No. 21-666

In the Supreme Court of the United States

PARKER WAICHMAN, LLP, ET AL., PETITIONERS,

v.

ARNOLD LEVIN, ET AL., RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After years of MDL litigation, where class counsel prosecuted the claims of class members in both the transferee and transferor courts, does a transferor court have authority to award a common benefit fee to class counsel to be deducted from the contractual fees paid to individual counsel for certain class members whose cases settled after remand?

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INTRODUCTION

This is a discrete fee disagreement between two groups of attorneys at the tail-end of complex and protracted *Chinese Drywall* MDL proceedings. A small subset of individual counsel (3 out of 78) representing plaintiffs who were members of a certified class are challenging the authority of federal courts to award common benefit attorneys' fees to class counsel, who dutifully litigated plaintiffs' claims for over a decade – from inception through case resolution – in both the transferee and transferor courts. Importantly, this matter does not impact any claimants. All plaintiffs, including those represented individually by both groups of attorneys, have been compensated.

Petitioners completely ignore the fact that their clients were members of a certified class. The class continued to be certified on remand, and respondents continued to act as class counsel for them after the damages aspects of their claims against the Chinese defendants were remanded for individualized adjudication. Petitioners do not suggest, nor could they, that there exists a circuit split or any other serious question regarding the authority of a federal court to award class counsel fees. See Fed. Rule Civ. P. 23(h).

Yet even in the non-class context, the authority of a district court to award common benefit fees in MDLs is well-established. Indeed, petitioners themselves expressly agreed that the transferor court would have authority to adjudicate a request

for an award of common benefit fees out of the individual settlement funds at issue.[1] Dissatisfied with the result, petitioners now seek a writ of certiorari. They fail, however, to establish a compelling reason to grant the writ, as set forth in Rule 10. There is no conflict between the decision of the court below and any other circuit or this Court regarding the Questions Presented by petitioners, and there has been no departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Specifically, petitioners dispute a common benefit fee award to 19 law firms whose efforts benefited both the lawyer-petitioners and their clients who opted to settle their cases after they were remanded from the MDL court and before a global settlement was reached. These cases were filed by class counsel in the first instance in the transferor court[2] and litigated by class counsel in the MDL court and on remand for many years. Petitioners' continuing efforts to challenge the common benefit fee award to class counsel is hardly surprising. They have a long history of engaging in protracted fee dispute tactics, resulting in what the MDL presiding judge, the Honorable Eldon E. Fallon, described as "havoc and needless delay." MDL R. Doc. 21168 at 23.

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[1] FLSD R. Doc. 390-1. The individual settlements are referred to collectively as the "Florida Individual Settlement" or the "FIS."

[2] See *Amorin, et al. v. Taishan Gypsum Co., Ltd. f/k/a Shandong Taihe Dongxin Co., Ltd.*, No. 2:11-cv-22408 (S.D. Fla.) (FLSD R. Doc. 1).

Previously, petitioners contested the split of attorneys' fees awarded from multiple non-Chinese defendant settlements, and in doing so they created "a second, unnecessary litigation," in violation of *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), which lasted two years and involved "unnecessary proceedings," "unnecessary written discovery," and "pointless depositions." *Id.* At one point, petitioners moved to disqualify the court-appointed fee committee,[3] and thereafter unsuccessfully sought mandamus relief in the Fifth Circuit Court of Appeals.[4] Thus, their current sounding of an alarm on perceived run-away common benefit fee awards and slippery slopes should be seen for what it is: just another bid to avoid compensating court-appointed counsel equitably for the benefits they created for all victims of defective Chinese Drywall.

Common benefit counsel labored for more than ten years doggedly pursuing recalcitrant Chinese defendants – securing defaults and a contempt order against them, establishing jurisdiction over these foreign entities, certifying the *Amorin* class, and achieving a class-wide formula to calculate plaintiffs' remediation damages. Their intensive work necessarily continued on remand when defendants challenged virtually every ruling adverse to them in the MDL proceedings.[5] If it were not for common

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[3] MDL R. Doc. 20735.

[4] MDL R. Doc. 20800.

[5] See, e.g., FLSD R. Doc. 53 (defendant's motion for a trial plan), FLSD R. Doc. 61 (defendant's motion to reject application of remediation damages formula), FLSD R. Doc. 66 (defendant's

benefit counsel's sustained, coordinated and comprehensive efforts in five separate jurisdictions (in the MDL court and four remand courts),[6] there

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motion to enforce discovery rights), FLSD R. Doc. 67 (defendant's motion for clarification to enforce trial rights); FLSD R. Doc. 97 (defendant's brief arguing that defaults do not apply in the transferor court); FLSD R. Doc. 98 (defendants' brief arguing there should be no preclusive effect of Judge Fallon's rulings in the MDL court); FLSD R. Doc. 112 (transferor court order adopting "**all** of Judge Fallon's findings of facts and legal conclusions" in the MDL court, including certification of the *Amorin* class, liability of the parent companies, liability of the Chinese defendants for defective drywall, and approval of application of the remediation damages formula).

[6] Ultimately, thousands of cases were remanded to the Southern District of Florida and the Eastern District of Virginia. See MDL R. Doc. 21642 (Florida *Amorin* remand order), MDL R. Doc. 21834 (Virginia *Amorin* remand order), MDL R. Doc. 22198 (Florida and Virginia *Brooke* remand order). At the same time, thousands of other cases involving properties in Louisiana, Mississippi, Alabama, Tennessee, Georgia, Texas, Illinois, North Carolina, and elsewhere remained in the MDL. For many months, common benefit counsel were fighting the Chinese defendants in all of these courts simultaneously, with overlapping deadlines and responsibilities, while also striving to preserve jurisdictional rulings against the parent companies on appeal in the Fifth Circuit. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 811 Fed. Appx. 910 (5th Cir. Jul. 9, 2020) (affirming jurisdiction over the parent entities of the Chinese drywall manufacturer).

would be no funds from which attorneys' fees could be obtained.

Petitioners were not only aware of but acquiesced in common benefit counsel's endeavors to achieve the best results for plaintiffs – which culminated in a historic $248 million global class settlement, in addition to the individual settlements of 497 Florida *Amorin* plaintiffs' claims on remand.[7] Never before has a Chinese corporation in the People's Republic of China agreed to a multi-million-dollar payment to thousands of American consumers in a product liability settlement.

Two federal district courts and a court of appeals panel reviewing this matter determined that the court-appointed counsel are entitled to compensation for their "efforts on behalf of the class[, which] brought [the Chinese defendants] to the bargaining table." App. B, at 19a. These rulings are consistent with the governing principles of common benefit fee awards derived from long-standing jurisprudence, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881) and refined in, *inter alia*, *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Sprague*

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[7] See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 424 F. Supp. 3d 456 (E.D. La. 2020). That the individual settlements were reached two months prior to the global class settlement is of no moment since the global deal increased the value of the individual settlements by more than 46% – from $27,892,700.05 to $40,744,712.88, through application of a "most favored nations clause" in the FIS settlement agreement. App. B, at 15a.

v. Ticonic National Bank, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); and approved and implemented in the MDL context, in *inter alia*, *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019-21 (5th Cir. 1977); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 772-75 (11th Cir. 1991) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)); *In re Diet Drugs*, 582 F.3d 524 (3d Cir. 2009); *In re Genetically Modified Rice Litig.*, 835 F.3d 822 (8th Cir. 2016).

Plainly, this case does not present petitioners' decried scenario of "roving authority," judicial overreaching, or a system of common benefit fee compensation "totally out of control." There is no inter-circuit conflict on whether a transferor court has authority to award common benefit counsel a percentage of the attorneys' fees paid to individual counsel in class members' cases resolved after remand from an MDL court. Review, therefore, is unwarranted. The Court should deny the petition.

STATEMENT OF THE CASE

Following the devastation caused by Hurricanes Katrina and Rita in 2005, and an ensuing shortage of drywall in the United States, millions of square feet of defective drywall manufactured in China were imported and installed in tens of thousands of homes, commercial buildings and other structures. In 2009, the *Chinese Drywall* MDL was established. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 626 F. Supp. 2d 1346 (J.P.M.L. 2009). At its inception Judge Fallon appointed a Plaintiffs' Steering Committee ("PSC") to prosecute plaintiffs' claims, prepare and respond to pleadings and motions, engage in discovery, pretrial preparation, trial and settlement of cases, manage the MDL docket, establish and administer a document depository, communicate with individual plaintiffs and their counsel, liaison with defendants, and attend court status conferences and hearings. MDL R. Doc. 144-1.[8] Eventually, almost 10,000 claims of property owners from more than a dozen states were transferred to the MDL court.

1. *Common Benefit Counsel's Efforts in the MDL Court and on Remand.* Members of the PSC and attorneys working under their direction ("common benefit counsel") worked tirelessly for over ten years

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[8] Jerrold Parker of petitioner Parker Waichman, LLP was an original member of the PSC, but withdrew in 2018, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2019 WL 7558265, at *23 (E.D. La. Feb. 4, 2019), and thereafter settled his Florida *Amorin* clients' claims as part of the FIS.

prosecuting thousands of property damage claims against the Chinese entities responsible for the defective drywall installed in plaintiffs' homes. This was no easy feat.

First, the PSC had to identify and bring the Chinese State-owned Enterprises into the litigation. Plaintiffs' leadership committee prepared and filed dozens of omnibus class action complaints in multiple jurisdictions, which included thousands of named plaintiffs owning properties damaged by Chinese Drywall in Louisiana, Florida, Virginia, Mississippi, Alabama, Georgia, Tennessee, Texas, and elsewhere.[9] Service of these complaints abroad

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[9] The PSC's preparation and filing of these omnibus complaints allowed plaintiffs' individual counsel to include their clients as named plaintiffs in the litigation without having to expend effort and expense to prepare, file, translate, and serve their own pleadings. See *Chinese Drywall*, 2019 WL 7558265 at *14 ("Numerous Omnibus Complaints were created that enabled lawyers representing individual claimants to file suit without incurring extravagant service filing costs and interrupting statute of limitations/prescription."); see also *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622, at *18 (E.D. La. Nov. 30, 2017) (The "Omnibus Complaints here were filed in federal court based on CAFA jurisdiction and Rule 23."). The 497 Florida *Amorin* plaintiffs who settled individually with the Chinese defendants were named on a PSC omnibus complaint that was transferred to the MDL court. *Amorin, et al. v. Taishan Gypsum Co., Ltd. f/k/a Shandong Taihe Dongxin Co., Ltd.*, No. 2:11-cv-22408 (S.D. Fla.) (FLSD R. Doc. 1). Petitioners representing these plaintiffs did not file separate suits for them.

on the foreign defendants required strict compliance with the Hague Convention. Moreover, since the Chinese manufacturers had no assets in the United States and there is no China-U.S. treaty for the mutual enforcement of judgments, plaintiffs risked an inability to collect on any judgment even if successful. The defendants were well-aware of this weakness and did everything they could to avoid service of process and responsibility under the law for their defective products.[10]

After the PSC obtained defaults against the Chinese defendants, common benefit counsel proved plaintiffs' damages in a bellwether trial[11] and contested numerous defendant motions to vacate the defaults.[12] This work established liability for

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[10] MDL R. Doc. 21641-4 at 4 (explaining why the Chinese defendants had no intention of responding to plaintiffs' complaints against them: "the most important reason is that there is no judicial treaty signed between China and the U.S. on mutual recognition and enforcement of court judgements, and Taishan Company does not have assets within the continental U.S., even if the lawsuit was lost, the U.S. court cannot enforce Taishan's assets in China."); see also MDL R. Doc. 21641-258 at 2 (acknowledging service of complaints against Taishan and its parent company but rather than responding in the U.S. courts, defendants vowed "to keep an eye on the progress of the incident" from afar).

[11] See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2010 WL 1445684 (E.D. La. Apr. 8, 2010).

[12] See *id.*; *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 894 F. Supp. 2d 819, 864, 891 (E.D. La. 2012), *aff'd*, 742 F.3d 576 & 753 F.3d 521 (5th Cir. 2014); *In re Chinese-*

defendants' defective drywall[13] and resulted in a civil and criminal contempt order against defendants.[14] The PSC also certified the *Amorin* class that includes the 497 plaintiffs who reached individual settlements on remand,[15] and achieved approval of a formula to calculate plaintiffs' remediation damages on an aggregate basis.[16]

A foundational element of the PSC's common benefit efforts and success in bringing the Chinese defendants to the bargaining table was the establishment of personal jurisdiction over the Chinese manufacturers and their parent companies.[17] This was a hotly contested issue involving years of jurisdictional discovery, production of hundreds of thousands of documents that required translation, hundreds of depositions, and multiple

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Manufactured Drywall Prods. Liab. Litig., 2018 WL 279629, at *8 (E.D. La. Jan. 2, 2018).

[13] *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2014 WL 4809520, at *10 (E.D. La. Sept. 26, 2014).

[14] MDL R. Doc. 17869.

[15] See *Chinese Drywall*, 2014 WL 4809520 at *16.

[16] *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 1421627 (E.D. La. Apr. 21, 2017).

[17] See *Chinese Drywall*, 894 F. Supp. 2d 819; *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576 (5th Cir. 2014); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521 (5th Cir. 2014); *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 1476595 (E.D. La. Apr. 21, 2017), *aff'd*, 811 Fed. Appx. 910 (5th Cir. Jul. 9, 2020).

appeals to the Fifth Circuit. This matter even required Judge Fallon to personally oversee depositions in Hong Kong in order to make rulings in real time about the credibility of witnesses and their testimony.[18] Without the favorable jurisdictional decisions obtained by class counsel, defendants never would have agreed to fund either the global class settlement or the individual settlements of 497 Florida *Amorin* plaintiffs' claims.

Class counsel's work on behalf of plaintiffs did not end when the remands occurred. There is no dispute that defendants were determined to challenge every important issue they had lost before the MDL court.[19] Class counsel took the lead and the laboring oar to achieve a pivotal order of the remand court adopting all of the MDL court's factual findings and legal conclusions, including defendants' defaults, liability for plaintiffs' damages, class certification in *Amorin*, and formulaic remediation damages. See FLSD R. Doc. 112 at 2-3.

Under strict deadlines and a compressed schedule, class counsel alone conducted essential product identification discovery of defendants who denied manufacturing many of the products at

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[18] See MDL R. Doc. 21069 at 5 (explaining the extraordinary steps required by the MDL court in light of a prior round of jurisdictional depositions that "degenerated into 'chaos and old night,' to borrow a phrase from Milton's *Paradise Lost*.").

[19] See fn. 5, *supra*.

issue[20]; they prepared updated spreadsheets tracking evidence of damages for each of the 1,700-plus remanded Florida *Amorin* plaintiffs[21]; they responded to defendants' challenges to plaintiffs' proofs of remediation damages[22]; and they selected 20 priority cases for trial and created plaintiffs' witness lists,[23] prepared homeowners for deposition and home inspections,[24] negotiated a joint stipulation regarding authentication and hearsay as to certain categories of documents,[25] worked up numerous experts and engaged in *Daubert* motion practice for those cases, and responded to motions for summary judgment.[26]

In stark contrast, petitioners did not argue any motions either before the MDL court or on remand; they did not take any discovery; and they did not work up any experts. Admittedly, the only thing they accomplished was "eighteen months (and counting) of complex negotiations, litigating (against Class Counsel), and administering the [individual] settlements." App. B, at 29a (quoting FLSD R. Doc. 337-1 at 2). During their settlement negotiations

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[20] See MDL R. Doc. 22152 (deposition of Taishan); FLSD R. Docs. 155, 160 & 167.

[21] MDL R. Doc. 20952-1; FLSD R. Docs. 52, 56 & 151.

[22] FLSD R. Docs. 266, 268 & 269.

[23] FLSD R. Docs. 130-150.

[24] See FLSD R. Docs. 269-70, 276, 278-79 & 281-84.

[25] FLSD R. Doc. 156.

[26] FLSD R. Docs. 244, 246-48, 271-74, 280, 289, 293-95 & 300.

with defendants, petitioners benefited from class counsel's detailed spreadsheets filed in the MDL,[27] showing each plaintiff's product ID proofs, ownership information, and damages calculations.

2. *Settlements with the Chinese Defendants.* Although petitioners negotiated the individual settlements of their Florida *Amorin* plaintiffs' claims over many months, that agreement came to fruition *only* as a result of the work product of class counsel and the PSC developed over many years. The payments under the FIS to the Florida *Amorin* class members were based on the Product ID evidence established by class counsel. In 2017, the PSC filed a "Taishan Product ID Catalog" created from defendants' profile forms and documents produced by defendants and third parties, as well as independent research.[28] It was this evidence that formed the basis of the FIS and the global class settlement.

Tellingly, petitioners took no risk by entering into the FIS on account of the "most favored nations" clause ("MFN") included in the agreement. This "ice-breaker" settlement with the Chinese defendants did not provide plaintiffs with optimal results, the proof of which was realized a few months later when the global class settlement was announced. Applying the MFN to the global settlement, the FIS payments increased by over 46%. See App. B, at 15a & n.3. The mathematical facts do not lie: class counsel's efforts added an additional $12,852,012.83 of value –

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[27] See MDL R. Doc. 20952-1 (filed Sept. 14, 2017).

[28] See MDL R. Docs. 20824 & 20824-6.

$11,683,648.06 in claim payments for the 497 Florida *Amorin* plaintiffs and $1,168,364.78 in attorneys' fees for their individual counsel. *Id.*

3. *The Transferor Court's Common Benefit Fee Decision*. The Honorable Marcia G. Cooke witnessed first-hand the efforts of common benefit counsel as they prosecuted more than 1,700 Florida *Amorin* plaintiffs' claims on remand against recalcitrant Chinese defendants. Having adopted all of Judge Fallon's rulings, including certification of the *Amorin* class and the remediation damages formula (FLSD R. Doc. 112 at 2-3), Judge Cooke scheduled a date certain for the calculation of property damages for all remanded *Amorin* class members using that formula (*id.* at 8), and she also set trial dates for 20 priority claimants' other damages (*id.* at 9-11).

In considering class counsel's petition for common benefit fees from the fees paid to individual counsel in the FIS (a process agreed-to by petitioners), the remand court analyzed the MDL court's fee order related to the global settlement, *Chinese Drywall*, 424 F. Supp. 3d 456, and made a specific finding that Judge Fallon's reasoning was "persuasive and instructive." App. B, at 27a. Then, in analyzing the factors set forth in *Camden I Condo.*, 946 F.2d at 772-75 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)), the remand court made additional findings that undermine petitioners' arguments as a matter of record:

- "Class Counsel undertook the substantial risk of litigating this case on a contingency basis," including "paying out-of-pocket expenses and 'devot[ing] three partners to this litigation virtually full time' without guarantee they would be reimbursed." App. B, at 26a.

- Class Counsel's "ability to bring a Chinese corporation to the bargaining table to resolve a product liability action in the United States represents an outstanding result." *Id*.

- Although "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." *Id.*

- Class Counsel were not precluded from accepting other employment by having committed to the responsibilities of this case. App. B, at 28a.

After this detailed analysis, rather than simply adopting the MDL court's award of 60% of the available attorneys' fees to class counsel, Judge Cooke exercised independent discretion, finding 45% fair given that individual counsel negotiated the FIS. On appeal, the Eleventh Circuit affirmed, holding that the district court did not abuse its discretion in making this fee award. App. A, at 3a.

4. *The Common Benefit Fee Award Does Not Constitute "Double-Dipping."* Contrary to petitioners' suggestion, the class counsel fees awarded in the global settlement were based not on the hours expended, but on the percentage-of-benefit to the

claimants in that settlement.[29] As petitioners point out, the claimants in the FIS who agreed to individual settlements with the Chinese defendants did not participate in the global settlement,[30] and the benefits provided to them by class counsel were not the subject of the MDL court's common benefit fee award. See MDL R. Doc. 22460 at 12-13.

Accordingly, the subsequent common benefit fee award from the individual settlements does not constitute a double recovery. As the transferor court

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[29] In connection with the global settlement, the MDL court made an aggregate award of 19% of the $248 million fund to be set aside for all plaintiffs' counsel. The MDL court then awarded class counsel 60% of those available attorneys' fees, leaving 40% for the contract attorneys. *Chinese Drywall*, 424 F. Supp. 3d at 503. Petitioners (along with 75 other firms) received pro rata distributions of those contract fees (MDL R. Doc. 22861 at 3-4), without objection. Previously, petitioners themselves had received common benefit fees and contract fees in connection with class settlements involving the non-Chinese defendants. See *Chinese Drywall*, 2019 WL 7558265 at *23-24 & *27 (allocating 52% of available fees to common benefit counsel, including petitioners); MDL R. Doc. 22288 (authorizing distribution of 48% of available fees to individual counsel, including petitioners).

[30] See Pet. at 12. Respondents did not include these plaintiffs in the global settlement precisely because their individual counsel had already negotiated the FIS that was announced two months prior, and they had already been offered this separate settlement with the Chinese defendants who would not agree to make duplicate payments to the same plaintiffs. See *Chinese Drywall*, 424 F. Supp. 3d at 473.

recognized, there simply "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." App. B, at 28a.

Moreover, the MDL court's percentage fee award from the global settlement translates to an effective hourly rate of only $258.82, which Judge Fallon appropriately characterized as a "meager hourly fee." MDL R. Doc. 22460 at 67 & n.12. Indeed, the court acknowledged, "this hourly fee is certainly less than the usual hourly rate for such experienced and competent counsel and is less than what common benefit counsel may have expected," but "the Court urge[d] counsel to remember that the risk of a small recovery is inherent in any contingency arrangement, and that any sum allocated to attorney fees necessarily reduces the recovery available to the thousands of claimants who have patiently waited for over a decade to recover from [the Chinese defendants]." *Id.*

REASONS FOR DENYING THE PETITION

Class counsel prosecuted the claims of the settling plaintiff-class members in the *Chinese Drywall* MDL for over a decade in both the transferee and transferor courts.[31] The challenged fee award compensates them for their efforts in creating significant benefits for petitioners and their clients, in accordance with long-standing, cohesive common benefit fee jurisprudence. This matter does not involve judicial overreaching or "roving authority," as petitioners allege. No state court litigants are involved. And, there is nothing in the record to support a claim of double-dipping on attorneys' fees. App. B, at 28a. Accordingly, petitioners' contentions (at 2 & 25) that this case reveals a system of common benefit fee compensation "totally out of control" and presents "MDL fee authority in full, unchecked bloom" are unfounded and wholly without merit. For these reasons, the petition should be denied.

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[31] *E.g.,* "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." App. B, at 19a. Further, "Class Counsel … effectuated service on and established jurisdiction over [the Chinese defendants], 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 th[e] [transferor] Court that the rulings obtained in the MDL were correct and should be adopted [on remand].' [FLSD R. Doc.] 344 at 2. Class Counsel's efforts on behalf of the class brought [the Chinese] to the bargaining table, and the Common Benefit doctrine lends to appropriate compensation for those efforts." *Id.*

I. There Is No Circuit Split on the Question Presented.

The petition does not identify a square conflict among the circuit courts of appeals – because one does not exist – on the specific question presented: *i.e.*, whether common benefit counsel can be compensated by the transferor court for their efforts benefiting plaintiffs (and their attorneys) whose claims were litigated on a class basis in the MDL court and on remand. This Court and all circuits addressing the issue of common benefit fees for the past 140 years have recognized the equitable authority of courts to award compensation to those who create a benefit for others. The fundamental contours of the common benefit doctrine remain unchanged. "[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*, 444 U.S. at 478. "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.*

The petition alludes to several alleged circuit splits concocted from various inapposite factual scenarios.[32] From this jumping off point, petitioners

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[32] For example, the petition (at 26 n.32) points to the Fourth Circuit's ruling in *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 165-66 (4th Cir. 1992) (limiting an MDL court's jurisdiction "to cases and controversies between persons who are properly parties to the cases transferred"); and the Eighth Circuit's ruling in *In re Genetically Modified Rice*

suggest (at 6) that the supposedly disparate appellate rulings create a "rare opportunity" for the Court to address "limitations on equitable fee power." Indeed, petitioners urge the Court to issue a writ of certiorari so there can be a "review of an award by a transferor court—from the outside in." *Id.* Admittedly, however, the alleged conflicts are but "variants of the common fund exception described in *Alyeska [Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 257-58 (1975)]," which, according to petitioners, "courts have struggled to harmonize." Pet. at 21-22. Under these circumstances, any differences of approach by the circuit courts to adjudication of highly fact-intensive common benefit fee awards – if they exist – do not warrant certiorari review.[33]

Litig., 764 F.3d 864, 874 (8th Cir. 2014), *cert. denied*, 135 Sup. Ct. 1455 (2015) (excluding from an MDL court's authority disputes involving state-court plaintiffs, who "neither agreed to be part of the federal MDL nor participated in the MDL Settlement Agreement") as evidence of "a circuit split over the reach of an MDL." The instant matter, however, does not involve any state court litigants and all parties involved were properly before both the MDL court and the transferor court. In fact, petitioners allowed the PSC to file the operative *Amorin* class action complaint on behalf of their clients (FLSD R. Doc. 1), which was transferred to the MDL court, and they expressly agreed that the transferor court has jurisdiction to adjudicate the disputed common benefit fee award (FLSD R. Doc. 390-1).

[33] See *Miroyan v. United States*, 99 S. Ct. 18, 19 (1978) (in denying an application for a stay of the mandate of the circuit court, Justice Rehnquist recognized that even where "there is undoubtedly a difference of approach between the Circuits on

Over a century ago, in *Trustees v. Greenough*, 105 U.S. 527 (1881), this Court made clear that federal trial courts possess equity power to reach beyond the confines of formal joinder, case captions and attorney fee contracts, to ensure that all who are the beneficiaries of litigation efforts undertaken for the common good contribute proportionately to those services. This doctrine was further articulated and applied in a series of landmark decisions, including *Pettus*, 113 U.S. 116; *Sprague*, 307 U.S. 161; *Mills*, 396 U.S. 375; *Boeing*, 444 U.S. 472; and *Blum v. Stenson*, 465 U.S. 886 (1984).

In essence, the common benefit doctrine acknowledges "the original authority" of the courts "to do equity in a particular situation" to prevent unjust enrichment. *Sprague*, 307 U.S. at 166. As this Court has observed, "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills*, 396 U.S. at 392.

While the common benefit doctrine is routinely invoked as the basis for the award of attorneys' fees from common funds or benefits generated in class actions, its application is not limited to the class context. *Sprague*, 307 U.S. at 167 ("when 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

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the question [presented]," that does not equate to a "square conflict.").

a party and the beneficiaries of his litigation."). See also *Fla. Everglades*, 549 F.2d at 1016 (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."); *Diet Drugs*, 582 F.3d at 546-48; *Genetically Modified Rice*, 835 F.3d at 828-30; *Washington Gas Light Co. v. Baker*, 195 F.2d 29, 33 (D.C. Cir. 1951) ("Allowance of fees to be paid from [a] fund which inured to the general benefit of gas consumers was permissible … without regard to the question whether or not the litigation carried forward … was a class action"); Federal Judicial Center, *Awarding Attorneys' Fees and Managing Fee Litigation* at p. 60 (2d ed. 2005) ("the common fund doctrine is not limited to class actions"); MANUAL FOR COMPLEX LITIGATION, FOURTH, § 14.121 at 186 (Fed. Jud. Ctr. 2004) ("The common-fund exception to the American Rule is grounded in the equitable powers of the courts under the doctrines of quantum meruit and unjust enrichment.").

As explained by the Honorable Eldon E. Fallon,

> The theoretical bases for the application of the common fund concept to MDLs are the same as for class actions-namely, equity and her blood brother, quantum meruit. However, there is a difference: In class actions the beneficiary of the common benefit work is the claimant; in MDLs the beneficiary is the primary attorney (the attorney who has the representation agreement with the claimant). For this reason, in

> MDLs, the common benefit fee is extracted from the fee of the primary attorney and not the claimant, as is the case with class actions. Thus in MDLs, the claimant does not pay the common benefit fee; the primary attorney who is the beneficiary of the common benefit work pays it.

Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 La. L. Rev. 371, 375-76 (2014) (fns. omitted). Petitioners' contention that courts may not award common benefit counsel a percentage of the fees they earned in the FIS solely because the FIS was not a class settlement is, therefore, not sustainable.

Further, an MDL court, like every trial court,[34] has managerial authority to oversee the litigation and the litigants. 28 U.S.C. § 1407; MANUAL FOR COMPLEX LITIGATION, FOURTH § 10.1 (Fed. Jud. Ctr. 2004); *Fla. Everglades*, 549 F.2d at 1012; *Diet Drugs*, 582 F.3d at 524; *Genetically Modified Rice*, 764 F.3d at 872 ("it was reasonable for the court to exercise its managerial power to ensure that Lead Counsel and the other common benefit attorneys were fully compensated for work that assisted other parties"). That "power is illusory," however, "if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation." *Fla. Everglades*, 549 F.2d at 1016.

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[34] *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

Petitioners' argument that there is no common "fund" available to pay these fees belies the record and is wholly without merit in any event. "Determination 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. Here, the "fund" consists of the FIS fees held in escrow pending the outcome of the fee dispute.[35]

There is no question that the efforts of class counsel benefited both petitioners and their clients who participated in the FIS – by at least the 46% increase in FIS payments generated by class counsel's efforts in creating the global settlement. The claimants have already paid attorneys' fees to petitioners under their contingency fee contracts. If petitioners do not pay their fair share of common benefit fees, they will be unjustly enriched by class counsel's work.

Petitioners' arguments are similar to those of certain objectors in *Diet Drugs*, who contested paying common benefit fees because they opted out of the class before a global settlement was reached and

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[35] Petitioners' reference (at 19) to the MDL Court's Enforcement Order as the "unwritten" "final chapter in this saga," and their critique of this order (at *id.* n.27) as "wrongly attempt[ing] to use equitable power to aid in the enforcement of a money judgment across jurisdictional lines" supports denial of the petition as a premature attempt to challenge a non-final event below. See *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009).

claimed they did not use the common benefit work product of the plaintiffs' steering committee. In rejecting those arguments, the Third Circuit recognized that MDL leadership counsel secured "favorable discovery and evidentiary rulings that applied on a litigation-wide basis … [in] every MDL case against" defendant. *Diet Drugs*, 582 F.3d at 548. Defendant knew the plaintiffs had access to MDL common discovery, so all plaintiffs benefited in defendant's "loss of bargaining power due to the [leadership's] efforts." *Id*. Thus, the court held, "those plaintiffs stood a better chance of recovery from [the defendant] than they would have absent the [leadership's] efforts." *Id*.

The same is true here. Had class counsel not established the Chinese defendants' liability for their defective drywall, the FIS could not have occurred. Had class counsel not fought for the pivotal preclusive effect order from the transferor court (FLSD R. Doc. 112), defendants would still be challenging every adverse ruling – certification of the *Amorin* class, aggregate formula damages, personal jurisdiction over defendants, defaults, etc. – accomplished in the MDL court. Had class counsel not established a matrix to evaluate plaintiffs' remediation damages, as set forth in detailed spreadsheets filed in the MDL and transferor courts,[36] the FIS could not have been accomplished. The fact that the FIS occurred after the claims were remanded to the transferor court does not negate class counsel's entitlement to common benefit fees.

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[36]MDL R. Doc. 20952-1; FLSD R. Docs. 52, 56 & 151.

II. This Case Does Not Warrant this Court's Review.

Petitioners have not presented a compelling reason to grant a writ of certiorari to review the common benefit fee award in dispute. In all cases, the issuance of a common benefit fee award is highly fact-intensive. As such, "[t]here 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." *Camden I Condo.*, 946 F.2d at 774. Indeed, as this Court has held, "individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." *Sprague*, 307 at U.S. at 167. Therefore, this case does not present a proper vehicle to establish the "bright jurisdictional line" advocated by petitioners (at 6). Moreover, it is unlikely this scenario will be repeated such that review by this Court is warranted.

The fee decision here was arrived at through transparent proceedings by a transferor court with first-hand knowledge of the efforts of class counsel on remand, a record from the MDL court with over 22,000 docket entries, and the express agreement from petitioners that the transferor court has jurisdiction to adjudicate the fee dispute. The fund of available fees was created from individual settlements of class members' cases following remand to the transferor court after years of litigation orchestrated by class counsel in the MDL court. These settlements were reached two months prior to a global settlement negotiated by class counsel, but through application of a "most favored

nations" clause, the value of their recoveries, as well as the amount of fees earned by their individual counsel-petitioners, increased by over 46% when the global deal was implemented. Under these circumstances, a fee award to common benefit counsel from the attorneys' fees paid to petitioners is appropriate and supported by long-standing fee jurisprudence, as set forth, *supra*.

At the end of the day, petitioners have failed to show that the decision of the Eleventh Circuit, affirming the transferor court's common benefit fee award on the grounds there was no abuse of discretion, warrants review by this Court. The district court followed proper procedures in making the determination that class counsel are entitled to 45% of the fees paid to petitioners, and there has been no showing that any of the district court's findings of fact are clearly erroneous.

CONCLUSION

For the foregoing reasons, and as a matter of law and the facts of record, this Court should deny the petition.

Respectfully submitted,

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DECEMBER 1, 2021