No. _____

In The
Supreme Court of the United States

ANDERSON LAW OFFICES,
BENJAMIN H. ANDERSON,

Petitioners,

v.

COMMON BENEFIT FEE AND COST COMMITTEE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

PAUL W. FLOWERS, ESQ.
Counsel of Record
LOUIS E. GRUBE, ESQ.
PAUL W. FLOWERS CO., L.P.A.
50 Public Square, Suite 1910
Cleveland, Ohio 44113
(216) 344-9393
pwf@pwfco.com
leg@pwfco.com

Attorneys for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The central question posed in this appeal is as follows:

> Whether federal district courts possess the authority to require appeal rights to be waived as a condition for receiving an award available under law.

The District Court below appears to be the first in the history of modern jurisprudence to refuse to consider granting a monetary recovery to any applicant that had not expressly or implicitly consented to relinquish the right to appeal the decision. Secure in their belief that their decisions could never be reviewed, both the District Court and the panel of the United States Court of Appeals for the Fourth Circuit then proceeded to abdicate their fundamental judicial responsibilities to carefully scrutinize and adjudicate the applications submitted by eighty-nine law firms seeking an equitable apportionment of the estimated $550 million Common Benefit Fund ("Fund") that had been collected in the Transvaginal Mesh Multi-District Litigation proceedings. These judicial duties were relegated instead to Respondent, the Common Benefit Fee and Cost Committee ("FCC"), which consists of eight attorney representatives of the applicant law firms and one private individual. Predictably, the FCC's members awarded themselves almost exactly two-thirds of the fund, while flatly refusing to allow any of the non-member firms to review the time

QUESTIONS PRESENTED—Continued

entries or expense receipts that purportedly justified their stunning allotment. Petitioners, Anderson Law Offices and Benjamin H. Anderson (collectively, "ALO"), and other non-member firms lodged numerous objections to the federal court's abandonment of its due process responsibilities and sought an opportunity to be heard through an evidentiary hearing, all to no avail.

The District Court casually dispensed with dozens of well-developed objections and approved the FCC's evident self-dealing in a single six-page opinion. And in a single-sentence decision, the United States Court of Appeals for the Fourth Circuit dismissed Petitioners' appeal with no further explanation.

Subsumed within the central question of whether federal courts are empowered to order the relinquishment of appeal rights are the following specific issues of concern that are ripe for review:

a. What are the elemental requirements for an enforceable waiver of the right to appellate review in federal proceedings?

b. Whether assent to a forfeiture of appeal rights may be implied from mere acquiescence to a district court's order.

c. Whether express and knowing consent to a forfeiture of appeal rights must be established either through a valid written instrument or in open court.

QUESTIONS PRESENTED—Continued

d. Whether the scope of implied or involuntary waivers of appeal rights must be narrowly construed against the forfeiture under federal law.

e. Whether there is an enforceable, implied guarantee in an otherwise valid waiver of appeal rights that the federal court will still abide by its own rulings in the case as well as basic principles of due process.

PARTIES TO THE PROCEEDING

Petitioner Anderson Law Offices is a legal professional association that was organized and based at the relevant time period in Cleveland, Ohio. Petitioner Benjamin H. Anderson was and is the Principal Attorney of Petitioner Anderson Law Offices and a citizen of the United States of America. Respondent Common Benefit Fee and Cost Committee is an organization of eight law-firm representatives and one private individual appointed by the United States District Court for the Southern District of West Virginia for the purpose of recommending an allocation of the estimated $550 million Common Benefit Fund that is at issue in this appeal.

CORPORATE DISCLOSURE

Petitioner Anderson Law Offices has no parent corporation and is not owned in any part by a publicly held company.

DIRECTLY RELATED PROCEEDINGS

Anderson Law Offices v. Common Benefit Fee and Cost Committee, Nos. 19-1849, 19-1850, 19-1851, 19-1853, 19-1855, 19-1856, 19-1857, United States Court of Appeals for the Fourth Circuit. Judgment Entered Sept. 23, 2019.

Bernstein Liebhard LLP v. Common Benefit Fee and Cost Committee, No. 19-1892, United States Court of

DIRECTLY RELATED PROCEEDINGS
—Continued

Appeals for the Fourth Circuit. Judgment Entered Sept. 23, 2019.

Mazie Slater Katz & Freeman, LLC v. Common Benefit Fee and Cost Committee, Nos. 19-1943, 19-1944, 19-1945, 19-1947, 19-1948, 19-1949, 19-1950, United States Court of Appeals for the Fourth Circuit. Judgment Entered Oct. 9, 2019. Rehearing *en banc* denied November 5, 2019.

In re: C. R. Bard, Inc., Pelvic Repair System Products Liability Litig., No. 2:10-md-02187, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re: American Medical Systems, Inc., Pelvic Repair System Products Liability Litig., No. 2:12-md-02325, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re: Boston Scientific Corp. Pelvic Repair System Products Liability Litig., No. 2:12-md-02326, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re: Ethicon, Inc. Pelvic Repair System Products Liability Litig., No. 2:12-md-02327, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re: Coloplast Corp., Pelvic Support Systems Products Liability Litig., No. 2:12-md-02387, United States

DIRECTLY RELATED PROCEEDINGS
—Continued

District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re: Cook Medical, Inc., Pelvic Repair System Products Liability Litig., No. 2:13-md-02440, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

In re: Neomedic Pelvic Repair System Products Liability Litig., No. 2:14-md-02511, United States District Court for the Southern District of West Virginia. Judgment Entered July 25, 2019.

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The order and judgment of the United States Court of Appeals for the Fourth Circuit in Consolidated Docket Numbers 19-1849, 19-1850, 19-1851, 19-1853, and 19-1855 dismissing Petitioners' appeal were issued on September 23, 2019, and are unpublished. The Memorandum Opinion and Order entered by the United States District Court for the Southern District of West Virginia overruling all objections and approving Respondent FCC's common-benefit fee allocations was issued on July 25, 2019, and is unpublished.

STATEMENT OF JURISDICTION

This Court's jurisdiction is drawn from 28 U.S.C. § 1254(1).

CONSTITUTIONAL AUTHORITY INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

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

Christine Scott's products liability action spawned a multitude of similar lawsuits against Bard in state and federal courts across the country, which were ultimately consolidated in a multi-district litigation ("MDL") proceeding based in the United States District Court for the Southern District of West Virginia. *Case No. 2:10-md-02187*. Similar lawsuits against other TVM manufacturers were also designated as MDLs and assigned to that same court. *S.D.W. Va. Case Nos. 2:12-md-02325, 2:12-md-02326, 2:12-md-02327, 2:12-md-02387, 2:13-md-02440, 2:14-md-02511*. Although each MDL retained its separate status throughout the proceedings, the District Court generally handled

them collectively, with all MDLs subject to the same orders and directives.[1]

Of the hundreds of law firms involved in the TVM MDLs, Petitioner ALO was at the forefront of litigating for the common benefit of over 100,000 women who had suffered lifelong, debilitating injuries from the TVM implants. ALO's early introduction and extensive involvement in the proceedings had differed markedly from the other firms in several important respects. By approximately May 2011, Petitioner Benjamin Anderson, Esq. ("Attorney Anderson") had devoted his entire practice to this effort against the well-funded legal defense that had been organized by the TVM product manufacturers. *Affidavit of Benjamin H. Anderson, Esq. dated April 9, 2018 ("Anderson Aff."), ¶ 5(a)*.[2] ALO was one of the first to undertake the mass tort effort that was originally consolidated in the New Jersey state court system against Ethicon, a division of Johnson & Johnson. *Id., pp. 13-14.*

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

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[1] For ease of reference, the remainder of this Petition will refer only to the Ethicon MDL Orders and Entries. *Case No. 12-md-02327*. The documents reproduced in the Appendix were filed in identical form in each MDL.

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

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

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

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

Court for reimbursement of costs and apportionment of attorneys' fees for common benefit work and any other utilization of the funds." *Doc#:1845, Pretrial Order#:211, p. 5; PageID#:23550*. The Court remained obligated, however, to closely scrutinize the committee's proposals, particularly given the inherent conflict of interest that was present. *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008).

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

These seven case-management orders were expressly endorsed by several of the attorneys who had been performing common-benefit work, nearly all of

whom were either appointed to the FCC or later rewarded with generous fee allocations. ALO's electronic signature appeared on just two of the entries, which were adopted in the MDLs that have now closed without producing significant common-benefit contributions.[3] Neither of these moot MDLs have been included in this appeal. ALO was not asked to, and did not, consent to the appeal waiver edicts in the other five MDLs, which are at issue in this Petition.

The District Court also established the position of External Review Specialist ("ERS"), which was later filled by former Missouri State Court Judge Daniel J. Stack ("Stack"). *Doc#: 404, PTO#:262, p. 9; PageID#: 141785*. Notably, he has received heavy criticism from a different district court judge while serving in the same capacity in a separate MDL proceeding, who rejected Stack's report and recommendations "due to several structural and procedural flaws." *In re Syngenta Mass Tort Actions*, No. 3:15-CV-01221-NJR, 2019 WL

[3] Although not a part of this appeal, the two case management orders bearing Attorney Anderson's electronic endorsement are: *In re: Cook Medical, Inc., Pelvic Repair System Products Liability Litig., S.D.W. Va. No. 2:13-md-02440 ("Cook"), Doc#:43, Pretrial Order#:11, p. 14; PageID#:580;* and *In re: Neomedic Pelvic Repair System Products Liability Litig., S.D.W. Va. No. 2:14-md-02511("Neomedic"), Doc#:78, Pretrial Order#:20, p. 16; PageID#: 514*. The *Cook* MDL closed on August 6, 2019. *Cook, Doc#:751, Order, p. 1; PageID#:14194.* The Neomedic MDL closed on March 12, 2018. *Neomedic, Doc#:78, Pretrial Order#:20, p. 16; PageID#: 514*. All common-benefit funds on hand as of July 25, 2019, have been disbursed consistent with the District Court's Order. *Doc#:8453, Pretrial Order#:342, p. 6; PageID#:205790, App. 17.* Significant funds are still being assessed in the other five MDLs now on appeal. *Id., p. 6, App. 17-18.*

3887515, at *5 (S.D. Ill. Aug. 19, 2019). The decision described Stack's approach as a "totally unprecedented methodology that runs contrary to Common Benefit principles" as well as the prior orders that had been issued. *Id.* at *5 n.4.

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

Respondent FCC's Preliminary Recommendations were released on September 13, 2018, which proposed that its eight member firms should be paid almost precisely two-thirds of the Fund that was supposed to be shared with ALO and eighty-four other applicants.[4] *See FCC Preliminary Written Recommendation dated*

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

September 13, 2018, App. 174-178. Although their own time and expense entries were never openly disclosed, simple calculations revealed that they were proposing to pay themselves an average hourly rate of $783.02, while the average for the other firms was just $268.22.

Acting as a *de facto* member of the FCC, ERS Stack immediately signed and endorsed the FCC's Preliminary Recommendations before any objections could be raised. *FCC Preliminary Written Recommendation dated September 13, 2018, p. 3, App. 178.*

While minor adjustments were made to the initial figures, neither the staggering two-thirds recovery nor the nearly three-to-one disparity in the hourly rates were significantly altered in the FCC's Final Written Recommendations of November 20, 2018. *FCC Final Written Recommendation, App. 58-172.* The FCC did disclose at that time that the allocations were no longer founded upon the detailed time entries that the attorneys had been required to submit to the court-appointed accountant. According to the Chairperson's sworn statement: "The FCC did *not* use an hourly rate method in arriving at its percent allocation for each applicant firm." *Garrard Dec., p. 33, ¶ 223* (emphasis added). Instead, "the Chairperson proposed a series of awards utilizing a percentage of the funds for each of the applicant firms." *Id., p. 30, ¶ 201*. This was the same purely subjective methodology that Chief District Judge Rosenstengel had found to be unacceptable in her criticism of ERS Stack's report in the

other MDL proceeding. *In re Syngenta*, 2019 WL 3887515, at *3-5.

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

On January 30, 2019, District Judge Goodwin approved the FCC's requests in the seven MDLs for five percent of the recoveries realized to date—totaling $7.25 billion—to be disbursed for common-benefit work performed and expenses advanced. *In re Cook Med., Inc., Pelvic Repair Sys. Prod. Liab. Litig.*, 365 F. Supp. 3d 685 (S.D.W. Va. 2019). There was no suggestion in the ruling that the Court intended to follow the FCC's lead and abandon the time data as a basis for calculating the reasonable allocations to the applicant attorneys. To the contrary, a "blended" approach was adopted in which District Judge Goodwin would "verify the reasonableness of the 5% award with a

lodestar cross-check." *Id.* at 695-96, citing *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 652 (E.D. La. 2010).

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

The following day, the District Court directed the FCC to submit the original and adjusted time entries, the attorneys' objections, and additional information for an *in camera* review. *Doc#:7639, Pretrial Order#: 332, pp. 2-3; PageID#:188217-18*. Petitioner ALO and several other non-member firms filed their comprehensive objections to the FCC's Final Recommendations on March 26, 2019. ALO observed *inter alia*: "It is not realistic to expect that all the flaws and errors in the fund allocation process can be identified and substantiated if the submitted time and expense data remains concealed." *Doc#:7718, ALO's Objections, p. 7; PageID#: 189399, App. 187-223*. In the seventy-five-page Omnibus Response that followed, the FCC members continued to insist that the allocations should be approved without any disclosure to objectors of the FCC

members' own time and expense entries and supporting data. *Doc#:7816, FCC's Omnibus Response; PageID#: 190025*.

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

Despite the parties' submission of over 150 pages of briefing, the District Court remarked in the decision that was issued on July 25, 2019, that there had been "very few objections[.]" *Doc#:8453, Pretrial Order#: 342, p. 1; PageID#:205790, App. 11.* The Court summarily overruled all objections in a six-page ruling without specifically addressing a single one. *Id., pp. 1-6; PageID#: 205790-95, App. 11-18.* And the Court furnished no indication that it had performed a lodestar cross-check with the eighty-nine applicant firms' submitted time entries multiplied by reasonable hourly rates as promised in the January 30, 2019 ruling. *See id*.; *In re Cook Med., Inc.*, 365 F. Supp. 3d at 695-96.

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

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

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

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

> Upon review of submissions relative to the motions to dismiss and the motion to stay pending appeal, the Court grants the motions to dismiss and denies the motion for stay pending appeal.

> Entered at the direction of Judge Agee, and with the concurrence of Judge King and Judge Diaz.

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

REASONS FOR GRANTING THE PETITION

Petitioner ALO now seeks further review in this Court and offers the following reasons why a writ of certiorari is warranted.

I. THIS DISPUTE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. THE ESTABLISHMENT OF AN UNACCEPTABLE PRECEDENT

Barring this Court's intervention, the ill-advised decisions rendered below will undoubtedly be cited time-and-time again as allowing district courts to require litigants to forfeit rights of appeal before affording any consideration to requests for relief. Such waivers are, of course, commonplace in criminal plea arrangements and civil alternative dispute resolution agreements. But in those circumstances, the parties' voluntary consent is acknowledged in writing, or at least in open court, and valuable consideration is exchanged in return. And some mechanism of review always remains available to rectify an injustice in the rare instance that due process rights or other

protected interests are violated in the remainder of the proceedings.

But in contrast to those acceptable forms of appeal waivers, the District Court below embarked upon an unprecedented approach: It made a forfeiture of appellate review mandatory for any law firm seeking a share of the Common Benefit Fund. There were *no* exceptions. The absence of any viable alternatives was particularly and acutely problematic for Petitioner ALO, which had already devoted considerable common-benefit time to the consolidated TVM proceedings in New Jersey. Had the firm refused to acquiesce to the District Court's "take-it-or-lose-it" edict, Attorney Anderson would not have qualified as "participating counsel" and would have received nothing for the effort he had already expended.

The lower courts' unapologetic abuse of the mandatory appeal waivers is even more troubling. As reflected in both the District Court's six-page Common Benefit Fee Order and the Fourth Circuit panel's single-sentence dismissal entry, the responsibility for ensuring a fair and equitable distribution of the $550 million fund amongst the eighty-nine participating firms was left *solely* to Respondent FCC and ERS Stack. Given that the eight FCC member firms generously awarded themselves over two-thirds of the fund, while refusing to release their own time and expense entries to the other applicants, their self-dealing could not have been more evident.

The lower courts were completely indifferent not only to Respondent FCC's unmistakable self-indulgence but also to its the eleventh-hour adoption of the subjective percentage-of-the-funds approach that had sparked criticism of ERS Stack in *In re Syngenta*, 2019 WL 3887515, at *3-5. District Judge Goodwin's prior orders had furnished assurances that the traditional lodestar/multiplier calculations would be employed at least as a cross-check, but that was never done. *In re Cook Med., Inc.*, 365 F. Supp. 3d at 695-96. And Chief District Judge Rosenstengel's rejection of ERS Stack's recommendations in *Syngenta* had raised additional grounds for concern. Her explanation of her decision focused primarily upon a group of law firms that was led by Clark, Love & Hutson, GP (the "Clark/Phipps Group"). *Id.*, 2019 WL 3887515, at *2. ERS Stack had praised the Clark/Phipps Group in his proposals and awarded them nearly eighty percent of the common-benefit fund. *Id.* at *2-5. But the District Court observed that "a large portion of Clark/Phipps' time is logged by anonymous employees, and their time summaries are not supported by contemporaneous time records." *Id.* at *6. ERS Stack thus "erred by not scrutinizing Clark/Phipps' time at all, given the tremendous discrepancy between the number of hours Clark/Phipps submitted and the number of hours the other firms across this litigation submitted." *Id*. Despite the District Courts' earlier instructions, ERS Stack's proposal did not "meaningfully differentiate between the types of work underlying the common benefit hours or who performed the work." *Id*.

For the Clark/Phipps Group in particular, "over two-thirds of those hours are attributable to miscellaneous non-attorneys and include a staggering 22,499.80 hours of 'assisting clients in perfecting claims in settlement' and 48,221.10 hours of 'pre-settlement communication with clients.'" *In re Syngenta*, 2019 WL 3887515, at *6. The District Court found that much of the Clark/Phipps Group's work had been counterproductive and actually assisted the defense. *Id.* at *7. Chief District Judge Rosenstengel proceeded to slash ERS Stack's allocation for the Clark/Phipps Group by nearly $23.5 million. *Id.* at *7-8.

The *Syngenta* decision should have merited careful consideration in the instant action for at least two reasons. First, Chief District Judge Rosenstengel's thorough and unerring analysis presented a compelling example of how common-benefit fee allocations should be closely scrutinized by the district courts, something which plainly has not been undertaken in this case. And perhaps more significantly, in the proceedings below, the Clark, Love & Hutson firm also received another astonishingly generous fee allocation from ERS Stack of over $43 million. *Doc#:7718-2, Fee and Expense Grid; PageID#:189431*. Their effective hourly rate of $913.39 was the highest of all the eighty-three firms receiving common-benefit awards. *Id.* It was later disclosed that the firm had been employing almost as many paralegals (seventeen) as attorneys (nineteen) in the effort. *Doc#:7816, FCC's Omnibus Response, p. 38; PageID#:190062*. Because the time and expense entries that were submitted by Clark, Love &

Hutson, as well as the other FCC members, have been tightly concealed, it is impossible for ALO to confirm whether or not the same sort of billing deficiencies and irregularities have been committed in these proceedings, as had been the case in *In re Syngenta*, 2019 WL 3887515.

Petitioner ALO has always recognized that a number of advantages are furnished by valid waivers of appeal rights that are voluntarily accepted in exchange for valuable consideration. But it is doubtful that such agreements will ever be entered into if they can be employed by a court as a justification for shirking fundamental judicial responsibilities. That is precisely the circumstance that developed below once the appeal waivers were ordered and ERS Stack's perfunctory endorsement was issued; a failure of due process that cannot be altered by the FCC's vacuous promises that the manifestly one-sided allocations were "fairly" and "painstakingly" rendered by the same eight firms that ultimately profited the most. A disturbing precedent has thus been established that threatens to discourage litigants from ever waiving their appeal rights out of a well-placed concern that the proceedings will devolve into an unchecked free-for-all.

It is not difficult to imagine the deleterious consequences that would immediately follow if the lower courts' unprecedented appeal waiver rulings are allowed to stand. The logical implication would be that in *any* scenario, unreviewable decisions could now be arranged. As but one example, a court could advise litigants in an entry that it will resolve a complex

discovery dispute on a privilege issue only with the understanding that their right to appeal the decision is being waived. Or a like-minded court could refuse to empanel a jury in a criminal case unless the defendant agrees that there will be no appellate review of the verdict. Such edicts can always be justified with Respondent FCC's glib explanation that they "avoid the potential for expensive and prolonged disputes with disgruntled or disappointed" parties. *Doc#:4, Appellee's Motion to Dismiss Consolidated Appeals dated August 9, 2019 ("FCC's Motion to Dismiss"), p. 9*.

The impact that will be felt by the lower courts' endorsement of mandatory appeal waivers will be both immediate and widespread throughout the thousands of MDL proceedings surging through the federal judicial system. With the precedent having been successfully established, it is difficult to fathom why any district court would not be enticed to enter identical pre-trial orders effectively relegating the potentially contentious and time-consuming common-benefit fee allocation process to a small group of hand-picked attorneys, all of whom can be expected to endorse the directive. Those lawyers who harbor distrust of the committee members will be left with only two choices: either acquiesce to their unrestrained authority or forego any prospect for a common-benefit recovery. This judicially imposed Hobbesian choice is particularly unfair to those firms, like Petitioner ALO, that pioneer a particular category of mass tort claims and depend upon an anticipated common-benefit recovery to justify the substantial risks that were undertaken.

Given both the number of prominent law firms possessing an interest in the outcome of this appeal as well as the $550 million fund at stake, careful consideration should be afforded as to the disruptive precedent that will be established.

B. THE IMPLIED FORFEITURE THEORY

Respondent FCC has steadfastly advocated an implied-forfeiture theory to justify binding non-member firms to appeal-waiver orders that they never explicitly approved. But the authorities that have been offered in support of this unprecedented position all involved litigants expressly consenting, either in writing, in open court, or both, to advantageous arrangements that included an unambiguous waiver of the right to appellate review. *MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005) (arbitration agreement); *In re Lybarger*, 793 F.2d 136 (6th Cir. 1986) (settlement agreement); *Brown v. Gillette Co.*, 723 F.2d 192 (1st Cir. 1983) (settlement agreement); *Goodsell v. Shea*, 651 F.2d 765 (C.C.P.A. 1981) (stipulation effectively dismissing appeal preemptively); *Slattery v. Ancient Order of Hibernians in Am., Inc.*, No. 97-7173, 1998 WL 135601 (D.C. Cir. Feb. 9, 1998) (settlement agreement); *Ziyad Mini Mkt. v. United States*, 302 F. Supp. 2d 124 (W.D.N.Y. 2003) (stipulated settlement). The FCC has yet to cite any authority that holds that valuable appeal rights may be lost through mere silence or acquiescence.

Here, the District Court's appeal forfeiture directives were expressly approved by some—but not all—of the attorneys performing common-benefit work. As previously observed, Attorney Anderson's electronic signature only appears on the orders entered in the two smallest MDLs, which have been closed without meaningful common-benefit recoveries and are not a part of this appeal. *Cook*, *Doc#:43, Pretrial Order#:11, p. 14; PageID#:580; Neomedic, Doc#:78, Pretrial Order#:20, p. 16; PageID#:514.* And while the FCC has asserted that "the Court-appointed steering committee for the Plaintiffs (which includes the Appellant) discussed and agreed that the District Court would have final, non-appealable decision-making authority[,]" it has cited and provided no record evidence to support that assertion. *FCC's Motion to Dismiss, p. 9*. When arguments that the forfeiture directives were not enforceable were raised below, no attempt was made to demonstrate through admissible proof that ALO had entered some sort of binding verbal agreement. *Doc#: 8465, FCC's Response to Motion to Partially Alter, Amend, or Reconsider Judgment; PageID#:205916*. There is thus no logical correlation between the District Court's "take-it-or-lose-it" appeal-forfeiture directive and civil actions involving voluntarily entered settlements and arbitration agreements.

The FCC's heavy reliance upon decisions enforcing criminal plea agreements is even more misplaced. *FCC's Motion to Dismiss, p. 11*. Such arrangements are typically entered to secure a valuable benefit, such as the dismissal of certain charges or a favorable

sentencing recommendation from the prosecutor. *E.g.*, *United States v. Johnson*, 410 F.3d 137, 143 (4th Cir. 2005); *United States v. Davis*, 689 F.3d 349, 351-52 (4th Cir. 2012). In contrast to ALO's situation, the defendant can always decline the plea offers and retain *all* of the rights furnished to the accused, including an opportunity for appellate review.

ALO was provided no such protection. Here, "Participating Counsel" could *only* seek payment for common-benefit services already provided and yet to be provided by forfeiting the right to appeal. *Doc#:282, Pretrial Order#:18, pp. 5-6; PageID#:3886-87*. Although the FCC has compared ALO to a "criminal defendant arguing that an appellate waiver made in a plea agreement should be disregarded because the sentence later imposed was unexpectedly harsh," this analogy is inapt. *FCC's Motion to Dismiss, p. 11*. ALO is far more like a criminal defendant arguing that the post-waiver proceedings have violated his constitutional rights or that his sentence exceeds the statutory maximum—both arguments that have been accepted as good reason to permit an appeal. *See Johnson*, 410 F.3d at 151, quoting *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994) ("Nor can a defendant 'fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance

with constitutional limitations.'"); *United States v. Bushert*, 997 F.2d 1343, 1350-51 n. 18 (11th Cir. 1993).

At most, Respondent FCC can only establish an express waiver in just two of the MDLs, both of which have terminated and neither of which has been included in this appeal. *Cook*, S.D.W. Va. Case No. 2:14-md-02440*; Neomedic*, S.D.W. Va. Case No. 2:14-md-02511; *Anderson Law Offices v. Common Benefit Fee and Cost Committee*, 4th Cir. Case Nos. 19-1856, 19-1857. In literally hundreds of Pretrial Orders and Decisions that were issued over the course of approximately seven years, the District Court continually maintained the separate identities of each of the seven MDLs. They were consolidated strictly for purposes of administrative and procedural convenience. And the five percent assessments were required to be deposited in separate accounts for each of the MDLs. *See Doc#:1754, Pretrial Order#:201; PageID#:21921; Doc#: 8453, Pretrial Order#:342, p. 2; PageID#:205790, App. 12*. There is thus no justification for the notion that accepting an appeal waiver in one MDL somehow applied to all of them.

C. THE LACK OF VALID CONSIDERATION

The lack of truly voluntary consent aside, a second justification had been raised but never explicitly resolved in the proceedings below. Federal courts have long recognized that appeal waiver agreements are governed by contract-law principles. *Goodsell*, 651 F.2d at 767-68; *Averitt v. Southland Motor Inn of Oklahoma*,

720 F.2d 1178, 1180-81 (10th Cir. 1983); *United States v. Nunez*, 223 F.3d 956, 958 (9th Cir. 2000); *United States v. Quintero*, 618 F.3d 746, 751 (7th Cir. 2010). These arrangements are enforceable provided they are supported by sufficient consideration. *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 31 (1st Cir. 2012); *Gramling v. Food Mach. & Chem. Corp.*, 151 F. Supp. 853, 856 (W.D.S.C. 1957); *United States v. Reap*, 391 F. App'x 99, 101-102 (2d Cir. 2010); *United States v. Lutchman*, 910 F.3d 33, 37 (2d Cir. 2018).

All Petitioner ALO "received" in exchange for its purported waiver of appeal rights was the ability to seek payment as "Participating Counsel" for the common-benefit work to which the firm was already entitled to be paid under principles of equity. *See Brundle on behalf of Constellis Employee Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 785-86 (4th Cir. 2019). This right is based squarely upon the doctrine of unjust enrichment, which precludes beneficiaries of an attorney's work from avoiding payment for those services rendered. *Mills*, 396 U.S. at 391-92; *Boeing Co.*, 444 U.S. at 478. ALO had already devoted thousands of hours to the New Jersey consolidated TVM proceedings when the "take-it-or-lose-it" orders were issued. *Anderson Aff., p. 14, ¶ 5(p)(4)*. In stark contrast to litigants freely entering appeal waivers as part of civil settlements or criminal plea agreements, ALO received nothing *additional* beyond that which was already available in equity.

Respondent FCC has responded to this reality with the rationalization that avoiding "the potential

for expensive and prolonged disputes" constitutes sufficient consideration. *FCC's Motion to Dismiss, p. 9*. The FCC member firms and their allies were obviously eager to establish a quick and unquestionable fee-allocation process when the appeal forfeiture orders were approved. But there is nothing in the record indicating that ALO shared their disdain for appellate review. In light of the FCC's undeserved thirty-percent reduction of the common-benefit time submitted by ALO and the effective hourly rate of $342.64 produced, which is disproportionately lower than any FCC member-firm's hourly rate, ALO will be far worse off if the appeal forfeiture is enforced.

The absence of consideration is inherent in any judicial order that requires parties to waive their appeal rights before a court will consider awarding relief that is already provided at law or in equity. In that situation, the parties receive nothing of value in return for the waiver beyond that which they were already entitled to, and are left without recourse for any errors or omissions that the court later commits. For this reason alone, such unsettling judicial directives should not be permitted.

D. THE PROPER SCOPE OF THE FORFEITURE PROVISIONS

Even if the District Court's appeal forfeiture orders are found to be enforceable, this Court should give careful consideration to their correct interpretation. When properly entered, such agreements are typically

afforded a strict construction by the courts. *See United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001). And an appeal-waiver provision "only precludes appeals that fall within its scope," which is "simply a matter of what the parties agreed to in the particular case." *United States v. McCoy*, 508 F.3d 74, 77 (1st Cir. 2007).

Assuming for the sake of argument that the appeal waiver terms are valid, the "Participating Counsel" eligible to apply for common-benefit compensation acknowledged only that the District Court would possess "final, non-appealable authority regarding the award of fees, the allocation of those fees and awards for cost reimbursements in this matter." *Doc#:282, Pretrial Order#:18, pp. 5-6; PageID#:3886-87*. The directive repeats this language in a slightly different form and concludes: "Participating Counsel knowingly and expressly waive any right to appeal those decisions or the ability to assert the lack of enforceability of this Agreed Order or to otherwise challenge its adequacy." *Id.* The waiver is thus confined to the actual *amounts* of the awards and the disbursements accepted by the Court; explicitly, the waiver does not reach the *procedure* employed to render the allocations. If the opportunity had been afforded, Petitioner ALO's appeal would have focused precisely upon these questions of whether the remainder of PTO#:18 and the other applicable orders were satisfied when the FCC and ERS abandoned the objective fee-calculation process utilizing the lodestar/multiplier method and

adopted instead a purely subjective percentage-of-the-funds approach that richly rewarded its own members and a few favored firms.

It should go without saying that only a knowing and voluntary waiver of the constitutional right to due process will be enforced by the courts. *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963, 969-70 (9th Cir. 2011); *Morrison v. Warren*, 375 F.3d 468, 474 (6th Cir. 2004); *Rivera v. Marcus*, 696 F.2d 1016, 1026 (2d Cir. 1982); *Turner v. Blackburn*, 389 F. Supp. 1250, 1260 (W.D.N.C. 1975); *Davis*, 689 F.3d at 354-55. There is no language in PTO#:18, nor in any other applicable court order, that even remotely suggests that ALO specifically forfeited its right to appeal from due process violations. The District Court's readily apparent intention was that the amount and allocation of the "award of fees" could not be appealed. Under the language adopted, however, no party was waiving or abandoning the basic rights to a full and fair judicial process. *See Johnson*, 410 F.3d at 151; *Attar*, 38 F.3d at 732. At a minimum, Petitioner ALO should be permitted to seek review of whether the District Court complied with its earlier orders as well as rudimentary principles of due process.

II. THIS DISPUTE PRESENTS A LIVE CASE AND CONTROVERSY

The present dispute remains a live one. "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already,*

LLC v. Nike, Inc., 568 U.S. 85, 90 (2013). Generally, "those who invoke the power of a federal court" must "demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.*, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974).

Although tens of millions of dollars has been paid out, the Common Benefit Fund continues to grow. The District Court has ordered that seventy-percent of future assessments must be dispersed on a quarterly basis while the remaining thirty-percent shall be "be held in the common-benefit fund for a final evaluation of common-benefit compensation until a further order of the court." *Doc#:8453, Pretrial Order#:342, p. 6; PageID#: 205795, App. 17-18.* The next disbursement will occur on or before January 15, 2020. *Id.* The controversy as to these funds thrives, and the amounts assessed are significant enough to provide for a meaningful remedy if this Court grants the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL W. FLOWERS, ESQ.
Counsel of Record
LOUIS E. GRUBE, ESQ.
PAUL W. FLOWERS CO., L.P.A.
50 Public Square, Suite 1910
Cleveland, Ohio 44113
(216) 344-9393
pwf@pwfco.com
leg@pwfco.com