No. 22-_____

In The
Supreme Court of the United States

KENNETH P. KELLOGG, et al.,

Petitioners,

v.

WATTS GUERRA LLP, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *Kellogg, et al.* lawsuit and this petition address whether lawyers can mislead 60,000 corn growers across the United States into signing 40 percent contingent fee retainer contracts to pursue individual lawsuits, exclude those corn growers from pending Fed. R. Civ. P. 23 class actions without their knowledge and informed consent, and then take their property interests in the litigation proceeds without their approval.

In law school, these transgressions, if presented as a hypothetical, would be disparaged. But in the harsh reality of federal court multidistrict litigation (MDL), the transgressions are accepted as the costs of efficiency, as MDL judges cannot be judged, class action and mass tort lawyers must get paid, and the Fifth Amendment due process rights of 60,000 American corn growers are trampled in the dirt.

The Tenth Circuit decisions in this case – denying jurisdiction to review an MDL transfer decision, allowing the lawyers to privately contract clients and absent class members out of a Rule 23 class action, disregarding the judicial recusal mandates that attach to a legal malpractice lawsuit transferred to the MDL judge who was misled by the lawyers to allow the private contract opt-outs, and disregarding 247 years of American jurisprudence addressing attorney deceit – should be reviewed by this Court on the merits.

The questions presented are:

1. Can a party who unsuccessfully challenges a Judicial Panel on Multidistrict Litigation (MDL Panel)

QUESTIONS PRESENTED – Continued

transfer decision by mandamus petition during the litigation under 28 U.S.C. § 1407(e), again challenge the transfer decision through an appeal of a final judgment by the MDL district court dismissing the lawsuit claims?

2. Can lawyers privately contract clients and absent class members out of a Fed. R. Civ. P. 23 class action, and thereby deprive the clients and absent class members of the individual notice and opt-out procedures enshrined in Rule 23?

3. Does an MDL district court judge have a conflict of interest that requires his recusal or disqualification from a lawsuit transferred to the MDL under the 28 U.S.C. §§ 455(b) and (e) recusal mandates of the United States Congress and the Fifth Amendment Due Process Clause's guarantee of an impartial adjudicator, when the judge breached fiduciary obligations to the plaintiffs in the lawsuit transferred to the MDL and has knowledge of contested facts in that lawsuit?

4. Can an MDL district court judge dismiss a legal malpractice lawsuit transferred to an MDL through a rationale that the lawsuit claims, which are not a collateral attack on the MDL settlement and the fee awards, are rendered moot by the settlement and the district court's fee award decisions in the settlement proceedings?

PARTIES TO THE PROCEEDING

Petitioners are Kenneth P. Kellogg, Rachel Kellogg and Kellogg Farms, Inc. (N.D.), Roland B. Bromley and Bromley Ranch, LLC (N.D.), John F. Heitkamp (Ohio), Dean Holtorf (Iowa), Garth J. Kruger (Minn.), and Charles Blake Stringer and Stringer Farms, Inc. (Tex.).

Petitioners represent a putative class of 60,000 corn growers ("Farmers") who signed 40 percent contingent fee retainer contracts with a Texas law firm, Watts Guerra LLP, and law firms and lawyers in multiple states.

Respondents are Watts Guerra LLP (Tex.), Daniel M. Homolka, P.A. (Minn.), Yira Law Office, LTD (Minn.), Hovland and Rasmus, PLLC (Minn.), Dewald Deaver, P.C., LLO (Neb.), Mauro, Archer & Associates, LLC (D.C.), Johnson Law Group (Tex.), Wagner Reese, LLP (Ind.), VanDerGinst Law, P.C. (Ill.), Patton, Hoversten & Berg, P.A. (Minn.), Cross Law Firm, LLC (Kan.), Law Office of Michael Miller (Tex.), Pagel Weikum, PLLP (N.D.), Wojtalewicz Law Firm, Ltd. (Minn.), Lowe Eklund Wakefield Co., LPA (Ohio), Mikal C. Watts (Tex.), Francisco Guerra (Tex.), and John Does 1-250.

Respondents are law firms and lawyers with 40 percent contingent fee retainer contracts signed by Petitioners, splitting fees with Watts Guerra LLP and sharing in the fee from each client. Respondents are those who conspired with Watts Guerra LLP as they pursued a contingent fee fraud scheme through racketeering, and violated fiduciary obligations to Farmers through deceit.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners are publicly traded corporations and no publicly held corporation owns 10 percent or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Kellogg, et al., No. 18-3220, was a mandamus petition to the United States Court of Appeals for the Tenth Circuit challenging the transfer of *Kellogg* by the MDL Panel from the District of Minnesota to the Syngenta MDL. The petition was dismissed by an order by the Clerk without reasons on November 20, 2018.

In re Kenneth P. Kellogg, et al., No. 18-768, was a mandamus petition to the Supreme Court of the United States challenging the transfer of *Kellogg* by the MDL Panel from the District of Minnesota to the Syngenta MDL. The Supreme Court denied the petition in a February 19, 2019 docket order without reasons.

Kellogg, et al., No. 19-3066, was an appeal to the Tenth Circuit under 28 U.S.C. §§ 1291 and 1292(a) challenging the district court's March 1, 2019, May 21, 2019, and August 13, 2019 decisions dismissing Farmers' federal and Minnesota fraud claims under Fed. R. Civ. P. 12 and requesting remand to the District of

STATEMENT OF RELATED PROCEEDINGS
– Continued

Minnesota. The appeal was dismissed by an order by the Clerk without reasons on December 31, 2019.

Kellogg, et al., No. 20-3006, was an appeal to the Tenth Circuit under 28 U.S.C. §§ 1291 and 1292(a) challenging the district court's December 18, 2019 decision denying Farmers' September 10, 2019 motion requesting the disqualification of the district court under 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment and remand to the District of Minnesota, and denying Farmers' Minnesota common law aiding and abetting claim which eliminated Farmers' request for class injunctive relief. The appeal was dismissed by an order by the Clerk without reasons on May 12, 2020.

Kellogg, et al., No. 20-3051, was a mandamus petition to the Tenth Circuit requesting the disqualification of the district court under 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment and remand to the District of Minnesota. The petition was dismissed by an order by the Clerk without reasons on June 1, 2020.

Kellogg, et al., No. 20-3070, was a mandamus petition to the Tenth Circuit requesting the disqualification of the district court under 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment and a request to vacate orders issued by the district court in disregard of the automatic transfer of jurisdiction for

STATEMENT OF RELATED PROCEEDINGS
– Continued

Farmers' appeal No. 20-3006, and remand to the District of Minnesota. The petition was dismissed by an order by the Clerk without reasons on June 1, 2020.

Kellogg, et al., No. 20-3084, was a mandamus petition to the Tenth Circuit requesting the disqualification of the district court under 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment for an adversarial response to Farmers' request to disqualify the district court and remand to the District of Minnesota. The petition was dismissed by an order by the Clerk without reasons on June 1, 2020.

Kellogg, et al., No. 20-3257, D. Kan. No. 2:14-MD-02591-JWL-JPO, was an appeal to the Tenth Circuit of the district court decisions denying the *Kellogg, et al*. Plaintiffs' motion to intervene in the Syngenta MDL settlement proceedings as a matter of right under Fed. R. Civ. P. 24(a), requesting the district court to hold in escrow the $149,756,512.64 in fee and expense awards to the Respondents in the *Kellogg* lawsuit in the MDL settlement proceedings as "disputed . . . funds" until the *Kellogg* lawsuit claims are "finally resolved," under Minn. R. Prof. Conduct 1.15(b) and Kan. R. Prof. Conduct 1.15(c), and requesting the disqualification of the district court under 28 U.S.C. § 455 and the Due Process Clause of the Fifth Amendment. *See* Farmers' opening brief, No. 20-3257, April 6, 2021; reply brief, June 4, 2021. The Tenth Circuit on October 17, 2022, denied Farmers' appeal of the district court decisions

STATEMENT OF RELATED PROCEEDINGS
– Continued

as moot, App.53-55, in an Order and Judgment that did not address Farmers' argument that Minn. R. Prof. Conduct 1.15(b) and Kan. R. Prof. Conduct 1.15(c) are ethics rules adopted by the Minnesota Supreme Court and the Kansas Supreme Court that express the public policies of Minnesota and Kansas and are a codification of the common law establishing substantive standards that must be applied by federal courts under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

In re Syngenta AG Mir162 Corn Litigation, Nos. 19-3008, 19-3021, 19-3022, 19-3032, 19-3079, 19-3080, 19-3172, 19-3174, 19-3175, 19-3176, 19-3178, 19-3279, 19-3280, 19-3284, 20-3000 & 20-3002, are consolidated appeals before the Tenth Circuit addressing the attorney fee and expense awards and fee award decisions by the Syngenta MDL court, D. Kan. No. 2:14-md-2591-JWL-JPO, during the MDL settlement proceedings. Because the *Kellogg* lawsuit is not a collateral attack on the MDL settlement or the fee awards in the MDL, Farmers did not appear in the MDL settlement proceedings for any substantive reason, and did not participate in these appeals.

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CASE SUMMARY

The *Kellogg, et al.* lawsuit is a putative class action by 60,000 corn growers across the United States ("Farmers") suing their lawyers, the Respondents, for racketeering and a breach of fiduciary obligations through deceit, in connection with lawsuits filed by those corn growers against Syngenta AG ("Syngenta") in federal and state courts in 2014-17. The *Kellogg* lawsuit is a fee forfeiture case.

The lawsuit was filed in the District of Minnesota on April 24, 2018, and transferred by the MDL Panel to the Syngenta MDL in the District of Kansas, a consolidation of cases by corn growers suing Syngenta for improper marketing of a genetically-modified seed. The *Kellogg* lawsuit did not meet any requirements for transfer under the transfer statute, 28 U.S.C. § 1407(a).

The lawsuit was transferred to an MDL district court judge with a judicial conflict of interest. There is substantial evidence that the judge breached fiduciary obligations to Farmers in the underlying Syngenta litigation and was misled by the Respondents to exclude Farmers from the MDL class proceedings through private contracts between the lawyers without Farmers' knowledge and informed consent.

The district court judge denied Farmers' motions to recuse and request that the MDL Panel return the *Kellogg* lawsuit to the District of Minnesota, and dismissed Farmers' racketeering and fraud claims through a rationale that Farmers' claims are rendered

moot by the MDL settlement and the district court's fee award decisions in the MDL settlement proceedings. The Tenth Circuit affirmed the district court decisions.

PETITION FOR A WRIT OF CERTIORARI

> "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."

In re Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020).

The *Kellogg* lawsuit has national implications for mass tort and class action practice in the United States. The lawsuit exposes how the "mass tort . . . individual suit" model has been exploited by some lawyers in class litigation to procure contingent fee contracts from individual clients through deceptive marketing; an end-run around the appointment of class counsel to represent the class under Fed. R. Civ. P. 23, and to collect excessive fees. *See Amended Class Action Complaint For Declaratory And Injunctive Relief And Damages* ("Amended Complaint"), D. Kan. No. 2:18-CV-02408-JWL-JPO, ECF No. 121, ¶¶ 1-336.[1]

[1] *See*, *e.g.*, Alison Frankel, *Venue fight in Syngenta fees [Kellogg] case highlights issue of MDL judges' policing power*, Reuters, May 31, 2018 (citing the *Kellogg* lawsuit as similar to the Volkswagen emissions cheating cases consolidated in an MDL in the Northern District of California, and the NFL Football League Concussion cases consolidated in an MDL in the Eastern District

The Syngenta litigation was a class action – common claim and damage for all corn growers across the United States – from the outset. The Respondents schemed to use the mass tort, product liability model to dupe unsuspecting Farmers into signing 40 percent contingent fee retainer contracts with Respondents to pursue individual lawsuits in the Minnesota state courts. Farmers were excluded, without their knowledge and informed consent, from participating in the Syngenta MDL class proceedings with Rule 23 protections, including individual notice and opt-out procedures, and where attorney fees are determined by the presiding courts as fiduciaries for the members of the class.

Farmers were deprived of the opportunity to make an informed decision during the litigation as to whether to pursue an individual claim or a class claim without representation by Respondents, thereby subjecting Farmers to Respondents' fraudulent scheme to apply their 40 percent contingent fee contracts and collect excessive fees. Farmers lost the opportunity to

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of Pennsylvania – where lawyers solicited individual contingent fee contracts in MDL class proceedings to claim a fee award after the settlement of the cases. The Frankel article notes that in the Volkswagen emissions cases, U.S. District Judge Charles Breyer of San Francisco "refuse[ed] to award [individual contingent] fees to plaintiffs' lawyers outside of class leadership in the $15 billion Volkswagen emissions cheating case." *See Hill v. Volkswagen Grp. of Am., Inc. (In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.)*, 914 F.3d 623 (9th Cir. 2019) (affirming district court's refusal to award individual contingent fees to plaintiffs' lawyers outside of Rule 23 class leadership).

make an informed decision as to whether they needed Respondents' legal services.

The issue in the Syngenta MDL is whether Respondents are entitled to a fee for their work on the Syngenta litigation, as a percentage of the MDL settlement fund and through their contingent fee contracts with Farmers. Respondents were awarded $149,756,512.64 in fees and expenses by the district court in the MDL settlement and fee award proceedings. *See Notice Of Property Interests And Disputed Funds[ ]*, D. Kan. No. 2:14-MD-02591-JWL-JPO, ECF No. 4500; *Appellants' [Second Motion For Judicial Notice]*, 20-3172, Sept. 29, 2021.

The *Kellogg* lawsuit will determine whether Respondents must *forfeit* their MDL fee and expense awards to Farmers as a result of racketeering and a breach of fiduciary obligations through deceit under Minnesota law. *See* Amended Complaint; 18 U.S.C. § 1964(a) (Civil remedies) (divestiture of interest in racketeering enterprise); *Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986) (*Perl III*) ("[W]e reaffirm that cases of actual fraud or bad faith result in total fee forfeiture."); *Perl v. St. Paul Fire and Marine Ins. Co*., 345 N.W.2d 209, 212 (Minn. 1984) (*Perl II*) ("the client is deemed injured even if no actual loss results"); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (*Perl I*) ("an attorney . . . who breaches his duty to his client forfeits his right to compensation"); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (attorney must forfeit his compensation when that compensation is earned in violation of obligations owed to a client).

After *Kellogg* was filed in the District of Minnesota on April 24, 2018, D. Minn. No. 18-CV-01082-DWF-BRT, ECF No. 1,[2] the Respondents tagged *Kellogg* as a tag-along to the Syngenta MDL lawsuits in the District of Kansas, MDL No. 2591. The Respondents misleadingly claimed the *Kellogg* complaint "potentially impacts the MDL Court's control over any award of attorneys' fees which is inextricably interwoven with the settlement approval process." Respondents thus persuaded the MDL Panel that *Kellogg* should be tagged and brought into the Syngenta MDL.

There are several issues with the transfer addressed in this petition. First, under 28 U.S.C. § 1407(a), the MDL Panel may only transfer "civil actions involving one or more common questions of fact" to any single district court for "coordinated or consolidated pretrial proceedings." *Kellogg*, a racketeering and attorney deceit lawsuit, did not meet any requirements for transfer. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 41-43 (1998) ("reversal is necessary" for decisions "erroneously litigated in a district in which . . . venue may never be laid under [28 U.S.C § 1407(a)]").

A second issue is that the Tenth Circuit cites 28 U.S.C. § 1407(e) to claim that transfer decisions can only be challenged by mandamus petition and that the panel has no "jurisdiction" to address Farmers'

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[2] The Honorable Donovan W. Frank, Senior United States District Judge for the District of Minnesota, is assigned to *Kellogg* in the District of Minnesota.

challenge in this appeal from a final judgment. The Tenth Circuit disregards this Court's decision in *Lexecon*, 523 U.S. at 41-43, that transfer decisions unsuccessfully challenged by a mandamus petition during the litigation can again be challenged through an appeal from a final judgment. Farmers challenged the MDL Panel transfer under § 1407(e) during the litigation, Tenth Circuit No. 18-3220 and Supreme Court No. 18-768, and through motion practice in the district court during the litigation, and again challenge the transfer, as in *Lexecon*, through this appeal from a final judgment by the district court dismissing Farmers' lawsuit.

A third issue is that the Syngenta MDL court, the district court for *Kellogg*, the Hon. John W. Lungstrum, has a judicial conflict of interest that required his recusal or disqualification under the 28 U.S.C. §§ 455(b) and (e) recusal mandates of the United States Congress and the Fifth Amendment Due Process Clause's guarantee of an impartial adjudicator. *Williams v. Pennsylvania*, 579 U.S. ___, 136 S. Ct. 1899, 1905, 195 L.Ed.2d 132 (2016) (a due process violation can occur if the judge played a critical role in a prior related proceeding that creates the likelihood of bias or a personal interest in the outcome). The district court judge breached fiduciary obligations to Farmers in the underlying Syngenta litigation by allowing the Respondents to automatically exclude Farmers from the MDL class proceedings through private contracts between the lawyers without Farmers' knowledge and informed consent. This Court and Rule 23 do not allow

lawyers to privately contract clients and absent class members out of a class action. The judge was either misled by the Respondents to allow Farmers to be removed from the MDL class proceedings through private contracts between the lawyers, or he inadvertently facilitated the Respondents' racketeering scheme by allowing the private contract opt-outs.

The district court judge denied Farmers' motions to recuse and request that the MDL Panel return the *Kellogg* lawsuit to the District of Minnesota, and dismissed Farmers' lawsuit claims through a rationale that Farmers' legal malpractice claims in the *Kellogg* lawsuit are rendered moot by the Syngenta MDL settlement and the district court's fee award decisions in the MDL settlement proceedings *after* the *Kellogg* complaint and amended complaint were filed. In doing so, the district court violated this Court's decisions in *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 (2015), that cases transferred to an MDL must "retain their separate identities," and *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008), that Article III standing is assessed at the time the case is filed.

The Tenth Circuit affirmed the district court decisions with an opinion that conflicts with decades of this Court's jurisprudence and the authoritative decisions of other federal appellate courts, and 247 years of American jurisprudence addressing lawyer deceit. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam), *reh'g denied*, 455 U.S. 1038 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower

federal appellate courts no matter how misguided the judges of those courts may think it to be.").

Farmers respectfully request that the Court grant the petition for certiorari.

In the alternative, Farmers request that the Court grant the petition, vacate the judgment, and remand this case to the Tenth Circuit for remand to the District of Minnesota in accordance with 28 U.S.C. § 2106 (allowing the use of grant, vacate, and remand orders (GVR)), and *Lawrence v. Chater*, 516 U.S. 163 (1996) (approving the use of GVR orders).

OPINIONS BELOW

The Tenth Circuit's opinion, *Kellogg v. Watts Guerra LLP*, 41 F.4th 1247 (10th Cir. 2022), is reproduced at App.1-50. The order denying Farmers' petition for rehearing and rehearing en banc, is reproduced at App.51-52. The district court's orders dismissing the *Kellogg* lawsuit claims and denying Farmers' recusal motions are reproduced at App.56-238.

JURISDICTION

The Tenth Circuit issued its opinion on July 26, 2022. Farmers timely filed a petition for rehearing and rehearing en banc which was denied by the Tenth

Circuit on October 17, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The full text of U.S. CONST. amend. V is reproduced at App.273. The full text of 28 U.S.C. § 455 is reproduced at App.273-277. The full text of 28 U.S.C. § 1407 is reproduced at App.277-280.

STATEMENT OF THE CASE

A. The *Kellogg* lawsuit addresses an attorney fee fraud scheme.

This putative class action addresses an attorney fee fraud scheme perpetrated by the Respondents, a Texas law firm and its partners and conspirators, lawyers and law firms in multiple states, against 60,000 corn growers across the United States in connection with GMO corn lawsuits against Syngenta AG, a global agricultural business, filed in federal and state courts in 2014-17.

The Respondents pursued their "mass tort . . . individual suit" attorney fee fraud scheme through: (1) deceptive solicitation of Farmers to sign 40 percent contingent fee contracts to pursue individual claims in Minnesota; (2) joint prosecution agreements ("JPA") automatically opting Farmers out of class litigation in

the Syngenta MDL and Minnesota without their knowledge and informed consent; and (3) a fraud upon the Syngenta MDL and Minnesota class action courts to persuade the courts to allow the automatic opt-outs. Amended Complaint, ¶¶ 1-336, D. Kan. No. 2:18-CV-02408-JWL-JPO, ECF No. 121, and Fourth Declaration of Douglas J. Nill, Exs. 1-60, ECF No. 153(1)-(4). The allegations in *Kellogg* go to the integrity of the judiciary and the foundation of our system of government. *Wood v. Georgia*, 370 U.S. 375, 383 (1962) ("The right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government. . . .").

The Syngenta MDL was a consolidation of lawsuits by corn growers against Syngenta for unreasonable marketing of a genetically-altered corn seed. Syngenta rushed the corn seed into the market believing that China would approve the seed. China initially did not approve the seed and closed their market to U.S. corn exports, causing a temporary drop in market prices for U.S. farmers. Because corn is priced nationally on the Chicago Board of Trade, the price drop was uniform across the country and the Syngenta litigation was a class action – common claim and damage for all corn growers across the United States – from the outset.

Respondents schemed to use the mass tort, product liability model – a litigation model for lawsuits with individualized injuries, for example, diet drugs or hip replacements – to dupe unsuspecting corn growers across the corn belt into signing individual 40 percent

contingent fee contracts and file individual lawsuits in Minnesota state courts. Farmers were dishonestly told through a barrage of television and internet advertising, direct-mail campaigns and hundreds of in-person "town hall" community meetings that a "*mass tort . . . individual suit*" is better than a class action and that "*only those who sign up [with Respondents] are eligible to pursue claims*." Farmers were dishonestly told that a "mass tort . . . individual suit" is better than a class action, because with a class action, "*lawyers will get all the money* and the *farmers may get a gift certificate*." Respondents thus avoided the class action in the Syngenta MDL with Fed. R. Civ. P. 23 protections, including notice and opt-out procedures and where attorneys' fees are determined by the presiding court as a fiduciary for the members of the class.

Filing and litigating an individual case is not enough to opt an absent class member out of a class action. Knowing this, Respondents contrived a scheme to exclude their 60,000 clients, with individual lawsuits filed in Minnesota, from class certification proceedings in the Syngenta MDL and Minnesota. Respondents accomplished this through secret joint prosecution agreements with the MDL and Minnesota class counsel to automatically opt their 60,000 clients out of the MDL class litigation. The agreements were secret because they were filed under seal in the MDL and never disclosed by Respondents to their 60,000 clients, the Farmers in the *Kellogg* lawsuit, who were unaware that they were putative members of the MDL class action.

Respondents used the joint prosecution agreements to mislead the MDL and Minnesota courts, through material misrepresentations and omissions, that Respondents had satisfied their fiduciary and ethical obligations by procuring informed consent from individual Farmers to be automatically excluded from the MDL class proceedings. Such conduct was a fraud upon the court and an obstruction of justice. *See, e.g.*, Amended Complaint at ¶¶ 203-32 and 421 (Respondents violated their fiduciary obligations to Farmers "by *misleading the class action courts* to allow Respondents to automatically exclude Farmers from the MDL and Minnesota class actions, thereby depriving Farmers of due process and the opportunity to exercise their individual right to be part of the class or opt-out of it."). (Emphasis added).

This Court and Rule 23 do not allow lawyers to privately contract clients and absent or putative class members out of class proceedings. The fundamental issue is *whether private attorneys*, representing individual clients, *can agree to pay class counsel* a portion of their prospective attorneys' fees from individual lawsuits to have their clients excluded from the class definition, and in turn avoid the mandatory Rule 23 court-authorized class notice and opt-out process. The answer is an emphatic no. More than a half century ago, this Court *mandated* the due process standard that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover*

Bank & Trust Co., 339 U.S. 306, 313 (1950). Twenty years later, this Court reaffirmed this position, unequivocally stating, "[n]otice to identifiable class members *is not* a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 176 (1974) (emphasis added).

Respondents' exclusion of their 60,000 corn grower clients from class action proceedings through unlawful and concealed agreements, never disclosed to Farmers until sixteen months after the agreements were negotiated and signed, and never explaining why Farmers were automatically excluded from the federal MDL and Minnesota classes, is an epic fraud of omission and violates Respondents' fiduciary obligations to the Farmers and professional responsibility rules requiring that clients be reasonably informed of litigation options and consent to the selected option.[3] At the same time, Respondents misled the MDL and

[3] The Respondents did not acknowledge the joint prosecution agreements to Farmers until 16 months after the agreements were negotiated and signed and never explained why Farmers were automatically excluded from the Syngenta MDL class proceedings. Amended Complaint, ¶¶ 213-32. And Respondents did more than just opt-out their already signed clients. Respondents continued to advertise, solicit and sign Farmers to contingent fee contract – Farmers who were putative members of the Syngenta MDL class action – long *after* Respondents had already opted those very Farmers out of the class proceedings without their knowledge and informed consent. Amended Complaint, ¶¶ 1-336. Respondents' concealment of the joint prosecution agreements and the terms of those agreements is an epic fraud of omission. Amended Complaint, ¶ 16.

Minnesota courts through misrepresentations and omissions to believe that Respondents had complied with their fiduciary and ethical obligations to gain informed consent from individual Farmers for exclusion from the class certification proceedings and notice and opt-out procedures.

Although Respondents never disclosed the September 25, 2017 settlement term sheet to Farmers, the term sheet was attached to MDL motion pleadings on March 26, 2018. The term sheet envisioned a two-prong settlement: a nationwide class action and a separate parallel inventory settlement for Respondents' 60,000 cases filed in Minnesota. The term sheet established jurisdiction with the MDL court to administer the national class action settlement, and jurisdiction with the 23rd District Court of Brazoria County, Texas, to administer the settlement of Respondents' 60,000 individual lawsuits.

It is no surprise that Respondents never disclosed the term sheet to Farmers. After three years of Respondents' misuse of the Minnesota judicial system to perpetrate their "mass tort . . . individual suit" attorney fee fraud scheme, Respondents unashamedly negotiated the transfer of Farmers' lawsuits to a Texas court in Respondent Watts Guerra LLP's backyard, with no previous connection to the Syngenta litigation, to apply Respondents' 40 percent contingent fee contracts.

The Hennepin County (Minn.) District Court judge did not appreciate Respondents' odious jurisdiction transfer, and the parties revised the term sheet as a National Class Action Settlement Agreement ("Settlement Agreement") filed with the MDL court on February 26, 2018, with claim administration under the jurisdiction of the MDL court.

At the end of the day, Farmers, the deceived and exploited corn growers, were reinstated into the Syngenta MDL settlement class. Although Respondents' two-prong settlement gambit failed, and Farmers were reinstated into the MDL settlement class, the Respondents' transgressions and Farmers' injury had occurred and are continuing today. The adage of "no harm, no foul" is not acceptable for litigation in the American justice system. In 244 years of American jurisprudence, the ends have never excused the means. This is particularly true when it is lawyers, tasked with the administration of justice through their law license, running the scam. *In re Tornow*, 835 N.W.2d 912, 923 (S.D. 2013) ("A practitioner of the legal profession does not have the liberty to flirt with the idea that the end justifies the means . . . Certainly our Rules of Professional Conduct allow no such flirtation.") (quoting *In re Discipline of Mines*, 523 N.W.2d 424, 427 (S.D. 1994); *In re Hager*, 812 A.2d 904, 914 (D.C. 2002) ("Obtaining the best possible outcome for one's clients is never a viable defense to charges of ethical misconduct; the ends do not justify the means.").

B. Farmers' expert, Richard W. Painter, issued opinions that the MDL judge was required to recuse.

Richard W. Painter, the chief ethics counsel for President George W. Bush and the White House staff from 2005-2007, and the co-author of two books on legal ethics with Judge John T. Noonan, Jr., of the U.S. Court of Appeals for the Ninth Circuit (Painter, Richard W. *Curriculum vitae*. 2020), ECF No. 322, pp. 19-25, addresses whether the district court judge should recuse or be disqualified as the judicial officer assigned to the *Kellogg* lawsuit in the *Expert Report Of Richard Painter*, Feb. 1, 2020, App.239-268, at ¶ 19:

> 19. The issue presented at this time, and the issue upon which I am opining in this report, is whether Judge Lungstrum should have this case on his docket now, and with it the power to make procedural and substantive rulings that could prevent this case from ever reaching a different judge and a jury in Minnesota. For the reasons explained below, my opinion is that he should not, and that for Judge Lungstrum to participate in this case would present a serious impediment to the due process that plaintiffs are entitled to.

Prof. Painter recognizes at ¶¶ 28-32 of his Expert Report that there is strong evidence that Respondents lied to the district court through the language of the joint prosecution agreements and statements to the district court to persuade the district court to

automatically opt-out Farmers from the Syngenta MDL class proceedings:

> 28. In sum, based on my review of the record, there is strong evidence that by, among other things submitting the JPA to the court, defendants lied to Judge Lungstrum in order to get him to approve of opting out 60,000 plaintiffs from the class action. There is evidence that the defendants showed blatant disregard for their obligations to the court under the Federal Rules of Civil Procedure, including Rule 11, and their ethical obligations as lawyers. See ABA Model Rule 3.3 (candor to the tribunal). I do not opine here on the truth of these allegations, but they are supported by evidence in the record and are extremely serious.

Prof. Painter identifies the "untenable" conflict of interest for the district court and the "serious violation of due process" for Farmers in his Expert Report at ¶ 39:

> 39. Regardless of how this plays out – which will only become clear as facts are established at trial – this is an untenable situation for the judge. He cannot without a disabling personal conflict of interest decide procedural or substantive issues in a case where a critically important underlying factual issue is whether the lawyers (i) lied to their clients but told the truth to the judge (himself), (ii) lied to their clients and to the judge, or (iii) told the

> truth to both their clients and to the judge. Of course, defendants want Judge Lungstrum, without examining the underlying facts, not to recuse from this case and to make determination (iii) and dismiss all or most of this case. But I am not aware of evidence in the record that would support determination (iii) – that the defendant lawyers were honest with both their clients and the court. Such a determination – made by a Judge who faces a personal conflict of interest with respect to determinations (i) and (ii) – is a serious violation of due process.

Prof. Painter addresses the ex parte communications that may have occurred in the Syngenta MDL that require the district court to recuse or be disqualified in *Kellogg* in his Expert Report at ¶¶ 41-42. And Prof. Painter addresses the "irrevocable" harm to Farmers' due process rights to an impartial judge in his Expert Report at ¶¶ 46-47. Prof. Painter concludes that the district court must recuse or be disqualified, at ¶¶ 65-67 (emphasis added):

> 65. There were multiple fiduciaries in the Syngenta class action who were legally obligated as fiduciaries to diligently protect the interests of the plaintiffs as putative and absent members of the Syngenta class. These fiduciaries included Judge Lungstrum himself and also the lawyers. The lawyer fiduciaries were both the class counsel and the defendant lawyers who purported to represent the plaintiffs as

> individual plaintiffs. Now the plaintiff class members allege breach of fiduciary duty. The fiduciary duty breach, if it occurred could have been a breach of fiduciary duty by the class counsel, a breach of fiduciary duty by the defendant lawyers who purported to represent the plaintiffs as individuals, a breach of fiduciary duty by Judge Lungstrum, or a breach of fiduciary duty by two of the above or by all three. Judge Lungstrum, as one of these fiduciaries for the plaintiff class, has an untenable conflict of interest if he sits on this case that turns upon a factual determination of whether there was a fiduciary breach and, if so, which fiduciaries were responsible for it.
>
> 66. Judge Lungstrum is in a bind in this case: he has three alternatives: (i) throw himself under the bus (for breaching his fiduciary duty to the plaintiffs as part of the class); (ii) throw the lawyers under the bus (for lying to him); or (iii) throw the plaintiffs in this case out of court. Judge Lungstrum should not allow himself to be put in this position.
>
> 67. Due process considerations require that Judge Lungstrum recuse.

Rather than acknowledging a breach of fiduciary obligations to Farmers and the substantial evidence of Respondents' deceit, the district court chose to "throw [Farmers] out of court," the improper third alternative identified by Prof. Painter in ¶ 66 above. The district

court dismissed Farmers' federal declaratory judgment and racketeering claims, and Minnesota statutory and common law fraud and civil conspiracy and aiding and abetting claims through Rule 12 motions to dismiss, and the remaining breach of fiduciary duty claim through litigation sanctions.[4]

C. The MDL judge denied motions to recuse and dismissed the *Kellogg* lawsuit claims by citing his fee award decisions in the Syngenta MDL.

The district court denied motions to recuse and dismissed Farmers' declaratory judgment and racketeering claims, and Minnesota statutory and common

[4] The MDL judge issued orders on April 15, April 27, and April 28, 2020, App.189, 197, and 203, sanctioning Farmers' counsel and the *Kellogg* named plaintiffs under Fed. R. Civ. P. 37(b) and 28 U.S.C. § 1927 for an alleged failure to participate in discovery and vexatious litigation, and directing the payment of the monetary sanctions within 14 days of the April 27 and April 28 orders. When Farmers' counsel did not timely pay the monetary sanctions, the district court dismissed the remaining breach of fiduciary claim as a termination sanction. App.210. The Tenth Circuit does not acknowledge that the district court sanctions were a hotly contested fact dispute, *see* p. 57 of Farmer's opening brief, No. 20-3172, Nov. 18, 2020, at pp. 54-60, and the termination sanction to dismiss the remaining breach of fiduciary duty claim was a violation of Farmers' due process rights. *Newland v. Superior Court*, 47 Cal. Rptr. 2d 24, 27-28 (Cal. App. 1995). Farmers' counsel, Douglas J. Nill, is an accomplished attorney with a 30-year record of success. After law school, Nill was a law clerk for a U.S. District Court judge in Iowa. Nill was recognized as an Attorney of the Year in Minnesota in 2006 by the *Minnesota Lawyer*, and has never been monetarily sanctioned by any other judge.

law fraud, civil conspiracy and aiding and abetting claims, through a rationale that the claims, which are not a collateral attack on the MDL settlement and the fee awards, are rendered moot by the settlement and the fee award decisions in the settlement proceedings. *See* March 1, 2019 order, App.69 (Farmers are not injured and do not have Article III standing because Respondents' recovery on their contingent fee contracts with Farmers is "only from the Court's fee award and the award pools" and not from the contingent fee contracts); May 21, 2019 order, App.96 ("[Farmers] are not injured in fact – by any fee awards received by [Respondents] from the Court's pools."); August 13, 2019 order, App.111 ("[fee award pool] orders in this MDL preclude the possibility of [Respondents'] recovery of any fees directly from [Farmers]"). The district court thus dismissed Farmers' federal and Minnesota claims through a rationale that Farmers' claims are rendered moot by the district court's unilateral actions in the Syngenta MDL *after* the *Kellogg* complaint and amended complaint were filed. *See* May 21, 2019 order, App.94 ("[district court rulings in the MDL] have foreclosed the possibility of the injury alleged by [Farmers] in their complaint.").

D. The Tenth Circuit affirmed the district court decisions.

1. Conflict with *Lexecon*.

The Tenth Circuit cites 28 U.S.C. § 1407(e) at pp. 7-10 of the slip opinion, App.7-10, to assert that

MDL transfer decisions can only be challenged by mandamus petition and that the Tenth Circuit has no "jurisdiction" to address Farmers' challenge in this appeal from a final judgment. The Tenth Circuit opinion is in conflict with this Court's decision in *Lexecon*, 523 U.S. at 41-43, that MDL transfer decisions unsuccessfully challenged by mandamus petition during the litigation, as occurred in *Lexecon* and *Kellogg*, can *again* be challenged through an appeal of the final judgment.

2. Disregard of Congressional recusal mandates and Farmers' due process rights.

The Tenth Circuit opinion disregards the factual record relevant to the 28 U.S.C. §§ 455(b) and (e) judicial recusal mandates of the United States Congress, and is in conflict with this Court's decision in *Williams*, 136 Sup. Ct. at 1905, that a Fifth Amendment due process violation occurs when the judge played a critical role in a prior related proceeding that creates the likelihood of bias or a personal interest in the outcome. The *Kellogg* lawsuit presents substantial *evidence* – not speculation – of a judicial conflict of interest – breach of fiduciary obligations to Farmers in the Syngenta MDL class litigation, knowledge of contested facts in *Kellogg* – that fall under 28 U.S.C. §§ 455(b) and (e) recusal mandates and Fifth Amendment due process protections.

3. *Kellogg* lawsuit and *Syngenta* lawsuits are not "the same parties."

The Tenth Circuit asserts that Farmers' Fifth Amendment due process rights to proceed with an impartial judge were not violated because the *Kellogg* lawsuit and the Syngenta lawsuits are "the same parties." App.15. The *Kellogg* lawsuit is corn growers suing their lawyers. The Syngenta MDL is corn growers suing Syngenta. The *Kellogg* lawsuit is an independent lawsuit and the parties are *not* the same parties. *See* MDL Panel transfer order, Oct. 3, 2019, App.61 ("*Kellogg* plaintiffs [are] not objecting to the MDL settlement or any fees awarded thereunder," App.63, but request "an escrow order holding disputed funds *until the claims in Kellogg have been resolved*."). App.65, n. 4 (emphasis added).

4. Lawyers cannot "consent" to privately contract clients and absent class members out of Rule 23 class actions.

The Tenth Circuit asserts at note 5 of the slip opinion, App.17, that the automatic exclusions of Farmers from the MDL class proceedings, through private contracts between the lawyers, were permissible because "the [Respondents] consented." This Court and Fed. R. Civ. P. 23 do not allow lawyers to privately contract clients and absent class members out of a class action. The *Kellogg* complaint and amended complaint explain that the automatic exclusions were concealed from Farmers by the Respondents and a scheme of

racketeering and a breach of fiduciary obligations through deceit. Amended Complaint, at ¶¶ 1-336. Lawyers cannot consent to their misconduct to excuse the misconduct.

5. Opinion that the Syngenta MDL "settlement eliminated any economic injury to the *Kellogg* farmers" is in conflict with national fee-forfeiture jurisprudence.

The Tenth Circuit opinion that the Syngenta MDL "settlement eliminated any economic injury to the *Kellogg* farmers," App.4 and App.22-34, is in conflict with the Minnesota Supreme Court's decision in *Perl II*, 345 N.W.2d at 212-13, and fee-forfeiture decisions by state courts across the United States, which recognize the black-letter principle that attorney fees claimed by lawyers who breach fiduciary obligations through deceit are "money damages" to clients. Respondents' misconduct is an injury, *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540 (2016), and the fee and expense awards by the district court to the Respondents during the MDL settlement proceedings are a monetary damage under Minnesota law.

REASONS FOR GRANTING THE PETITION

> "[Y]et the law taketh heed of the corrupt beginning and counteth all as one entire act." *Dolus circuitu non purgatur*.

Broom's Legal Maxims, 6th ed. (1884), 222.

I. The transfer of the *Kellogg* lawsuit from the District of Minnesota to the Syngenta MDL was a "categorical violation" of the 28 U.S.C. § 1407(a) mandate.

Under 28 U.S.C. § 1407(a), the MDL Panel may only transfer "civil actions involving one or more common questions of fact" to any single district court for "coordinated or consolidated pretrial proceedings." *Kellogg* did not meet any requirements for transfer. The Syngenta MDL was litigation by corn growers against Syngenta for unreasonable marketing of a genetically-altered seed. Pretrial proceedings in the MDL were concluded and a national class settlement of the growers' claims against Syngenta was filed by the parties in the MDL *before* the transfer of *Kellogg* to the MDL, and a final judgment on the terms of the settlement and attorney fee awards in the MDL was entered on December 7, 2018.

Kellogg is a class action lawsuit by corn growers against their lawyers for racketeering and a breach of fiduciary obligations through actions which constitute deceit under Minnesota law. *Kellogg* has no common questions of fact and no shared claims with the cases transferred into the Syngenta MDL. Thus, the transfer by the MDL Panel was a "categorical violation" of the § 1407(a) mandate and a judicial usurpation of power by the MDL Panel exceeding the mandate as enacted by the United States Congress. *Lexecon*, 523 U.S. at 41-43 ("reversal is necessary" for decisions "erroneously litigated in a district in which . . . venue may never be laid under [28 U.S.C § 1407(a)]").

II. The Tenth Circuit opinion that the Tenth Circuit has no "jurisdiction" to review the transfer is in conflict with this Court's decision in *Lexecon*.

The Tenth Circuit cites 28 U.S.C. § 1407(e) to assert that transfer decisions can only be challenged by mandamus petition and that the panel has no "jurisdiction" to address Farmers' transfer challenge in this appeal from a final judgment. App.7. The Tenth Circuit disregards this Court's decision in *Lexecon*, 523 U.S. at 41-43, that transfer decisions unsuccessfully challenged by a mandamus petition during the litigation can again be challenged through an appeal from a final judgment. Farmers challenged the MDL Panel transfer by mandamus petitions under § 1407(e) during the litigation, Tenth Circuit No. 18-3220 and Supreme Court No. 18-768, and through motion practice to the MDL district court, and again challenge the transfer, as in *Lexecon*, through this appeal from a final judgment.

A. *Lexecon* and *Kellogg* share the same procedural background.

In *Lexecon*, a lawsuit was transferred by the MDL Panel from the Northern District of Illinois to the District of Arizona. Plaintiff *Lexecon* asked the district court to refer the case back to the MDL Panel for remand to the Northern District of Illinois. 523 U.S. at 30. The district court denied the motion and assigned the lawsuit to itself for trial.

The Ninth Circuit denied *Lexecon's* mandamus petition, 523 U.S. at 31-32, and the case went to trial in the District of Arizona. After the trial and entry of a final judgment, *Lexecon* again challenged the transfer through the appeal of the final judgment. This Court agreed the trial by the transferee court was improper, and reversed the judgment of the Ninth Circuit and remanded the case for remand to the Northern District of Illinois for trial.

In vacating the final judgment, the Court recognized in *Lexecon* that "the § 1407(a) mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate could obtain no relief at the end of the day." 523 U.S. at 43. Thus, the Court recognized that transfer decisions under § 1407(a) can be challenged by mandamus petition during the litigation, § 1407(e), and again through an appeal of a final judgment.

In the *Kellogg* case, Farmers challenged the transfer with the MDL Panel at the time of transfer, and then filed a mandamus petition with the Tenth Circuit, which was denied in an order without reasons, and then filed a mandamus petition with this Court, which was denied in a docket order without reasons. And then, during the litigation in the District of Kansas, Farmers filed motions requesting remand under the 28 U.S.C. §§ 455(b) and (e) recusal mandates and on due process grounds, and consistently arguing that transfer was a categorical violation of 28 U.S.C. § 1407(a), the transfer statute.

B. Farmers' procedural efforts to challenge the wrongful transfer were addressed by this Court in *Lexecon*.

Farmers' procedural efforts to challenge the wrongful transfer are exactly what Justice Souter had in mind when he wrote the unanimous opinion for the Court in *Lexecon*. Farmers have persistently argued, at every possible stage, through mandamus petitions and motion practice to the district court and appeals under 28 U.S.C. §§ 1291 and 1292(a), that the MDL Panel transfer of *Kellogg* to the Syngenta MDL was a "categorical violation" of the § 1407(a) mandate and a judicial usurpation of power by the MDL Panel in exceeding the mandate as enacted by the United States Congress. And the categorical violation of the § 1407(a) mandate is acute; an error of constitutional magnitude. The MDL district court judge has a judicial conflict of interest that compels his recusal or disqualification under 28 U.S.C. §§ 455(b) and (e) recusal mandates and the Due Process Clause's guarantee of an impartial adjudicator.

C. The cases cited by the Tenth Circuit are waiver cases – law of the case doctrine – that have no relevance to the *Kellogg* appeal.

The cases cited by the Tenth Circuit in the opinion, App.8, are waiver cases – an application of law of the case doctrine – where the aggrieved party did not challenge the transfer during the litigation through a mandamus petition when the transfer dispute was ripe and

thus waived the right to challenge the transfer through an appeal from the final judgment. *See In re Morg. Elec. Registration Sys., Inc*., 754 F.3d 772, 780 (9th Cir. 2014) (plaintiffs "waived" the right to challenge the transfer of their cases to the MDL through an appeal because they "have not sought a writ of mandamus" to challenge the transfer during the litigation); *Grispino v. New England Mut. Life Ins. Co*., 358 F.3d 16, 19 n. 3 (1st Cir. 2004) (the plaintiff did not challenge the transfer through a writ of mandamus during the litigation and thus waived a challenge through an appeal of the final judgment).

III. The Tenth Circuit did not consider the factual record relevant to the 28 U.S.C. §§ 455(b) and (e) recusal mandates of the United States Congress and the opinion is in conflict with this Court's decision in *Williams*.

The *Kellogg* lawsuit presents substantial *evidence* – not speculation – of a judicial conflict of interest – breach of fiduciary obligations to Farmers in the Syngenta MDL class litigation, knowledge of contested facts in *Kellogg* – that fall under 28 U.S.C. §§ 455(b) and (e) recusal mandates and Fifth Amendment due process protections. The *Expert Report Of Richard Painter* is based on his review of the factual record, hearing transcript statements, and the language of the unlawful and concealed joint prosecution agreements.

A. The Tenth Circuit did not consider the factual record relevant to the 28 U.S.C. §§ 455(b) and (e) recusal mandates.

The operative provisions of 28 U.S.C. § 455 are divided into two subsections. Subsection (a) states: "Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Subsection (b) applies to specific circumstances which suggest impartiality and thus mandate recusal. The portions of § 455(b) applicable here, state: § 455(b)(1) ("personal knowledge of disputed evidentiary facts concerning the proceeding"), and § 455(b)(5)(iv) ("likely to be a material witness in the proceeding"). In 28 U.S.C. § 455(e), the Congress has provided: "No . . . judge . . . shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)."

The Tenth Circuit has acknowledged the analytic distinction between 28 U.S.C. § 455(a) allegations by litigants of speculative bias and prejudice, and the recusal mandates of the United States Congress under § 455(b) and (e). *See United States v. Gipson*, 835 F.2d 1323, 1325-26 (10th Cir. 1988) (§§ 455(b) and (e) mandates create a "jurisdictional" limitation on the authority of a judge to participate in a given case and the burden is on the judge to recuse). Most § 455 requests for recusal by litigants are § 455(a) allegations that *speculate* that the judge is biased; for example, an allegation that the Judge was harsh with the litigant or ruled against the litigant, which are readily dismissed by district and appellate courts. However, when there

is substantial *record evidence* that a specific circumstance of § 455(b) is implicated, as in *Kellogg*, the judge is required to recuse, and the conflict of interest cannot be waived and the recusal mandate is ongoing under § 455(e).

To be clear, the MDL judge shows demonstrable bias in the *Kellogg* lawsuit under § 455(a) through decisions to dismiss the *Kellogg* lawsuit claims that are a manifest disregard of the facts and the law. Even so, Farmers primarily request the recusal or disqualification of the MDL district court judge under §§ 455(b) and (e), through substantial record evidence that the MDL judge breached fiduciary obligations to Farmers in the Syngenta MDL class proceedings, and was deceived by the Respondents to allow the private contract exclusions of Farmers from the class proceedings. *See*, *e.g.*, *Expert Report Of Richard W. Painter*, App.239.

1. This Court and Fed. R. Civ. P. 23 do not allow lawyers to privately contract clients and absent class members out of a class action.

It is black-letter law that a district court judge is a fiduciary for absent class members in a class action. An issue in this petition is whether the district court judge [in *Kellogg*] played a critical role in a prior related proceeding [Syngenta MDL litigation] that creates the likelihood of bias or a personal interest in the outcome. *Williams*, 136 S. Ct. at 1905.

There is no legal authority allowing lawyers to privately contract clients and putative class members out of class litigation proceedings and Fed. R. Civ. P. 23 protections. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("[W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."); *Eisen*, 417 U.S. at 176 ("[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23."); *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1024 (9th Cir. 1998) (citing Newberg & Conte, *Newberg on Class Actions* § 16.16 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel."). The *Hanlon* court stated:

> There is no class action rule, statute, or case that allows a putative class plaintiff or counsel to exercise class rights *en masse*, either by making a class-wide objection or by attempting to effect a group-wide exclusion from an existing class. Indeed, to do so would infringe on the due process rights of the individual class members, who have the right to intelligently and individually choose whether to continue in a suit as class members.

Id. at 1024 (emphasis added) (citing *Eisen*, 417 U.S. at 173-77); *see also Bennett v. Boyd Biloxi*, Civ. No. 14-0330, slip op. at p. 6 (S.D. Ala. July 8, 2016) (the lawyers

who seek to intentionally exclude absent class members from class certification notice "identify no authority empowering the Court to exclude particular class members from the class simply by saying they are excluded . . . .").

The district court allowed the Respondents to privately contract with Syngenta MDL class counsel to remove 60,000 corn growers – the 60,000 Farmers in this *Kellogg* lawsuit – from the MDL class proceedings without individual notice and opt-out procedures. The private contracts were the product of collusion; an exchange of money and favors.[5] Again, the district court judge was either misled by the Respondents to allow Farmers to be removed from the MDL class proceedings through private contracts between the lawyers, or he inadvertently facilitated the Watts Guerra LLP racketeering scheme by allowing the private contract opt-outs.

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[5] The language in the joint prosecution agreements that class counsel would not contest Respondents' 40 percent contingent fee contracts with individual farmers in exchange for a share of Farmers' recovery from Syngenta is the height of collusion at the expense of absent class members. *See*, *e.g.*, Amended Complaint at ¶ 224 (directing MDL class counsel to "refrain from interfering with or altering the terms and conditions of any fee agreement with any of [Defendants'] clients") (JPA at p. 14 ¶ iii).

2. Richard W. Painter recognizes that "there is strong evidence" that the Respondents "lied" to the district court.

Farmers' expert, Richard W. Painter, recognizes at ¶¶ 23-33 of his *Expert Report of Richard Painter*, App.239-268, that "there is strong evidence" that the Respondents "lied" to the district court to get him to approve the automatic opt-outs for 60,000 absent class members from Syngenta MDL class proceedings during the litigation through the unlawful and concealed joint prosecution agreements (emphasis added):

> 25. * * * If this statement was false, when the JPA containing this false representation was submitted by the Respondents and by class counsel to Judge Lungstrum, *lawyers who knew that this language was false lied to the Judge*. * * *
>
> 28. In sum, based on my review of the record, there is *strong evidence* that by, among other things submitting the JPA to the court, *Respondents lied to Judge Lungstrum* in order to get him to approve of opting out 60,000 plaintiffs from the class action. * * *
>
> 32. * * * Any lawyers who were aware of these facts who sat silent in Judge Lungstrum's courtroom while he assumed the exact opposite *perpetrated a fraud upon the Court*.

B. The Tenth Circuit did not consider the Fifth Amendment due process violation under *Williams*.

Farmers allege a Fifth Amendment due process violation because the district court judge played a critical role in a prior related proceeding [the Syngenta litigation], that creates the likelihood of bias or a personal interest in the outcome [in *Kellogg*]. *Williams*, 579 U.S. ___, 136 S. Ct. at 1903. Prof. Painter summarized in the *Expert Report Of Richard Painter*, at ¶¶ 66-67:

> 66. Judge Lungstrum is in a bind in this case: he has three alternatives: (i) throw himself under the bus (for breaching his fiduciary duty to the plaintiffs as part of the class); (ii) throw the lawyers under the bus (for lying to him); or (iii) throw the plaintiffs in this case out of court. Judge Lungstrum should not allow himself to be put in this position.
>
> 67. Due process considerations require that Judge Lungstrum recuse.

The Tenth Circuit casts Prof. Painter's expert opinions as "speculation," App.16, while not recognizing that his opinions are based on a review of the factual materials, including the language of the unlawful and concealed joint prosecution agreements that automatically removed 60,000 absent class members from the Syngenta MDL class action without their knowledge and informed consent.

C. The Tenth Circuit applied an incorrect standard of review.

The Tenth Circuit applied an abuse-of-discretion standard of review to the MDL judge's recusal decisions. App.11. This is an incorrect standard of review. A disregard of the recusal mandates of the United States Congress under 28 U.S.C. §§ 455(b) and (e) and an unconstitutional failure to recuse are structural error. *Gipson*, 835 F.2d at 1325-26 (§§ 455(b) and (e) mandates create a "jurisdictional" limitation on the authority of a judge to participate in a given case and the burden is on the judge to recuse); *Williams*, 136 S. Ct. at 1909 ("an unconstitutional failure to recuse constitutes structural error . . ."); *Neder v. United States*, 119 S. Ct. 1827, 1833 (1999) ("Errors of this type [structural error] are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome."). The MDL judge's failure to recuse from the *Kellogg* lawsuit is structural error.

IV. Lawyers cannot privately contract clients and absent class members out of a Fed. R. Civ. P. 23 class action.

This Court and Fed. R. Civ. P. 23 do not allow lawyers to privately contract absent class members out of a class action. The exclusion of clients and absent class members from Rule 23 class proceedings through private contracts between the lawyers deprives the clients and absent class members of the assurance of their informed consent through individual notice and opt-out procedures enshrined in Rule 23, and

vanquishes their due process rights and property interests in the cause of action and the prospective common fund recovery for the benefit of the class. *Shutts*, 472 U.S. at 807 (named and "absent class-action plaintiffs" have a "constitutionally recognized property interest" in "a chose in action"); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (class action common fund is the property of the class).

V. The Tenth Circuit opinion that the MDL "settlement eliminated any economic injury to the *Kellogg* farmers" is in conflict with this Court's decision in *Gelboim*.

A. The MDL Panel recognized that *Kellogg* is an independent lawsuit and not a collateral attack on the MDL settlement or the fee awards in the MDL.

The MDL Panel recognized in an October 3, 2018 transfer order, App.61, that *Kellogg* is an independent lawsuit and not an objection to the MDL class settlement and fee award proceedings. Thus, the MDL Panel recognized in the October 3 order at App.63-65, that *Kellogg* is entitled to proceed on the merits (emphasis added):

> *Kellogg* plaintiffs [are] "*not objecting to the MDL settlement or any fees awarded thereunder*," App.63, but request "an escrow order holding disputed funds until the claims in *Kellogg* have been resolved," App.65, n. 4, . . . "[Farmers] argue that our transfer order improperly equates the *Kellogg* plaintiffs with

> objectors to the settlement. It does not." App.63.

The improper transfer of the *Kellogg* lawsuit from the District of Minnesota to the Syngenta MDL was based upon a misleading claim by Respondents that the *Kellogg* complaint "potentially impacts the MDL Court's control over any award of attorneys' fees which is inextricably interwoven with the settlement approval process." The passage of time demonstrates the absurdity of Respondents' claim. Farmers never appeared in the Syngenta MDL litigation for any substantive reason, and *Kellogg* had no impact on the MDL settlement and fee award proceedings. Indeed, when Farmers attempted to intervene in the MDL settlement proceedings to request that the district court order the Respondents to hold in escrow the $149,756,512.64 in fee and expense awards to the Respondents as "disputed . . . funds" under Minn. R. Prof. Conduct 1.15(b) and Kan. R. Prof. Conduct 1.15(c), the district court *denied the motion to intervene* and the Tenth Circuit affirmed that decision. App.53-54. The *Kellogg* lawsuit was never a collateral attack on the MDL settlement or the fee awards in the MDL.

B. The district court could only make rulings on the factual record and causes of action in the *Kellogg* complaint and amended complaint.

The panel decision violates this Court's directive in *Gelboim*, 574 U.S. at 413, that MDL cases must

"retain their separate identities." "This means a district court's decision whether to grant a motion . . . [to dismiss claims] . . . depends on the record *in that case* and not others." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d at 845 (emphasis added). "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance." *Id.*, at 844. Thus, the district court could only make rulings on the factual record and causes of action in the *Kellogg* complaint and amended complaint and without reference to the MDL settlement and the district court's fee award decisions in the MDL settlement proceedings.

CONCLUSION

For the foregoing reasons, Farmers respectfully request that the Court grant the petition for certiorari. In the alternative, Farmers request that the Court grant the petition, vacate the judgment, and remand this case to the Tenth Circuit for remand to the District of Minnesota in accordance with 28 U.S.C. § 2106 and *Lawrence*, 516 U.S. 163.

Respectfully submitted,

Dated: January 10, 2023

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