of the Eleventh Circuit strained to accommodate the transferee court's benevolence. What started as an attempt by the transferee court to reserve jurisdiction over a "collateral matter"[11] turned into a deprivation of petitioners' contractual rights and an unprecedented double recovery for the court appointed attorneys.

1. *Proceedings Prior to Remand*. Throughout the decade-long MDL, all "Chinese Drywall" cases were managed by attorneys appointed by the MDL court ("Class Counsel"), who engineered a settlement with one group of defendants, the "Knauf Entities," but were unable to settle with another group of defendants, the "Taishan Entities."

In connection with the Knauf settlement, the MDL court awarded common benefit fees in the amount of $197,803,738 from the proceeds of the settlement for all common benefit work performed prior to January 1, 2014. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 09-2047, 2018 WL 2095729 (E.D. La. May 7, 2018).[12]

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[11] Judge Fallon described the issue as a "collateral matter." Appellants' App. Doc. 33, at 11 (citing *In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 127 (2d Cir. 2010) (involving a "set aside order")).

[12] Although common benefit work on the Knauf claims overlapped with work on the Taishan claims, the court opted to draw a line in time for compensation purposes, rather than attempt to untangle time entries from lodestar submissions.

Litigation continued in the MDL against the Taishan Entities with no end in sight, largely for two reasons: (1) a dispute over the identity of the manufacturer of several varieties of drywall, and (2) wide disparity in the value of individual damage claims. The issues were far too diverse to resolve in the aggregate.

2. *Remand and the Jurisdictional Fee-Hook*. On March 13, 2018, Judge Fallon suggested remand of the individual claims, but sought to "retain[] jurisdiction to consider the fair and equitable assessment of any potential recovery for" common benefit fees and expenses. MDL R. Doc. 21242, at 12. Conditional remand was granted March 22, 2018 by the Judicial Panel on Multidistrict Litigation (JPML), MDL No. 2047. See JPML R. Doc. 482.

On April 3, 2018, the MDL "Plaintiff Steering Committee" requested a holdback from future settlements and judgments of remanded cases for payment of common benefit fees. See MDL R. Doc. 21267. Multiple law firms objected (MDL R. Doc. 21289-1) and filed a motion to vacate the conditional remand before the JPML. See JPML R. Doc. 504.

While the motion to vacate was pending, Judge Fallon issued "Pretrial Order 32" (PTO 32) requiring parties and attorneys to inform the court of any settlement or judgment on remand within three days and prohibiting the distribution of any recovered funds "until the Court confers with the transferor court regarding the proper procedures to allocate a fair and equitable division among plaintiff(s), individually retained counsel and common benefit counsel." MDL R. Doc. 21328, at 2-3.

On June 6, 2018, the JPML issued a formal Remand, noting the objection to the transferee court's reservation of jurisdiction, but finding it premature. See Appellants' App. Doc. 13, at 1 ("We need not reach this issue, as plaintiffs have not yet achieved any recovery.").[13]

3. *Proceedings in the Transferor Court*. Following remand, Class Counsel continued to use their MDL appointment authority to control the litigation, despite clear conflicts. This issue was raised by petitioners to Judge Cooke at the initial status conference. See Appellants' App. Doc. 40, at 22 (Tr. of July 13, 2018). In response, the court appointed Respondent Patrick Montoya as interim lead counsel and suggested that additional orders may be appropriate at a later date. See *id.* at 8-9, 22. But no further orders were requested or issued. Instead, the litigation remained under the control of Class Counsel acting on MDL appointment authority.[14] Faced with this dilemma, petitioners pursued individual settlements.

After nearly a year of complex negotiations—in which Class Counsel *refused* to participate—petitioners and the Taishan Entities agreed to a

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[13] Predictably, PTO 32 became an obstacle to settlement of individual cases on remand. It remained in place until lifted as part of negotiations between petitioners and respondents to litigate the instant claims in the Southern District of Florida in exchange for petitioners waiving the right to make claims in a fee proceeding for a global class settlement, explained below.

[14] Respondents Arnold Levin, Stephen J. Herman, Richard J. Serpe, and Sandra S. Duggan have no appointment authority in the district court below.

settlement framework for individual clients based on a formula and a "Most Favored Nations" clause allowing for additional payments in the event of future settlements involving similarly situated property.

In response, Class Counsel moved to block the individual settlements by filing motions to "protect" the *Amorin* Class in both courts (Appellants' App. Docs. 188, 188-1), wrongly arguing that petitioners were somehow threatening the class and that approval of the settlement was required under Fed. R. Civ. P. 23 (Rule 23).[15] Over petitioners' objection, Judge Cooke stayed execution of the individual settlements. Appellants' App. Doc. 196.

Having stonewalled the individual settlements, Class Counsel hurriedly scheduled a mediation with the Taishan Entities and negotiated a proposed global class action settlement using the methodology developed by petitioners for the individual settlements. Critically, Class Counsel ***excluded*** all of petitioners' 498 clients from the global class action agreement while Judge Cooke's stay order prevented action on the individual settlements. Appellants' App. Docs. 305 and 337-2. This marks the definitive point—before acceptance or rejection of individual settlement offers—at which Class Counsel severed their relationship with the individual plaintiffs.[16]

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[15] See *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1140 (7th Cir. 1979) ("it is only the settlement of the class action itself without court approval that F.R. Civ. P. 23(e) prohibits.") (Citation omitted).

[16] Unlike for the individual settlements, the class action settlement required court approval under Rule 23 by Judge

On June 6, 2019, Judge Cooke lifted the stay, allowing the individual settlements to proceed. Appellants' App. Doc. 313. Having been cut adrift from the *Amorin* Class, the 498 excluded plaintiffs had the choice to either accept the terms of the individual offer or proceed alone in the litigation. Faced with this "Hobson's choice," 497 plaintiffs opted for an individual settlement (collectively, the "Florida Individual Settlements" or the "FIS"). See Appellants' App. Doc. 400.[17]

4. *The Transfer Agreement and Lifting of PTO 32.* At this point, MDL PTO 32 was an obstacle to both the FIS and the class action settlement, but for very different reasons. On one hand, petitioners could not proceed with the FIS without Judge Fallon's approval and coordination with Judge Cooke over common benefit fee proceedings in her court. On the other hand, Class Counsel wanted to avoid objections to the class action settlement by the excluded plaintiffs, who would rightfully object to their exclusion if their individual settlements were being simultaneously delayed. In addition, because the global settlement utilized petitioners' work product in negotiating and formulating the FIS, Class Counsel wanted to avoid a claim by petitioners to an award of common benefit fees from the global class action settlement.

Fallon, as agreed by the settling parties and transferor judges. Appellants' App. Doc. 305.

[17] The one plaintiff who declined the FIS was subsequently denied entry into the global class action settlement and received nothing. See S.D. Fla. R. Doc. 376-1 (Feb. 5, 2020). Her claim was dismissed by Judge Cooke on a motion for summary judgment.

Thus, to fully separate the excluded plaintiffs and their attorneys from proceedings in the Eastern District of Louisiana, petitioners and Class Counsel entered an "Agreement Regarding Pre-Trial Order No. 32 and Related Issues." Appellants' App. Doc. 390-1 (the "Transfer Agreement"). In sum, the Transfer Agreement provided that petitioners would file an unopposed motion to lift PTO 32 before Judge Fallon and that all fee claims against the FIS would be litigated in the Southern District of Florida, with Judge Fallon retaining "jurisdiction to allocate any such award" as between the MDL common benefit attorneys. *Id.* ¶¶ 1-3.

As a central feature, the Transfer Agreement included a waiver by petitioners of the right to object or assert a claim in the global fee proceeding (*id.* ¶ 4) in exchange for the right to request that Judge Cooke consider the value of petitioners' groundwork leading to the global settlement as an offset, if such an award was made (*id.* ¶ 6)—which petitioners opposed.[18]

On July 16, 2019, Judge Fallon signed an order lifting PTO 32, as provided in the Transfer Agreement. Appellants' App. Doc. 390-2, at 2.

5. *Fee Claims in Both Courts: One Involving 497 Individual Settlements and the Other a Class Action.* On August 8, 2019, Class Counsel filed a motion in the Southern District of Florida for a common benefit fee award from the 497 individual settlements. The motion included lodestar schedules of time for work in the MDL and on remand, along with an affidavit from

[18] This important bargain was not even acknowledged in the decisions below.

an accountant appointed by Judge Fallon in the MDL. Appellants' App. Doc. 320 ("Original Fee Motion").

On December 2, 2019, Class Counsel filed a request in the Eastern District of Louisiana for a fee award from the global class action settlement—a classic common fund. In support, Class Counsel submitted the same lodestar schedules and the same accountant's affidavit. MDL R. Doc. 22380. To be clear, Class Counsel submitted the same evidence in both proceedings and made no effort to differentiate work product as it related to the different settlements.

On January 10, 2020, Judge Fallon issued an order awarding common benefit fees of $28,272,000 from the global class action settlement, equivalent to 11.4% of the value of the common fund settlement. Order and Reasons (Fallon, J.), Appellants' App. Doc. 368-1, at 67.[19] His findings include a per-hour analysis of time submissions from the cut-off date for fees from the Knauf Settlement, January 1, 2014, through completion of work on the global class action settlement, August 31, 2019. This period included Class Counsels' work on remand. Appellants' App. Doc. 368-1, at 67, 67.

On March 10, 2020, Class Counsel amended their Original Fee Motion to request that Judge Cooke adopt Judge Fallon's findings and rationale—*despite the Transfer Agreement provision expressly preventing petitioners from participating in the class action fee*

[19] Judge Fallon set an "initial benchmark of 19%" against the total value of the common fund recovery. *Id.* at 60. He then allocated the benchmark 60-40 in favor of common benefit counsel, resulting in common benefit fees of $28,272,000. *Id.* at 61, 67.

proceeding. Appellants' App. Doc. 384. Petitioners filed detailed objections to the fee motions and requested both limited discovery and a hearing. Appellants' App. Docs. 337, 337-1, 337-2, 390, 390-1, 390-2. The court did not respond to the request for discovery. The request for a hearing was denied. App., *infra*, 16a n.5.

6. *The District Court Award*. At the threshold, petitioners argued that state law governed and that "the fee request is barred by Florida's law on forfeiture of fees," under *Faro* v. *Romani*, 641 So. 2d 69 (Fla. 1994),[20] because Class Counsel excluded the individual plaintiffs from the global class action before action on the individual settlement offers.[21] Alternatively, petitioners argued that, if an award was proper, "the Court must rely on quantum meruit and utilize the lodestar methodology, as under Florida law[.]"[22] Petitioners further argued that an award in equity is improper because the claim does not meet the requirements for a common fund award under *Boeing*. In response, Class Counsel disavowed any claim to fees under state law, casting their lot solely with federal equity, and asked the court to apply the common benefit rule from *In re Air Crash Disaster at*

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[20] *Faro* held that an attorney "forfeits all rights to compensation" under a continency fee agreement by voluntarily withdrawing from representation before the event triggering the contingency fee. 641 So. 3d at 71.

[21] Appellants' App. Doc. 337-1, at 1 (Memorandum in Opposition to Class Counsel's Motion for an Award of Common Benefit Costs and/or Fees out of the Proceeds of the Florida Individual Settlement (ECF No. 320), and for Discovery and a Hearing).

[22] *Id.* at 17.

Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006 (5th Cir. 1977).[23]

On May 22, 2020, Judge Cooke awarded common benefit fees in the amount of "45% of the total fees (paid by both Taishan and the clients)" under the FIS. App., *infra*, 29a.[24]

She found that Class Counsel had not terminated their representation of the excluded plaintiffs based on a statement by counsel for petitioners at the initial status conference objecting to Class Counsels' lack of formal authority. App., *infra*, 20a-23a (quoting counsel as stating, "Mr. Montoya has no authority to speak for Parker Waichman's clients"). But this statement was made moments *before* the court appointed Mr. Montoya as interim lead counsel, thus giving him authority and creating the linchpin for these claims.

Lacking a common fund against which to set a benchmark and perform calculations, Judge Cooke borrowed from Judge Fallon's calculations for the global class action fee proceeding, but adjusted the fee split as between the attorneys—from 60-40 to 45-65—

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[23] Class Counsel informed the court that they "have no contingency fee contract with any of the 498 FIS Plaintiffs and have made no pretense of a right to a fee based upon a contractual theory." Appellants' App. Doc. 344, at 11 (emphasis added).

[24] The Order does not identify the amount of fees awarded or the amount owed by each firm, nor does it reference the voluntary escrow. At the court's request, a schedule of fees was filed under seal reflecting the contract rates and fees paid to each firm. Appellants' App. Doc. 400-1 (sealed). Applying this schedule, the value of the award is $5,832,950.95.

with no analysis of the work performed or the results obtained. Although Judge Cooke obviously intended to award a lower rate of common benefit fees than awarded by Judge Fallon, her mere adjustment of raw percentages yielded the opposite result. It turns out that Class Counsel received a higher rate for the individual settlements they opposed (14% of the total FIS recovery), than for the global class action settlement they negotiated (11.4% of the common fund).[25]

7. *The Eleventh Circuit's Decision*. The decision by the Eleventh Circuit affirmed the district court's award based primarily on *In re Air Crash Disaster*, but steered closer to the common fund doctrine, finding that "[h]ere, the 'common fund' was the fees generated by Individual Counsel," a finding not made by Judge Cooke. App., *infra*, 10a.

This finding allowed the court to address unjust enrichment as between the attorneys, as beneficiaries of the fund, which led to a general comparison of the "hard" work of petitioners to produce the FIS and the "decade of foundational work" by Class Counsel in the MDL—for which they were paid over $226,000,000. App., *infra*, 10a. The court rejected concerns about a double recovery, stating "[t]hat Class Counsel has otherwise been compensated for this work does not prevent them from continuing to reap the rewards of their efforts." *Id.*

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[25] This resulted because Judge Fallon set a benchmark of 19% against the value of the global class recovery, and then determined the fee split. Judge Cooke skipped the baseline step. Thus, Class Counsel were awarded 45% of all contractual fees, which averaged roughly 34%.

8. *The MDL Enforcement Order*. The final chapter in this saga remains unwritten. On August 19, 2021, Class Counsel filed a "Motion to Enforce Judgment Awarding" fees to Class Counsel in the Southern District of Florida, asking the court to order petitioners to transfer the voluntarily escrowed funds—not mentioned in either the ruling of the district court or the decision of the Eleventh Circuit—to the registry of the Eastern District of Louisiana. Petitioners opposed the motion on the basis that (1) the judgment was not yet in proper form because it merely awarded a gross percentage of the contractual fees with no further detail, (2) the court had no jurisdiction over the escrowed funds, which were not part of the mandate, and (3) the motion failed to comply with Fed. R. Civ. P. 69 and improperly sought use of the court's contempt authority to aid in enforcement of a money judgment.[26]

While the motion before Judge Cooke was (and remains) pending, Judge Fallon ordered the six law firm firms to transfer the escrowed funds. Petitioners filed a motion to stay the order (MDL R. Docs. 23207, 23207-1 (Oct. 4, 2021)), which Judge Fallon has denied. MDL R. Doc. 23219 (Oct. 27, 2021).[27]

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[26] See *Combs* v. *Ryan's Coal Co.*, 785 F.2d 970, 980 (11th Cir. 1986).

[27] This order wrongly attempts to use equitable power to aid in the enforcement of a money judgment across jurisdictional lines. If conflicts with Rule 69, *Erie*, and *Grupo Mexicano de Desarrollo S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308 (1999) (holding that the district court lacked equitable authority to enjoin the disposal of assets pending adjudication of a contract claim for money damages).

REASONS FOR GRANTING THE PETITION

This case raises recurring questions of judicial significance and national prominence that have divided the circuits into a patchwork of conflicting decisions and undermined the Court's precedent on the use of federal equitable powers to award attorney fees. Certiorari is warranted.

I. The Eleventh Circuit's decision creates a circuit conflict over the use of federal equitable powers to award attorney fees in a diversity proceeding

Alyseka emphasized that the use of equitable power to grant exception to the American Rule is primarily reserved for cases involving federal question jurisdiction: "A very different situation is presented when a federal court sits in a diversity case." 421 U.S. at 259 n.31. The First, Third, Seventh, Ninth, and District of Columbia Circuits have followed this distinction, as did the Eleventh Circuit in *Zaklama* v. *Mount Sinai Med. Ctr.*, 906 F.2d 650, 652 (11th Cir. 1990) ("The rights and obligations of parties to a contract, which provides attorneys' fees upon the happening of a contingency, are governed by state law.").

"The issue of attorneys' fees has long been considered for Erie purposes to be substantive and not procedural, so state-law principles normally govern the award of fees." *In re Volkswagen & Audi Warranty Extension Litig.*, 692 F.3d 4, 16-17 (1st Cir. 2012) (citing *IOM Corp.* v. *Brown Forman Corp.*, 627 F.3d 440, 451 (1st Cir. 2010) ("Where, as here, the court's jurisdiction is based on diversity of the parties, a district court's award of attorneys' fees is governed by relevant state law...."; there are "no inherent federal

equitable powers" to support a fee award in a diversity case.)); *Titan Holdings Syndicate, Inc.* v. *City of Keene, N.H.*, 898 F.2d 265, 273 (1st Cir. 1990) (same); *Chin* v. *Chrysler LLC*, 538 F.3d 272, 279 (3d Cir. 2008) (same); and *Scottsdale Ins. Co.* v. *Tolliver*, 636 F.3d 1273, 1280 (10th Cir. 2011) (same). "[I]t is to state law that district courts must look in determining whether attorneys' fees may be awarded in a diversity case." *Tryforos* v. *Icarian Dev. Co., S.A.*, 518 F.2d 1258, 1265 n.27 (7th Cir. 1975), *overruled on different grounds by Felzen* v. *Andreas*, 134 F.3d 873 (7th Cir. 1998). See also *Nat'l Ass'n of Letter Carriers, AFL-CIO* v. *U.S. Postal Serv.*, 590 F.2d 1171, 1176 (D.C. Cir. 1978) ("Absent express statutory authority, federal courts still have 'inherent (equitable) power' in a federal question case (not in diversity cases) to award attorney fees for 'willful disobedience of a court order' … or when the losing part has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'") (citing *Alyeska*, 421 U.S. at 258-59).

These cases demonstrate how far the decisions below strayed from *Alyeska*—not merely by applying federal equity powers in a diversity proceeding, but by expanding the use of equity in a diversity proceeding.

II. The federal courts of appeals are in conflict over the use of federal equity power to award attorney fees

Boeing and *Alyeska*, 421 U.S. 240, define the contours of the common fund doctrine, the long-recognized exception to the American Rule. Of that, the circuit courts are in agreement.[28] The conflict

[28] See 5 *Newberg* § 15:58, n. 2 (providing an extensive list of cases by circuit).

involves the variants of the common fund exception described in *Alyeska*, primarily the substantial benefit doctrine and common benefit doctrine. 421 U.S. at 257-58. The central questions are when and how to use these methods. *Boeing* provided a clear construct:

> In *Alyeska* … we noted the features that distinguished our common-fund cases from cases where the shifting of fees was inappropriate. First, the classes of persons benefited by the lawsuits "were small in number and easily identifiable." 421 U.S. at 265 n.39. … Second, "[t]he benefits could be traced with some accuracy . . . ." *Ibid*. Finally, "there was reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to those benefiting." *Ibid*. Those characteristics are not present where litigants simply vindicate a general social grievance. *Id.* at 263–267, and n.39 …

444 U.S. at 478-79. In sum, the Court swept all exceptions under the banner of "common fund cases" and provided core criteria for all.

Despite *Boeing*'s instruction, courts have struggled to harmonize the variants of the common fund doctrine, largely as a result of MDL courts using an adaptation of the common benefit rationale from *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939) to expand fee authority for an entirely different purpose than the Court intended, i.e., to pay court appointed attorneys by "taxing a portion of the fees" paid to private attorneys under contracts with their clients. See 5 *Newberg* § 15:113 ("Common benefit fees—Arguments for and against"). This has led to an

amalgamation of fee doctrines in the circuit court decisions, both in and out of MDLs.[29]

It is revealed within the Eleventh Circuit itself. In previous decisions, different panels of the court closely adhered to *Boeing*'s description of the common *fund* doctrine. See *Camden I Condo. Ass'n* v. *Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991), and *In re Home Depot Inc.*, 931 F.3d 1065 (11th Cir. 2019). Here, the court cited those decisions, but moved toward the MDL common benefit variant from *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1019 (5th Cir. 1977) to avoid *Boeing*'s "rigid requirements." App., *infra*, 8a. Effectively, the court merged the MDL common benefit theory into the common fund doctrine. This is new ground.

The fundamental problem is that the goal of avoiding unjust enrichment—the foundation of common fund doctrine—is illusory under the MDL version of the common benefit doctrine, because the focus is on attorney compensation, as demonstrated in the decision below.[30] This puts the Eleventh Circuit

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[29] See generally *Savoie* v. *Merchants Bank*, 84 F.3d 52, 56 n.3 (2d Cir. 1996) ("In agreement with the First Circuit, see *Weinberger* v. *Great Northern Nekoosa Corp*., 925 F.2d 518, 522 n.6 (1st Cir. 1991), we use the term 'common fund doctrine' somewhat broadly so as to incorporate the 'common benefit' doctrine"); *Rosenbaum* v. *MacAllister*, 64 F.3d 1439, 1444 (10th Cir. 1995) (distinguishing the common benefit doctrine from the common fund doctrine);

[30] See 5 *Newberg* § 15:114 ("The problem with this argument is that it is rooted in a *sense* of unjust enrichment far more than it is in the doctrinal requirements necessary to establish a claim of unjust enrichment.") (emphasis in original). See also Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of*

at odds with decisions from other circuits holding that the proper focus is whether there is unjust enrich as between the parties to the litigation, as directed by *Boeing*. See *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992) (applying the label "free-rider" to those "who benefit from a lawsuit without shouldering its costs"); *United States* v. *Tobias*, 935 F.2d 666, 668 (4th Cir. 1991) ("generally, a fund claimant who is represented by counsel … is deemed not to have taken a 'free-ride' on the efforts of other counsel"); *Consol. Edison Co. of New York* v. *Bodman*, 445 F.3d 438, 458 (D.C. Cir. 2006) (noting that "the fact that parties with interest in the common fund were separately represented may militate against the award of a common fund fee" (citations omitted)).

Adding to the conflict over the proper circumstances for awarding common benefit fees, there is a circuit spit over how to value a common fund for purposes of making an award. See *Gascho* v. *Glob. Fitness Holdings, LLC*, 822 F.3d 269, 283 (6th Cir. 2016) ("Despite *Boeing*'s guidance, the circuits have split on the most appropriate way to value settlement funds."). The Eleventh Circuit's decision deepens that conflict by recognizing a whole new type of common fund—contractual contingency fees from individual settlements—but without explaining how to value such a fund for purposes of making allocations. Here, the district court failed to establish a benchmark

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Managing Multi-District Litigations: Problems and A Proposal, 63 Vand. L. Rev. 107, 121 (2010) (arguing that unjust enrichment does not support awarding common benefit fee because the "predominant rationale [for fee awards in consolidations] is not unjust enrichment but administrative convenience").

based on the value of *any* fund, but instead merely borrowed percentages from the MDL fee proceeding—which were based on the value of the global class action settlement, not the value of the attorney-fee fund recognized by the Eleventh Circuit.

The depth of the circuit conflict over the relationship between the common fund doctrine and the common benefit doctrine is too great for these limited pages. See 5 *Newberg* §§ 15:53-61, 111-116 (canvassing the conflicting opinions across the range of equitable fee theories). Several observations by Professor Rubenstein are particularly applicable here: (1) that courts "sometimes" refer to the fee doctrines interchangeably, "causing confusion in the law" (*id.* § 15:112); (2) that "the law would be clearer if the term "common benefit fees" was reserved for its special use as a fee allocation mechanism in MDL cases (*id.*); (3) that the "rationale and legal basis" for awarding common benefit fees "are contested and neither substantive nor procedural norms exist to govern their administration" (*id.*); and (4) that "[w]hile there is significant debate about, and opposition to, common benefit fees, that controversy has done little to rein in their perpetuation." *Id.* § 15:113.

Finally, given the influence of PTO 32 on the outcome here and the most recent order by the MDL court to aid in enforcement of the Eleventh Circuit's mandate, the decision below adds to a circuit split over the reach of an MDL fee order outside of an MDL. This is the issue causing Judge Chhabria to declare the MDL compensation system "totally out of control" a few months ago.[31] The Fourth and Eighth Circuits

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[31] Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage, *In re Roundup Prods. Liab.*

have rejected MDL fee authority beyond an MDL.[32] The former Fifth and former Ninth Circuits, and a recent decision by the Eighth Circuit in the same case (but involving a different fee order) allow more extended authority."[33] But even in these cases, the orders were limited to non-MDL settlements tied to MDL settlements. This link was intentionally broken in this instance.

Litig., No. 16-md-02741, 2021 WL 2531084, *1 (N.D. Cal. June 6, 2021).

[32] See *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 165–66 (4th Cir. 1992) (stating that "a transferee court's jurisdiction in multi-district litigation is limited to cases and controversies between persons who are properly parties to the cases transferred," and "[t]he district court simply has no power to extend the obligations of its order" to non-parties to the MDL); *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 874 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1455 (2015) ("[S]tate-court cases, related or not, are not before the district court. The state-court plaintiffs at issue neither agreed to be part of the federal MDL nor participated in the MDL Settlement Agreement. Even if the state plaintiffs' attorneys participated in the MDL, the district court overseeing the MDL does not have authority over separate disputes between state-court plaintiffs and Bayer" and "equity is insufficient to overcome limitations on federal jurisdiction.").

[33] See *In re Air Crash Disaster*, 549 F.2d at 1019; *Vincent* v. *Hughes Air W., Inc.*, 557 F.2d 759, 770-71 (9th Cir. 1977); *In re Genetically Modified Rice Litig.*, 835 F.3d 822 (8th Cir. 2016).

III. The Eleventh Circuit's decision is incorrect

A. The decision below conflicts with *Erie* and *Alyeska*'s limitation on the use of equity power in a diversity proceeding

The Eleventh Circuit's expansive use of equity power in a diversity proceeding is irreconcilable with *Erie*'s limitation on diversity jurisdiction, as explained in *Alyeska*, 421 U.S. at 459 n.31. ("We see nothing after *Erie* requiring a departure" from the longstanding rule that state law governs claims for attorney fee awards). A rule is considered substantive for *Erie* purposes if it "alter[s] the rights themselves, the available remedies, or the rules of decision by which the court adjudicate[s] either." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 407-08 (2010). Florida's forfeiture law is plainly substantive. Applied here, it bars Class Counsels' claim to a share of petitioners' contractual attorney fees, as there is no question that by excluding the 497 individual plaintiffs from the global class action settlement, Class Counsel voluntarily terminated their appointed representation of these plaintiffs before the event giving rise to contingency fees, i.e., the individual settlements.

In response to petitioners' state law defense in the district court, Class Counsel disavowed any claim under state law. Appellants' App. Doc. 344, at 11. Hence, from that point forward, the focus of the litigation concerned whether the use of federal equity power was proper in this instance, as an equitable

remedy.[34] The issue, thus, returned to whether the FIS created a common fund from which Class Counsel could demand an award of fees under the *Boeing* rationale.

The *Erie* conflict here occurs not so much because the court used equity power in a diversity proceeding per se, but because the court *expanded* equity power in a diversity proceeding. *Alyeska* did not establish a categorical rule for diversity cases,[35] but its instruction against the use of "roving" equity (421 U.S. at 260) and the fashioning of "drastic new rules" to fit "public policies involved in particular cases" (*id.* at 269) in federal question cases applies with greater force in a diversity proceeding.

In *In re Volkswagen*, the First Circuit drew a brighter line than *Alyeska,* rejecting use of inherent equitable authority to allocate fees in a diversity proceeding involving a class action settlement that produced no common fund. 692 F.3d at 16-17. The court began with the "basic premise" that attorney fee issues are considered substantive under *Erie*, "so state law principles normally govern the award of fees." *Id.* at 16. Next, the court distinguished this Court's

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[34] See *Guar. Tr. Co.* v. *York*, 326 U.S. 99, 104-05 (1945) and its progeny.

[35] See 421 U.S. at 259 n.31 ("[A]lthough the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule.") (citation omitted); see also *Montgomery Ward & Co., Inc.* v. *Pac. Indem. Co.*, 557 F.2d 51, 55-58 (3d Cir. 1977) (analyzing *Alyeska*'s impact on fee awards in diversity).

common fund cases as "rest[ing] on federal question jurisdiction, not diversity." *Id.* at 17. According to the First Circuit, "the basis of the award here is the agreement itself, a contract under state law, not a federal law[]" hence, "there is no basis to resort to these federal doctrines." *Id.*[36] The same logic applies here.

The Eleventh Circuit's merging of the common benefit doctrine into the common fund doctrine to support an equitable fee award from contractual fees in a diversity proceeding was error.

B. The decision below conflicts with *Boeing* and *Alyeska*'s limitations on the common fund doctrine

Boeing instructed: "The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense" and that "[j]urisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit." 444 U.S. at 478 (citing *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 392, 394 (1970)). This language establishes "[t]wo threshold requirements" for awarding common fund fees: "*first*, there must be a common fund, and *second*,

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[36] A similar bright line rule was suggested in *Nat'l Ass'n of Letter Carriers, AFL-CIO* v. *U.S. Postal Serv.*, 590 F.2d 1171 (D.C. Cir. 1978), where the court denied fees in a federal question case. The court recognized that "federal courts still have 'inherent (equitable) power' in a federal question case (not in diversity cases)"). *Id.* at 1176 (quoting *Alyeska*).

the fund must be under the court's supervision." 5 *Newberg* § 15:56. The Eleventh Circuit's award fails to meet either of these requirements. Nor does the award prevent unjust enrichment or spread the costs of litigation, as required by *Boeing*.

1. There is no common fund

"For a court to award a fee from a common fund, a common fund must exist." 5 *Newberg* § 15:56. Otherwise, "the common fund approach lacks its anchor and is foreclosed." *Applegate* v. *United States*, 52 Fed. Cl. 751, 760 (2002), *aff'd*, 70 F. App'x 582 (Fed. Cir. 2003). A common fund, according to *Boeing*, means an ascertainable recovery "for the benefit of persons other than" the lawyer or litigant requesting payment. 444 U.S. at 478.

Petitioners first objected to the lack of a common fund in the district court. In reply, Class Counsel argued that the individual settlements may be viewed as "minifunds" and the aggregate value treated as a common fund under the reasoning of *In re Air Crash Disaster*, 549 F.2d 1006. The district court made no finding of a common fund, but instead made an award solely because the settlements "occurred with the benefit of Class Counsel's [sic] effort on behalf of *the class*." App., *infra*, 18a (emphasis added). Remarkably, the court disregarded that the individual plaintiffs were excluded from the class action settlement.

Confronted with Eleventh Circuit precedent strictly applying *Boeing*,[37] the circuit decision below

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[37] See *Camden I Condo. Ass'n* v. *Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991), and *In re Home Depot Inc.*, 931 F.3d 1065 (11th Cir. 2019).

attempts to reconcile its merging of the MDL common benefit theory with the common fund doctrine by declaring the contractual attorneys' fees a common fund. App., *infra*, 10a ("Here, the 'common fund' was the fees generated by Individual Counsel in the FIS"). This finding squarely conflicts with *Boeing*'s definition of a common fund as a "fund for the benefit of persons other than himself (the attorney requesting the fee) or his client." 444 U.S. at 478. Moreover, the reasoning is detached from the district court's findings and offers no explanation for how to value such a fund for purposes of making an award.[38]

2. The district court lacked jurisdiction over the funds

The second threshold requirement for a common fund fee award—court supervision over the alleged fund—is also lacking. This requirement stems from the "'historic equity jurisdiction of the federal courts." *Boeing*, 444 U.S. at 478. Without it, a court lacks authority to "spread[] fees proportionally among those benefitted by the suit." *Id*.

The FIS were negotiated by private counsel with no Rule 23 involvement or oversight by the district court and no orders governing common benefit activities or private settlement negotiations and approvals. The FIS funds were not under the district court's control and, thus, the jurisdictional element for a common fund award under *Boeing* is lacking.

But the Eleventh Circuit avoided this issue by declaring the contractual fees as the common fund,

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[38] See *Gascho* v. *Glob. Fitness Holdings, LLC*, 822 F.3d 269, 283 (6th Cir. 2016) ("Despite *Boeing*'s guidance, the circuits have split on the most appropriate way to value settlement funds.").

and in doing so, shifted the focus to the district court's authority over those funds. First and foremost, this deepens the *Erie* conflict by underscoring the substantive nature of the fee award, bringing it squarely into the reasoning of the First Circuit in *In re Volkswagen*, 692 F.3d at 16-17 (finding no inherent federal fee authority where award arises from "a contract under state law"). Further, the circuit court's finding that the district court had "control over" these funds by virtue of the Transfer Agreement (Appellants' App. Doc. 390-1) and "the actions taken by the court after the settlement agreement was first filed" (App., *infra*, 10a) falls far short of the "jurisdiction" required by *Boeing*.

As provided in the Transfer Agreement, a portion of the contractual fees were "voluntarily" placed in escrow in a "firm trust account" by agreement of the parties. Further, the "actions" taken by the district court in response to Class Counsels' disruptive efforts—most notably the stay—were improper. "[I]t is only the settlement of the class action itself without court approval that Rule 23(e) prohibits." *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1140 (7th Cir. 1979). "[C]ourts oversee class-action settlements only because factors unique to the class-action context … call into question whether representatives' loyalties are in fact undivided." *Duhaime* v. *John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 1999). There was no Rule 23 oversight over these individual settlements. The "oversight" process here was a charade orchestrated by Class Counsel to delay the individual settlements long enough to allow Class Counsel to negotiate the global class action settlement.

3. There is no unjust enrichment or spreading of costs

As explained at length above, the Eleventh Circuit made no effort to anchor its decision in the avoidance of unjust enrichment, nor did the district court. Rather, the single goal was to compensate Class Counsel through the use of equity designed to promote the goals of the MDL device. This Court has never endorsed such unrestrained use of equity power. On the contrary it runs head-long into the Court's admonishments about "roving" authority to achieve policy objectives. See *Alyeska*, 421 U.S. at 260; *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 125 (2015) ("Congress has not granted us 'roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted'" (quoting *Alyeska*).

Moreover, even viewing the concept of unjust enrichment as between the attorneys, it simply does not exist here. More than $226,000,000 of fees were awarded to common benefit counsel for their work on the Chinese Drywall litigation. By any measure, they were well compensated. On the other side, petitioners were not "free-riders,"[39] as they negotiated and administered the FIS for their clients with no assistance from Class Counsel and provided the groundwork for the global class action settlement.

Finally, Class Counsels' actions to thwart the individual settlements forecloses a finding of unjust enrichment. See *Hobbs* v. *McLean*, 117 U.S. 567, 561

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[39] See *United States* v. *Tobias*, 935 F.2d 666, 668 (4th Cir. 1991), and *In re Nineteen Appeals*, 982 F.2d 603, 606 (1st Cir. 1992), recognizing that the label "free-rider" does not apply to attorneys who earn their fees.

(1886) ("We see no reason why [plaintiffs] should pay defendant, who, instead of aiding them in securing their rights, has been an obstacle and obstruction to their enforcement."); *Tobias*, 935 F.2d 666, 668 ("A party may not recover and try to monopolize a fund, but then, failing in the attempt, declare it a 'common fund' and obtain his expenses from those whose rightful share of the fund he sough to appropriate.").

C. The decision below conflicts with the "clear explanation" standard from *Hensley* v. *Eckerhart*

In *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), the Court established the standards applicable to fee proceedings, in particular the burden of proof for the mover and the adequacy of findings to support awarding fees to a prevailing party under 42 U.S.C. § 1988. While noting that there is "no precise rule or formula" and that a district court has broad discretion, the Court held that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates" and that the court must "provide a concise but clear explanation of its reasons for the fee award." 461 U.S. at 437. See also *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010) (explaining that even in "a matter that is committed to the sound discretion of a trial judge ... [i]t is essential that the judge provide a reasonably specific explanation for all aspects" of its determination because otherwise "adequate appellate review is not feasible").

The decision below fails this standard. First, Class Counsel merely submitted their lodestar schedules from the MDL and made no effort to differentiate work contributing to the global class

action settlement with work contributing to the FIS. Second, the district court refused to allow discovery and denied petitioners' request for a hearing. Third, the court failed to identify a fund, establish a baseline, and perform an analysis of the relevant factors influencing a fee award,[40] or to tether lodestar time submissions to work performed on remand contributing the FIS. Instead, the court for all purposes treated the FIS as an extension of the MDL fee proceeding—from which petitioners were barred by the Transfer Agreement. The only explanation by Judge Cooke about how the award was calculated was her rationale for modifying Judge Fallon's bottom-line fee split as between the attorneys. This skips the majority of the required fee allocation process and falls far short of the "concise but clear explanation" required by *Hensley*, 461 U.S. at 467.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[40] The percentage method in the Eleventh Circuit requires the setting of a benchmark based on the value of the settlement, followed by application of factors under *Johnson* v. *Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). See *Camden I Condo Ass'n, Inc.*, 945 F.2d at 775.

Respectfully submitted.

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NOVEMBER 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JUNE 9, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12100

MR. EDUARDO AMORIN, *et al.*,

Plaintiffs,

PARKER WAICHMAN, LLP, MILSTEIN JACKSON FAIRCHILD & WADE, LLP, WHITFIELD BRYSON & MASON, LLP, MRACHECK FITZGERALD ROSE KONOPKA THOMAS & WEISS, PA, ROBERTS AND DURKEE PA, LEVIN PAPANTONIO THOMAS MITCHELL RAFFERTY PROCTOR, PA,

Interested Parties - Appellants,

versus

TAISHAN GYPSUM CO., LTD., F.K.A. SHANDONG TAIHE DONGXIN CO., LTD., *et al.*,

Defendants,

ARNOLD LEVIN, STEPHEN J. HERMAN, RICHARD J. SERPE, PATRICK SHANAN MONTOYA, SANDRA S. DUGGAN,

Interested Parties - Appellees.

Appendix A

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:11-cv-22408-MGC

June 9, 2021, Decided
June 9, 2021, Filed

Before WILSON, ROSENBAUM, and HULL, Circuit Judges.

WILSON, Circuit Judge:

I.

This appeal concerns a discrete disagreement over attorneys' fees following a fractured multidistrict litigation (MDL) about defective Chinese drywall. A group of attorneys appointed by the MDL court (Class Counsel) were awarded common benefit costs and fees by the district court. The award comes out of fees received by another group of attorneys (Individual Counsel) who negotiated private settlements for 497 Florida plaintiffs.[1] The order awarded Class Counsel 45% of the total fees

1. Class Counsel is a generic term that encompasses numerous attorneys involved in the overarching litigation. For purposes of this appeal, Class Counsel includes Arnold Levin, Stephen J. Herman, Richard J. Serpe, Patrick S. Montoya, and Sandra S. Duggan. Individual Counsel includes the firms Parker Waichman LLP; Milstein, Jackson, Fairchild & Wade LLP; Whitfield, Bryson & Mason LLP; Roberts & Durkee, PA; Levin Papantonio Thomas Mitchell Rafferty Proctor PA; and Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss P.A.

received by Individual Counsel for the Florida Individual Settlements (FIS). Individual Counsel appealed. Because the district court did not abuse its discretion in awarding these fees, we affirm.

II.

This MDL arose out of thousands of complaints filed against Chinese drywall manufacturers and other companies that were involved in the production and sale of the drywall. The plaintiffs, primarily from Florida and Louisiana, alleged extensive property damage and some physical ailments caused by the defective drywall. The case was transferred to the Eastern District of Louisiana (the MDL court) for consolidated pretrial proceedings before Judge Fallon.

In 2018, 1,734 Florida cases from the MDL were remanded to Judge Cooke in the Southern District of Florida (SDFL) for further proceedings. Individual Counsel subsequently negotiated an agreement with a group of defendants that offered nearly 500 of the Florida plaintiffs an individual settlement to resolve their claims. Class Counsel and Individual Counsel entered an agreement to litigate any claims for common benefit fees in the SDFL. The defendants made a total payout of more than $40 million dollars to the 497 claimants who accepted the FIS. The claimants paid attorneys' fees to Individual Counsel pursuant to private contingency fee agreements.

In August 2019, Class Counsel moved for an award of common benefit costs and/or fees from the proceeds

of the FIS. Arguing that a substantial amount of their foundational work was used to secure the FIS, Class Counsel claimed that they were entitled to 20% of the total settlement. Individual Counsel opposed the motion, arguing that Class Counsel was not entitled to any fees or costs from the FIS.

Meanwhile, the MDL court approved a global settlement between the same defendants and the remaining class members in January of 2020. The plaintiffs involved in the FIS were not a part of this settlement. The MDL court awarded Class Counsel 60% of the fees obtained in the global settlement.

Back in the SDFL, Class Counsel amended their award motion to request 60% of the attorneys' fees of the FIS—consistent with the MDL court's award. In May 2020, the district court partially granted Class Counsel's amended motion for a common benefit award. The district court found that the settling claimants benefitted from Class Counsel's work in the MDL court and in the global settlement.[2] Accordingly, the district court awarded Class Counsel 45% of all fees obtained by Individual Counsel. Individual Counsel appealed.

2. The FIS included a Most Favored Nations (MFN) clause that would have increased each plaintiff's payout if a more valuable settlement were reached with any other Florida class plaintiff. The MFN clause ultimately increased the FIS plaintiffs' recovery by more than $12 million.

III.

We have jurisdiction over this appeal pursuant to the collateral order doctrine as the amount of the disputed fees is fixed, the district court's allocation of that amount is completely separate from the merits of the underlying action, and the appeal is unaffected by further district court proceedings.[3] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S. Ct. 669, 66 L. Ed. 2d 571 (1981).[4]

A district court's award of attorneys' fees is reviewed for abuse of discretion. *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 770 (11th Cir. 1991). An abuse of discretion occurs if the district court "applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1068 (11th Cir. 2014) (citation and quotation marks omitted). "The district court has great latitude

3. One Florida plaintiff, M.E., did not accept the FIS settlement and was prevented from joining the global settlement. Class Counsel argues that the merits of M.E.'s claims remain pending as she actively litigates her claims individually, depriving us of appellate jurisdiction. However, the district court docket indicates that M.E. is no longer represented by Individual Counsel, and the resolution of her claims and attorney's fees is completely separate from the common benefit fees dispute at issue in this appeal.

4. Accordingly, the motion to dismiss for lack of appellate jurisdiction, which was carried with the case, is denied.

in formulating attorney's fees awards subject only to the necessity of explaining its reasoning so" the decision can be reviewed. *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1293 (11th Cir. 1999) (internal quotation mark omitted). "A district court's order on attorney's fees must allow meaningful review—the district court must articulate the decisions it made, give principled reasons for those decisions, and show its calculation." *In re Home Depot Inc.*, 931 F.3d 1065, 1089 (11th Cir. 2019) (internal quotation marks omitted). "The level of specificity required . . . is proportional to the specificity of the fee opponent's objections." *Id.*

IV.

Individual Counsel argue that common benefit fees are only appropriate when there is a "common fund" from which to award the fees. *See* William B. Rubenstein, *Newberg on Class Actions* § 15:56 (5th ed. 2021) (describing examples of what is and is not a common fund). They contend that the award is inappropriate here because there is no common fund, nor is there judicial supervision of the alleged fund. They argue that the court therefore erred by treating the FIS as a common fund from which it can allocate the costs of litigation among those who benefitted from the suit.

Individual Counsel further contend that there was no unjust enrichment or free-rider problem here, as those doctrines are about *plaintiffs* as free riders, not attorneys. *See* Rubenstein, § 15:61 (discussing unjust enrichment in common benefit cases). And they argue that there is no

equity issue because Class Counsel have already been heavily compensated for their common benefit work by the MDL court. Alternatively, Individual Counsel argue that even if a common benefit fee was appropriate here, the order does not allow for meaningful review and the percentage standard for calculating an award was misapplied because the court did not analyze each *Johnson* factor. *See Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[5]

Class Counsel argue that the FIS need not be a class settlement for a common benefit-like award to be proper. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167, 59 S. Ct. 777, 83 L. Ed. 1184 (1939) ("[W]hen such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation."); *see also In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1016 (5th Cir. 1977) (holding that "the district court had the power to direct that the [court-appointed Plaintiffs'] Committee and its counsel be compensated and that requiring the payment come from other attorneys was permissible.").

They argue that common benefit fees—whether for class actions or MDLs—are based on equity and quantum meruit. *See* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 375-76 (2014).

5. Decisions of the Fifth Circuit predating September 30, 1981, are binding on us. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

Because it was Class Counsel who established jurisdiction over the defendants, obtained default judgments that were essential to establishing liability, and prepared and filed the complaints, among other things, Class Counsel claim that the award was appropriate here to ensure equity.

Finally, Class Counsel argue that the 45% award was reasonable, and the district court carefully applied the *Johnson* factors, including "the time and labor required" and the "novelty and difficulty of the questions involved." *See Johnson*, 488 F.2d at 717-19.

We affirm the fee order. The district court did not abuse its discretion in awarding Class Counsel 45% of the fees earned by Individual Counsel in the FIS.

"[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 (1980). "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.*

Recognizing the purpose and importance of these awards, our precedent maintains that common benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements. *See, e.g.*, *Fla. Everglades*, 549 F.2d at 1019 ("Because the payment was assessed against the attorneys this case does not quite fit in the equitable fund cases. It need not precisely fit."). In

Florida Everglades, the former Fifth Circuit explained that the "[d]etermination of whether a fund exists is a combination of traditional and pragmatic concepts centering around the power of the court to control the alleged fund." *Id.* at 1018.

Particularly in complex litigation, courts have broad managerial power that includes significant discretion in awarding fees. *See id.* at 1012. The panel in *Florida Everglades* explained the "much larger interests" that arise in MDL cases—not only the sheer number of plaintiffs and claims involved but also the importance of effectively and efficiently managing the crushing caseloads of federal courts. *Id.* Thus, the "broad grant of authority" awarded to trial courts when consolidating cases necessarily includes the ability to compensate appointed counsel that carry "significant duties and responsibilities." *Id.* at 1013-14, 1016.

Individual Counsel cite to cases from other circuits to argue that this case does not have any common fund that would allow for this type of award because the FIS consists of *individual* settlements subject to their own contingency fee agreements.[6] But those cases involve factually different scenarios. In many of those cases, the defendants—not the class members—were paying the fees, which made them not "common fund" cases at all. *See generally In re Home Depot*, 931 F.3d at 1079 ("Thus, the key distinction between common-fund and

6. *See, e.g.*, *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 526 n.10 (1st Cir. 1991); *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 208 (2d Cir. 1987).

fee-shifting cases is whether the attorney's fees are paid by the client (as in common-fund cases) or by the party (as in fee-shifting cases).").

Here, the "common fund" was the fees generated by Individual Counsel in the FIS. The district court had control over the funds pursuant to the agreement of the parties to litigate common benefit fees in the SDFL and the actions taken by the court after the settlement agreement was first filed. Awarding a portion of these fees to Class Counsel was therefore within the district court's power.

The district court rightly acknowledged that Individual Counsel worked hard to bring about the FIS. But their work did not exist in a vacuum. They benefitted from the decade of foundational work that Class Counsel exerted in this groundbreaking MDL, which involved evasive defendants in China, complex jurisdictional challenges requiring two trips to the Fifth Circuit, decertification attempts, and liability determinations. That Class Counsel has otherwise been compensated for this work does not prevent them from continuing to reap the rewards of their efforts. Moreover, preventing appointed counsel from recovering awards when their work leads to massive recoveries down the road would make it harder for courts to find capable and competent lawyers to take on that work in the future. *See Fla. Everglades*, 549 F.2d at 1016.

After considering the efforts and outcomes of each group of attorneys at each stage of the litigation, the district court awarded a reasonable percentage of the

fees as common benefit fees. *See Camden I Condo. Ass'n*, 946 F.2d at 774 ("There is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case.").

It is appropriate for courts to consider the *Johnson* factors when determining the proper percentage. *Id.* at 775.[7] The district court did that here. In particular, the order contemplates the "time, effort, and skill" that Individual Counsel exerted in the FIS negotiations. It considers the specific contributions of Class Counsel including "discovery, travel (both domestic and foreign), motion practice, conferences, appeals, court appearances, and settlement negotiations." The order also reflects Judge Cooke's appreciation for the novelty and difficulty of the case, as well as the amount of money involved. Though the court found the MDL court's reasoning to be "persuasive and instructive," Judge Cooke still exercised independent judgment—considering the facts of the cases before her and awarding a lower percentage of fees because of the significant efforts of Individual Counsel. This was not an abuse of discretion.

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7. The *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d at 717-19.

V.

Lastly, Individual Counsel argue that they were denied due process because the district court denied discovery, refused to hold a hearing, and adopted findings from the MDL court's proceedings where Individual Counsel were not permitted to participate. We are not persuaded by this argument.

"Due process, in its most basic form, still requires notice and an opportunity to be heard." *S.E.C. v. Torchia*, 922 F.3d 1307, 1316 (11th Cir. 2019). Both were afforded to Individual Counsel here. Individual Counsel were aware of Class Counsel's request for an award. The court permitted numerous briefs and documentary evidence to be filed, providing a fair opportunity to be heard. A hearing was not required. *See Miles v. Sampson*, 675 F.2d 5, 9-10 (1st Cir. 1982) (noting that while a hearing on attorneys' fees may be helpful, "no case holds that a hearing is mandatory"). Moreover, while the district court relied on the MDL court's findings, it still considered the facts and realities of the case at hand—adjusting the award to account for the effort and type of work completed by Individual Counsel. This was not a due process violation, nor an abuse of discretion. So we affirm.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MAY 22, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-22408-CIV-COOKE/GOODMAN

EDUARDO AND CARMEN AMORIN, *et al.*,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

TAISHAN GYPSUM CO., LTD. F/K/A SHANDONG
TAIHE DONGXIN CO., LTD, *et al.*,

Defendants.

ORDER

THIS MATTER is before the Court on Class Counsel's Amended Motion for an Award of Common Benefit Costs and/or Fees Out of the Proceeds of the Florida Individual Settlement (the "Amended Motion") (ECF No. 384), filed on March 10, 2020. Class Counsel[1] request 60% of the attorneys' fees charged by Individual Counsel to their

1. "Class Counsel" consist of Attorneys Arnold Levin, Stephen J. Herman, Richard J. Serpe, Patrick S. Montoya, and Sandra L. Duggan. ECF No. 330-1 at 1, n.3.

Florida *Amorin* clients who participated in the Florida Individual Settlements ("FIS"). ECF No. 384. In response, Individual Counsel[2] argue the Court should award $0 to Class Counsel, and, in the alternative, no more than 5% of the recovery for fees and 1% of the recovery for costs. *See* ECF No. 390. For the following reasons, the Court will **GRANT *in part*** the Amended Motion and award Class Counsel 45% of the attorneys' fees Individual Counsel received from the FIS.

BACKGROUND

On September 26, 2014, Judge Fallon certified the *Amorin* class of homeowners with defective drywall manufactured by the Taishan Defendants and appointed Class Counsel to oversee the prosecution of the litigation. ECF No. 330-1 at 6. On June 7, 2018, this matter was remanded to this Court from the Eastern District of Louisiana (the "MDL Court"). ECF No. 13. Subsequently, Individual Counsel negotiated an agreement with Defendant Taishan that offered 498 *Amorin* class members who had properties in Florida to individually settle their claims. *See* ECF No. 187-2; ECF No. 315 at 10.

Individual Counsel announced these Florida Individual Settlements (the "FIS") on March 7, 2019, through the

2. "Individual Counsel" consist of (i) Parker WaichmanLLP; (ii) Milstein Jackson Fairchild & Wade LLP; (iii) Whitfield Bryson & Mason LLP; (iv) Mrachek Fitzgerald Rose Konopka Thomas & Weiss PA; (v) Roberts and Durkee PA; and (vi) Levin Papantonio Thomas Mitchell Rafferty Proctor PA. *See* ECF No. 390 at 2, n.1; ECF No. 396(order granting Motion for Permission to File Notice of Joinder to Opposition).

filing of a Joint Notice of Settlement Agreement with the MDL Court. *Id.* On March 14, 2019, Class Counsel filed a Motion for an Order to Protect the Florida *Amorin* Class, arguing that "Settling Counsel and Taishan categorize[d] [the FIS] as individual settlements only, so as to avoid the procedural safeguards afforded to class settlements under Rule 23." ECF No. 192 at 6. On March 19, 2019, the Court entered an order striking the Notice of Settlement and staying execution of the settlement agreement until further order of the Court. ECF No. 196. After a hearing on June 5, 2019, the Court lifted the stay as to the FIS. ECF No. 313. Defendant Taishan made a total payout of $40,744,712.88 to the claimants who accepted the FIS.[3] *See* ECF No. 400. The claimants paid attorneys' fees to Individual Counsel via private contingency fee agreements. *Id.*

On August 8, 2019, Class Counsel filed a Motion for an Award of Common Benefit Costs and/or Fees Out of the Proceeds of the Florida Individual Settlement. ECF No. 320. On August 26, 2019, Class Counsel filed a corrected version of that Motion (the "Corrected Motion") to reflect a revised analysis by Philip A. Garrett, C.P.A. *See* ECF No. 330-1. Class Counsel requested fees and costs amounting to "20%

3. Taishan paid $25,356,999.83 as the Formula Amount Component to the claimants who accepted the FIS plus an additional sum of $2,535,700.22 as the Attorneys' Fees Component, for a total payout of $27,892,700.05. *See* ECF No. 400. Under the Most Favored Nations Buyout Agreement, Taishan paid $11,683,648.06 to the accepting claimants plus the additional sum of $1,168,364.78 in attorney fees, for a total payout of $12,852,012.83. *Id.*

of the total funds paid in the FIS." ECF No. 330-1 at 4. Individual Counsel opposed, arguing Class Counsel is not entitled to any fees or costs from the FIS. ECF No. 337-1. In their reply in support of the motion, Class Counsel noted that this Court could wait for the MDL Court to enter its order on the fairness of the Class Settlement, including an award of attorneys' fees, "before delving into the factually involved analysis required by *Camden I*." ECF No. 344 at 15.

On January 10, 2020, Judge Fallon, presiding over the MDL Court, issued an order granting final approval of the class settlement, certifying a settlement class, and awarding attorneys' fees and costs (the "MDL Order"). ECF No. 368-1. Judge Fallon awarded 19% of the settlement fund in attorneys' fees. *Id.* Common benefit counsel received 60% of the fee award and contract counsel received 40% of the fee award. *Id.*

On March 10, 2020, Class Counsel filed the Amended Motion, requesting this Court adopt Judge Fallon's reasoning outlined in the MDL Settlement Order and award Class Counsel "60%[4] of the attorneys' fees charged by the Settling Attorneys to their Florida *Amorin* clients who participated in the FIS." ECF No. 384 at 2. Individual Counsel opposes the Amended Motion.[5]

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4. The Court notes that the Amended Motion effectively decreases the amount of fees requested by $371,674.65.

5. Both Class and Individual Counsel have asked the Court to set this matter for oral argument and state generally that the Court would benefit from such a hearing. As this issue has been fully briefed on both the Corrected Motion (ECF No. 330) and the Amended Motion (ECF No. 384), the Court does not find oral

Appendix B

DISCUSSION

Class Counsel asks the Court to award them 60% of the attorneys' fees received from the FIS, which they assert "adopts the reasoning of the MDL Court, and is based on the evidence presented in Class Counsel's fee petition." ECF No. 384 at 2. Individual Counsel argues that Class Counsel are not entitled to a portion of the fees received in the FIS because 1) there is no unjust enrichment to warrant use of the common benefit doctrine, 2) Class Counsel forfeited their right to fees under Florida law, and 3) forfeiture of fees is proper under the "unclean hands" doctrine. ECF No. 337-1. Further, Individual Counsel argue that if the Court grants the fee request, it cannot rely on the MDL Order because such reliance would violate Individual Counsel's Due Process rights and the Eleventh Circuit's requirement that an order awarding attorneys' fees must contain a "level of specificity . . . proportional to the specificity of the fee opponent's objections." ECF No. 390 at 2 (citing *In re Home Depot Inc.*, 931 F.3d 1065, 1089 (11th Cir. 2019)). For the following reasons, the Amended Motion is granted in part.

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argument necessary. *See* L.R. 7.1(b) ("The Court in its discretion may grant or deny a hearing [for oral argument] as requested, upon consideration of both the request and any response thereto by an opposing party.")

Appendix B

I. CLASS COUNSEL ARE ENTITLED TO COMMON BENEFIT FEES

Individual Counsel describe Class Counsel's fee request as a "misguided attempt to invoke federal equity authority to recover a share of contractual contingency fees – not a common fund recovery – paid to private attorneys who negotiated and continue to administer hundreds of individual, non-Rule 23, settlements." ECF No. 337-1 at 1. While the Court is mindful that the FIS is not a class settlement, it finds that these settlements between Defendant Taishan and 497 *Amorin* class members occurred with the benefit of Class Counsel's efforts on behalf of the class.

The Supreme Court has "recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Court noted that the common benefit doctrine "rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* at 478. In a decision binding on this Court, the Fifth Circuit reasoned that "if lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation." *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1016 (5th Cir. 1977).

First, Individual Counsel contend there is no unjust enrichment because they "earned these fees through eighteen months (and counting) of complex negotiations, litigating (against Class Counsel), and administering the settlements." ECF No. 337-1 at 2. While it may be true that Individual Counsel performed important work leading to the FIS, Individual Counsel do not contest that Class Counsel performed work on behalf of the class, including the FIS claimants, since they were appointed as Class Counsel in 2014.As Class Counsel notes, they effectuated service on and established jurisdiction over Taishan, obtained default judgments against Defendants, "certified a litigation class, which as a result of the default judgments established liability for all *Amorin* class members (including every Plaintiff in the FIS), [and] proved to this Court that the rulings obtained in the MDL were correct and should be adopted in this tribunal." ECF No. 344 at 2. Class Counsel's efforts on behalf of the class brought Taishan to the bargaining table, and the Common Benefit doctrine lends to appropriate compensation for those efforts.

Next, Individual Counsel argue that if this Court awards fees to Class Counsel, it must "utilize the lodestar methodology, as under Florida law (where a contract is terminated through no fault of a lawyer) or under federal common law in for fee-shifting claims." ECF No. 337-1 at 17. The Court disagrees. The Eleventh Circuit has held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class. The lodestar analysis shall continue to be the applicable method used

for determining statutory fee-shifting awards." *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

This is not a fee-shifting case. In *Home Depot*, the Eleventh Circuit stated that "the key distinction between common-fund and fee-shifting cases is whether the attorney's fees are paid by the client (as in common-fund cases) or by the other party (as in fee-shifting cases)." *In re Home Depot Inc.*, 931 F.3d 1065, 1079 (11th Cir. 2019). The court held "that the constructive common fund does not apply when the agreement provides that attorney's fees will be paid by the defendant separately from the settlement fund, and the amount of those fees is left completely undetermined." *Id.* at 1081. Here, the attorneys' fees are primarily paid by the claimants. *See* ECF No. 400. Unlike the fee-shifting agreement in *Home Depot*, the amount Taishan paid claimants "towards payment of Settling Claimants' attorneys' fees" was not "left completely undetermined." To the contrary, Taishan agreed to pay each claimant exactly 10% of their individual recovery towards payment of their attorneys' fees. ECF No. 400 at 2.

II. CLASS COUNSEL HAVE NOT FORFEITED THEIR RIGHTS TO FEES

Individual Counsel argue that Class Counsel's "fee request is barred by Florida's law on forfeiture of fees." ECF No. 337-1 at 1. The Florida Supreme Court has held that "when an attorney withdraws from representation [in a contingency fee case] upon his own volition, and

the contingency has not occurred, the attorney forfeits all rights to compensation." *Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994). However, Class Counsel did not have contingency fee agreements with the FIS plaintiffs nor did they withdraw from representation. While Individual Counsel claim that "it is indisputable that Class Counsel terminated their representation of the Eligible Plaintiffs prior to execution of [the FIS]," Class Counsel does, in fact, dispute that they terminated their representation. *See* ECF No. 344 at 11. Individual Counsel notified Class Counsel of their intent to represent their clients individually and separate from the other *Amorin* Class members and that Class Counsel were not to represent those clients upon remand. *See* ECF No. 344 at 11; ECF No. 40 at 22 (Mr. Faircloth informing the Court of his position that "Mr. Montoya has no authority to speak for Parker Waichman's clients"). Therefore, Individual Counsel's reliance on *Faro* to argue that Class Counsel forfeited their right to compensation is misplaced.

Individual Counsel also argue that Class Counsel have forfeited their entitlement to fees from the FIS based on the "unclean hands" doctrine because Class Counsel 1) "deliberately avoided formal authority to avoid Rule 23 scrutiny" and 2) breached their fiduciary duty to the 498 *Amorin* class members eligible for FIS. ECF No. 337-1 at 10.

First, Individual Counsel argue that Class Counsel's "intentional avoidance of formal authority…exposed all plaintiffs to predictable risks [and] although the Global Settlement may prevent those risks from materializing,

there is no denying that the rights of individual litigants would have been better served under a leadership regime respecting the disparity of the claims and the limitations of counsel." ECF No. 337-1 at 13. But, the Court cannot find Class Counsel has unclean hands simply because Individual Counsel believes Class Counsel should have taken a different approach to the litigation. Individual Counsel does not cite to any authority in support of this position. Moreover, there is no evidence that Class Counsel avoided formal authority. To the contrary, Class Counsel were appointed to represent the class in 2014, and upon remand from the MDL, this Court appointed Mr. Montoya as interim lead counsel. *See* ECF No. 40 at 22.

Second, Individual Counsel argue that Class Counsel breached their fiduciary duty to the 498 *Amorin* class members by attempting to delay execution of the FIS and negotiating a global settlement that excluded the FIS claimants. ECF No. 337-1 at 2. Some courts have found fee forfeiture appropriate where attorneys act in bad faith, such as by failing to disclose conflicts of interest to the class and the court. *See Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1238–39 (S.D. Fla. 2006) (finding partial forfeiture appropriate and reducing attorneys' fees and incentive award by 25%, where the attorneys seeking the award "acted in 'bad faith' by failing to fully disclose their fee splitting agreement … and by filing their affidavits … without making appropriate disclosures"). Fee forfeiture is an equitable remedy that "requires careful consideration of all the relevant circumstances." *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 102 (2d Cir. 2003) (declining to require counsel to forfeit fees where they

were placed "in a position of potential conflict" of interest but acted with "utmost good faith.").

The Court does not agree with Individual Counsel's assertion that "for all practical purposes, Class Counsel kicked the Eligible Plaintiffs out of the *Amorin* Class." *See* ECF 337-1 at 16. Individual Counsel chose to settle their clients' claims individually and outside of the class settlement. Moreover, the FIS claimants were able to increase their recovery through the global settlement's impact on the Most Favored Nations("MFN") clause. *See* ECF No. 400 at 4. The record does not support a finding that Class Counsel breached their fiduciary duty to the class or otherwise acted in bad faith. Accordingly, the Court cannot find that Class Counsel have forfeited their entitlement to fees under the "unclean hands" doctrine.

III. DIVISION OF FEES

Having determined that Class Counsel are entitled to common benefit fees, the Court must now determine what percentage of the fees received by Individual Counsel should be awarded to Class Counsel. The Eleventh Circuit has held that the following factors can be used to evaluate a request for a percentage fee award in common fund cases:

> (1) the time and labor required;
> (2) the novelty and difficulty of the questions involved;
> (3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and the length of the professional relationship with the client;
(12) awards in similar cases.

Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772-775 (11th Cir. 1991) (citing *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974)). These factors are not exclusive, and "in most instances, there will also be additional factors unique to a particular case which will be relevant to the district court's consideration." *Id.* at 775.

Class Counsel addresses seven of the *Camden* factors in their Corrected Motion, including the time and labor required, the novelty and difficulty of the issues, the requisite skill of the attorneys, preclusion of other employment, and the results obtained. *See* ECF No. 330-1 at 13-21. Considering all factors presented in this case, the Court finds reasonable a common benefit fee award of 45% of the fees received in the FIS.

Class Counsel outline the time-consuming labor they conducted for the benefit of all plaintiffs since January

2014, including over 30 depositions of parties and third parties. *See* ECF No. 330-1 at 14. Class Counsel submitted the affidavit of Philip A. Garrett, C.P.A., the court-appointed CPA in the MDL Court, and a declaration made under the penalty of perjury by Patrick Montoya and Sandra Duggan, who are members of Class Counsel. ECF Nos. 330-2; 320-1. Class Counsel submit that since January 2014, the effort toward this litigation "consumed over 104,540 hours by attorneys with a lodestar value of $71,906,164.00." ECF No. 330-1 at 16. This arduous litigation is also thoroughly discussed in the MDL Order.

Individual Counsel does not dispute that Class Counsel conducted the work described. Rather, they argue that this Court lacks authority to award what they describe as "supplemental" fees. While Individual Counsel do not make any specific objections to Class Counsel's *Camden* analysis, Individual Counsel state that they "expressly challenge the lodestar alleged by Class Counsel as including excessive, redundant and unnecessary time and expenses." ECF No. 337-1 at 18. Even considering this general objection, the Court finds Class Counsel exerted a great deal of time and labor that directly benefited the FIS claimants, and this factor weighs heavily in favor of the fee award here.

Class Counsel also claim they were precluded from taking on other cases because of the time spent on this litigation. Judge Fallon found that "there is no evidence to suggest that counsel were precluded from other employment by having accepted responsibilities inherent in this case." ECF No. 368-1 at 63. This Court agrees.

However, the Court acknowledges that Class Counsel undertook the substantial risk of litigating this case on a contingency basis. Such risk included paying out-of-pocket expenses and "devot[ing] three partners to this litigation virtually full time" without guarantee they would be reimbursed. *See* ECF No. 330-1 at 23.

The Court also finds that the results achieved in the FIS support the fee award in this case. While the Court acknowledges that Individual Counsel negotiated and administered the FIS, it would be impractical to find that these results were obtained without any benefit from the years of litigation conducted by Class Counsel leading up to the FIS. Additionally, FIS claimants increased their total recovery by $12,852,012.83 when they "liquidated their MFN rights based on the approximate anticipated value of comparable claims in the global settlement." ECF No. 400 at 4. The Court agrees with Class Counsel that their "ability to bring a Chinese corporation to the bargaining table to resolve a product liability action in the United States represents an outstanding result." ECF No. 330-1 at 20.

Class Counsel asks this Court to award them 60% of the attorneys' fees received based on the reasoning in the MDL Order. Individual Counsel argue that Due Process and the Eleventh Circuit's "specificity" requirement for fee awards prevents the Court from adopting the MDL Order in ruling on the instant motion. Alternatively, Individual Counsel argues that if the Court relies on the MDL Order, it should find that the order "actually defeats Class Counsel's request for *any* fees from the individual

settlements by closing the chapter on Chinese Drywall common benefit fees." ECF No. 390 at 2 (emphasis in original).

The MDL Order applied the blended method to calculate the attorneys' fees to be awarded. First, Judge Fallon determined the value of the benefit claimants received and assigned 19% as an initial benchmark percentage. Then, Judge Fallon determined the benchmark percentage did not need to be adjusted in light of the *Johnson* factors. Finally, he found the fee was reasonable upon conducting a lodestar analysis. Of those fees awarded, Judge Fallon determined it was appropriate that Individual Counsel received 40%, recognizing that they "generally performed significant works for their clients" but that the work performed "can be done—and usually is done—by non-lawyers working under the supervision and direction of attorneys." ECF No. 368-1 at 67. Conversely, Judge Fallon noted that Class Counsel performed "discovery, travel (both domestic and foreign), motion practice, conferences, appeals, court appearances, and settlement negotiations." *Id.* at 66. Accordingly, he concluded that Class Counsel were entitled to 60% of the attorneys' fees awarded. *Id.*at 67. The Court finds Judge Fallon's reasoning persuasive and instructive.[6]

6. The Court notes that Individual Counsel argue that "basic due process forbids the use of judicial findings against a party denied the right to be heard." ECF No. 390 at2. As Individual Counsel filed an extensive opposition to both the Corrected Motion and the Amended Motion, the Court is satisfied that Individual Counsel have had ample opportunity to be heard.

Appendix B

Individual Counsel's argument that the MDL order "defeats Class Counsel's request for *any* fees from the individual settlements by closing the chapter on Chinese Drywall common benefit fees" is without merit. *See* ECF No. 390 at 2. The fees awarded in the MDL Order were for a percentage of the total benefit received by those claimants, and not an hourly payment for the work performed. Judge Fallon found the fees awarded to Class Counsel in that matter reasonable under the circumstances of that settlement, which included the amount recovered in the global Class Settlement and the fact that each claimant would not receive the funds necessary to completely remediate their property. The Court agrees with Class Counsel that "there is nothing in the record to suggest that Judge Fallon ruled that common benefit counsel have already been compensated for their efforts in the remanded litigation." ECF No.391 at 4.

However, the Court disagrees with Class Counsel's contention that awarding 60% to Class Counsel "adopts the reasoning of the MDL Court." Such an outcome would completely disregard the time, effort, and skill Individual Counsel exerted on the FIS negotiations. While Class Counsel handled the settlement negotiations leading to the global Class Settlement—which Judge Fallon considered in concluding that Class Counsel should receive 60% of the fees awarded—Individual Counsel handled the settlement negotiations leading to the FIS. Class Counsel does not contest this distinction. In fact, they admit they did not know of the FIS until Individual Counsel filed the Notice of Settlement Agreement in the MDL. *See* ECF No. 344 at 7. Accordingly, the Court's fees determination accounts

for what Individual Counsel describe as "eighteen months (and counting) of complex negotiations, litigating (against Class Counsel), and administering the settlements." ECF No. 337-1 at 2. As a result, the Court finds Class Counsel is entitled to 45% of the total fees (paid by both Taishan and clients) received by Individual Counsel from the FIS.

CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** that Class Counsel's Amended Motion for an Award of Common Benefit Costs and/or Fees Out of the Proceeds of the Florida Individual Settlement (ECF No. 384) is **GRANTED *in part*** and Class Counsel are awarded 45% of the total fees (paid by both Taishan and clients) received by Individual Counsel from the FIS.

DONE and ORDERED in chambers, at Miami, Florida, this 22nd day of May 2020.

/s/_____
MARCIA G. COOKE
United States District Judge

APPENDIX C — ORDER DENYING REHEARING AND REHEARING EN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED, AUGUST 5, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12100-GG

D.C. Docket No. 1:11-cv-22408-MGC

MR. EDUARDO AMORIN, *et al.*,

Plaintiffs,

PARKER WAICHMAN, LLP, MILSTEIN JACKSON FAIRCHILD & WADE, LLP, WHITFIELD BRYSON & MASON, LLP, MRACHECK FITZGERALD ROSE KONOPKA THOMAS & WEISS, PA, ROBERTS AND DURKEE PA, LEVIN PAPANTONIO THOMAS MITCHELL RAFFERTY PROCTOR, PA,

Interested Parties-Appellants,

versus

TAISHAN GYPSUM CO., LTD., F.K.A. SHANDONG TAIHE DONGXIN CO., LTD., *et al.*,

Defendants,

Appendix C

ARNOLD LEVIN, STEPHEN J. HERMAN,
RICHARD J. SERPE, PATRICK SHANAN
MONTOYA, SANDRA S. DUGGAN,

Interested Parties-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, ROSENBAUM, and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

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