No. 12-3958
No. 12-4045

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE PHIPPS GROUP,
Appellants and Cross-Respondents,

v.

DON DOWNING & ADAM LEVITT, ETC.,
Appellees and Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION,
DISTRICT COURT NO. 4:06-MD-1811-CDP

APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(A) and 8th Cir. R. 26.1A, counsel for Appellants and Cross-Appellees state that the law firms listed below are corporations, that none have a parent corporation, and that no publicly held corporation owns 10 per cent or more of their stock:

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SUMMARY OF THE CASE

This appeal raises issues of first impression in the burgeoning area of multidistrict litigation. For example:

1. Is the common benefit doctrine, used in class actions where the only lawyers participating are class counsel, applicable to MDLs? In this case, the District Court ordered Appellants, who had hired their own lawyers, to pay Appellees, court-appointed lead counsel, up to $72,000,000 of their recoveries. This was a windfall for Appellees, who had already been paid for this same work product by their own clients, and a penalty to Appellants, who had already paid their own counsel for diligently prosecuting their cases.

2. If fee-shifting is allowed in MDLs, what process should federal courts should follow to ensure a transparent, complete, and fair proceeding. Here, the District Court summarily awarded $72,000,000 without questioning (or allowing anyone else to test) Appellees' generalized, conclusory fee spreadsheet.

Appellants contend oral argument is warranted and request this Court afford each side 30 minutes.

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STATEMENT OF JURISDICTION

(i) Factual Information

Appellants and Appellees have filed a direct appeal to this Court regarding the District Court's fee-shifting orders. The District Court entered its order granting Appellees' motion for allocation and distribution of common benefit fees and expenses on December 6, 2012. Appellants filed their notice of appeal to this Court on the same date.

(ii) Subject Matter Jurisdiction

The jurisdiction of several District Courts was invoked pursuant to 28 U.S.C. § 1332, based upon the diverse citizenship of plaintiffs and defendants and the amounts in controversy between the parties. The underlying cases were centralized for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1291, which authorizes the Courts of Appeals to decide appeals from final decisions of the District Courts. Alternatively, jurisdiction is afforded by the Collateral Order

Doctrine. *See Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949). Fed. R. App. P. 4(a)(1)(B) provides that a notice of appeal is timely if filed within 30 days after entry of the judgment or order from which the appeal is taken.

Unlike other fee-shifting cases where an appellate court has dismissed the appeal for lack of appellate jurisdiction, in this case, the District Court's Orders, (App.526,3687), are not "interim" fee awards and constitute final rulings on the District Court's creation of a Common Benefit Trust Fund, the award of up to $72 million in fees to Appellees, and the denial of fees to Appellants. *In re Diet Drugs,* 401 F.3d 143, 161 (3d Cir. 2005).

STATEMENT OF THE ISSUES

1. The District Court erred in establishing a Common Benefit Trust Fund.

   Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)
   Fox v. Vice, 131 S.Ct. 2205, 2213 (2011)
   Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)
   28 U.S.C. §1407

2. The District Court erred in ordering Appellants, who were not "Free Riders," to pay into the Common Benefit Trust Fund.

   Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)
   Boeing Co. v. Van Gemert, 444 U.S. 47 (1980)
   In re Air Crash Disaster at Florida Everglades, 549 F.2d 1005 (5th Cir. 1977)

3. The District Court erred in denying discovery, a hearing, and/or a trial on the merits before disbursing monies from the Common Benefit Trust Fund.

   In re Diet Drugs, 582 F.3d 524 (3d Cir. 2009)
   In re Air Crash Disaster at Florida Everglades, 549 F.2d 1005 (5th Cir. 1977)
   In re High Sulfur Content Gasoline Prods., 517 F.3d 220 (5th Cir. 2008)

4. The District Court erred in awarding Appellees a disbursement from the Common Benefit Trust Fund.

5. The District Court erred in denying Appellants a disbursement from the Common Benefit Trust Fund.

STATEMENT OF THE CASE

Appellants are long grain rice farmers from Arkansas, Mississippi, and Texas whose cases against Bayer CropScience and other Bayer-related entities (hereinafter referred to as "Bayer") were consolidated into a federal MDL ("the Rice MDL"), as well as their lawyers (collectively referred to as "Appellants"). Appellees are two attorneys, Don M. Downing and Adam J. Levitt (collectively referred to as "Downing"), who were appointed by the District Court as Co-Lead Counsel of the Rice MDL.

The appeal arises from the District Court's entry of an order creating a common benefit trust fund ("CBF") and ordering all MDL plaintiffs to pay 11 percent of their recoveries into the fund. (App.526). The appeal also challenges the District Court's denial of Appellants' request for discovery, an evidentiary hearing, and a trial on Downing's fee request, the District Court's order disbursing up to $72,000,000 to Downing for "common benefit"

attorney's fees from the CBF, and the District Court's denial of Appellants' request for disbursement from the CBF. (App.3687).

STATEMENT OF THE FACTS

Farmers sued Bayer in state and federal court after Bayer's experimental, genetically-modified rice escaped its test fields and contaminated the national long-grain rice supply. (App.528). The farmers' state and federal claims against Bayer are all-but settled by virtue of a global $750,000,000 settlement.[1] What remains is a dispute amongst the farmers' attorneys over attorney's fees.

Who are Appellants?

Appellants comprise and represent a large, if not the largest, share of all rice farmers, farming operations, and farming entities suing Bayer (approximately 5,000 clients). (App.1844,2244-2254). In prosecuting claims in state and federal court, Appellants:

(1) filed lawsuits on behalf of 3,850 plaintiffs;[2]

(2) propounded nearly 2,000 discovery requests in state court and filed MDL fact sheets on behalf of nearly 1,000 clients;[3]

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[1]http://www.annualreport2012.bayer.com/en/legal-risks.aspx (last visited March 23, 2013).

[2]In the Rice MDL, Appellants filed lawsuits on behalf of 872 plaintiffs; the remaining plaintiffs filed suit in state courts.

(3) conducted massive amounts of document discovery, including, *inter alia,* review, coding, organization, and analysis, of over 4.2 million documents;

(4) attended 23 MDL depositions; [4]

(5) took or defended 121 depositions through state court proceedings, including depositions of key Bayer witnesses in Singapore and London, as well as the depositions of federal governmental officials;

(6) investigated experts within the industry and developed, independent of Downing's experts, the testimony of four experts in the pivotal areas of rice breeding/testing standards, economics, farming individual losses, and farming past and future market losses;

(7) prepared enumerated pretrial and dispositive motions and for jury trials in six cases;

(8) tried two of those cases through to a verdict (one of which constituted the first punitive damage verdict against Bayer in the country and the overall highest per-acre award against Bayer);

(9) defended those two verdicts against Bayer's post-verdict, post-judgment, and appellate challenges;

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[3]Appellants prepared and filed fact sheets for its MDL clients in lieu of written discovery based on the District Court's order restricting discovery to fact sheets. (App.1844,2244-2246).

[4]When Rice MDL depositions took place, Appellants were ordered by the District Court to attending only (23 MDL depositions).

(10) attended five mediations and/or settlement conferences;

(11) orchestrated the terms of the global farmers' settlement, that ultimately resulted in two settlement agreements (one for state court farmers and one for MDL farmers).

(App.1841-60,1873,1947,2244-2254). Appellants position throughout the Rice MDL and state court litigation is that the American Rule governs, *i.e.,* all parties should pay their own attorney's fees and litigation costs and that court-ordered fee-shifting undermines Congress's intent behind MDLs. (App.281,1655).

Who is Downing?

In 2007, the District Court designated a group of plaintiffs' attorneys as leadership counsel in the Rice MDL. (App.1). By order, the District Court forbid or severely limited the right of other plaintiffs' attorneys, including Appellants, from conducting discovery in the Rice MDL, allowing only Downing to conduct MDL-based discovery. *Id.* In his role as court-appointed counsel, Downing conducted discovery, tried bellwether cases, and negotiated on behalf of MDL farmers. (App.885).

Judges presiding over state court cases, however, did not limit Appellants ability to prosecute their cases. As will be detailed throughout the Brief, Appellants conducted extensive discovery, took/defended over 120 deposition, and tried two cases to verdict against Bayer. (App.1841-60,1873,1947,2244-2254). The result this work product was an enhancement and bolstering of the work already performed by Downing, as well as the development of new evidence and damages models increasing the settlement value of state and federal farmers' claims. (App.1844-1846).

The CBF

Two years after his appointment, Downing asked the District Court to establish a CBF to compensate court-appointed counsel. (App.9). Downing contended he had already incurred $20,000,000 in fees and asked that the Court order Bayer to set aside a total of 11% of the overall recovery of the farmers and pay that amount into the CBF. (App.9-10). Downing asked the Court to order Bayer to withhold and pay into the CBF 11 percent of the recoveries of *state* and *MDL* farmers. (App.10).

Bayer and Appellants objected to Downing's request. (App.262,279). The District Court ultimately overruled Bayer's and Appellants' objections and created the CBF. The Order:

- Concluded the District Court lacked jurisdiction to order a holdback from state court plaintiffs;[5]
- Required Bayer to hold back 11% of MDL farmers' recoveries;
- Required Bayer to hold back 10% of MDL non-farmer plaintiffs' overall outcomes;

(App.534-36,545-46).

Disbursement of Fees

A little more than a year later, state and MDL farmers reached a $750,000,000 "global" settlement with Bayer. (App.1721). Shortly thereafter, Downing asked the District Court

[5]That conclusion is consistent with the rulings of other courts. *In re Zyprexa Prods., Liability Litig.,* 476 F.Supp.2d 256, 268-69 (E.D. NY 2006); *see In re Showa Denko K.K. L-Tryptophan Prod. Liab. Litig.-II,* 953 F.2d 162, 166 (4th Cir. 1992) (holding that a federal district court cannot order contribution of costs from parties not before it); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1002 (9th Cir. 1976) (ordering MDL court to return contributions obtained from non-party claimants as a condition of approving settlements); *In re Linerboard Antitrust Litig.*, 292 F.Supp.2d 644, 664 (E.D. Pa. 2003) (finding that court lacked jurisdiction over cases not formally transferred into the MDL, and refusing to order sequestration of funds from settlements and other recoveries in untransferred cases); *see also Howery v. Allstate Ins. Co.,* 243 F.3d 912, 916 n.6 (5th Cir. 2001) ("Where a federal court proceeds in a matter without first establishing that the dispute is within the province of the controversies assigned to it by the Constitution and statute, the federal tribunal poaches upon the territory of a coordinate judicial system").

to disburse to him up to $72,000,000 from the CBF for "common benefit" work. (893). In support of his request, Downing submitted a generalized spreadsheet listing out the names of individuals (without detailing if they were attorneys, paralegals, clerks, etc.), their claimed hourly rate, and the total number of hours each individual had worked. (App.972-81). This generalized spreadsheet, which is less than 10 pages in length, claims that over 107,023 hours of "common benefit" work was performed at a cost of $51,053,603. (App.981).

Appellants renewed their objection to the creation of the CBF and asked for discovery regarding Downing's generalized spreadsheet and conclusory declarations. (App.1665, 1667, 1689, 1750-1766, 1768-1786, 1788-1839, 1862-1871, 1874-1946). Appellants also sought an evidentiary hearing and/or a trial on the merits of Downing's fee request. *Id.* Appellants argued that the prior filings by Downing indicate that his generalized spreadsheet sought compensation for work already paid for by his MDL clients, for duplicative work, and for work falling beyond the scope of "common benefit" work. *Id.* The District Court denied all of

Appellants' objections and requests, relied exclusively on Downing's untested, generalized spreadsheet, and entered an order awarding Downing up to $72,000,000 in fees. (App.3687).

SUMMARY OF THE ARGUMENT

How many times should an attorney be compensated for the same work product? That is one of the questions presented by this appeal. Appellants contend the District Court lacked authority to order fee-shifting from federal plaintiffs, who had hired their own counsel and actively prosecuted their cases, to Downing, who is court-appointed lead counsel of the Rice MDL. Downing performed work in his capacity as court-appointed counsel, but has never denied he received compensation for this work from his own MDL clients.

Appellants contend this process utilized by the District Court, often referred to as "common benefit assessment," while appropriate in class actions where class counsel does all the work to the benefit of "free riding" plaintiffs, is inappropriate in MDLs. Indeed, as noted by legal scholars across the country, this process pits plaintiffs' lawyers against each other, puts the District Court

in the position of having to "judge" which lawyers did a better job, and prolongs the litigation process.[6] This is why MDL defendants, like Bayer in this case, object to fee-shifting in MDLs. Importantly, the Supreme Court of the United States has never sanctioned fee-shifting in MDLs.

Alternatively, if this Court upholds the concept of fee-shifting in MDLs, Appellants contend that the procedure followed by the District Court was incomplete, lacked transparency, denied Appellants due process, and afforded Downing a windfall. Other courts presiding over fee-shifting requests require the attorney seeking compensation from non-clients to file time sheets, allowed objectors to review the time sheets and conduct limited discovery, and held multiple hearings before awarding fees. The District Court in this case did none of the above.

Rather, before ordering federal plaintiffs, including Appellants, to pay Downing up to $72 million in fees, the District

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[6]Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal,* 62 VAND. L. REV. 107, 111 (2010) (criticizing the award of fees to court-appointed counsel in MDLs because "the Supreme Court has never said the [common benefit] doctrine applies to MDLs, which are consolidations rather than class action suits, and the American Law Institute's *Restatement (Third) of the Law of Restitution and Unjust Enrichment* suggests otherwise").

Court reviewed only a generalized spreadsheet filed by Downing (listing out the names of varying individuals, total hours worked, and claimed hourly rates). Downing also filed a conclusory, self-serving declarations by the attorneys seeking fees, which "assured" the District Court their fees were reasonable and for "common benefit" work. Because the District Court denied Appellants' request to test Downing's spreadsheet and declarations with discovery, they and the District Court were left to take Downing at his *ipse dixit*.

As stated by Judge Ambro when considering steps necessary to ensure fairness in fee-shifting inquiries:

> But counsel have inherent conflicts. They make recommendations on their own fees and thus have a financial interest in the outcome. How much deference is due the fox who recommends how to divvy up the chickens?

In re Diet Drugs, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring); *see In re High Sulfur Content Gasoline Prods.,* 517 F.3d 220, 235 (5th Cir. 2008) (quoting Judge Ambro and reversing District Court's fee award, which relied heavily on the untested fee awards recommended by court-appointed lead counsel).

Here, the District Court disallowed Appellants to test Downing's generalized spreadsheet or to propound discovery to investigate Downing's claims of the hours necessary and whether the hours were non-duplicative and for "common benefit" work. When an award of this size is imposed on plaintiffs who did not contract with the court-appointed attorneys, fairness and justice call for more than just an attorney's self-serving *ipse dixit*. Here, over Appellants' objections and in spite of Appellants' request for discovery, a hearing, and a trial on the merits, the District Court "rubber-stamped" Downing's request for $72 million.

Additionally, if this Court affirms the District Court's authority to enter the fee-shifting orders, as well as the procedure followed by the District Court, then this Court should reverse the District Court's denial of fees to Appellants. Appellants, like Downing, represented their clients in the Rice Litigation. Appellants, like Downing, performed work product in state and federal court that ultimately benefited all farmer plaintiffs. Accordingly, if Downing is entitled to be paid based on this

standard, then the standard should apply across the board to all counsel, thereby requiring compensation to Appellants as well.

ARGUMENT

I.
THE DISTRICT COURT ERRED IN CREATING A COMMON BENEFIT TRUST FUND

Over the objection of Appellants and Bayer, the District Court created a CBF. (App.526,1689). The District Court determined it had the power to order all federal farmer plaintiffs to pay court-appointed attorneys for work they were already performing on behalf of their own federal farmer clients. *Id.* The District Court determined it derived this authority: from "its 'managerial' power over the consolidated litigation and, to some extent, from its inherent equitable power." (App.533). The Supreme Court of the United States has sanctioned neither of these as a source of authority to order fee-shifting in MDLs.

A. *The American Rule: Litigants pay their own fees.*

"Our legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless whether he wins or loses." *Fox v. Vice,* 131 S.Ct. 2205, 2213

(2011). Indeed, this principle "is so firmly entrenched that it is known as the 'American Rule.'" *Id.* (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975)). Congress has authorized courts to deviate from this rule in certain types of cases by shifting fees from one party to another. *Id.; see Burlington v. Dague*, 505 U.S. 557, 562 (1992) (listing federal fee-shifting provisions).

B. *Congress did not create an exception to the American Rule in 28 U.S.C. § 1407.*

Congress enacted 28 U.S.C. §1407 to authorize and govern federal MDLs. 28 U.S. C. §1407. This provision establishes a Judicial Panel on Multidistrict Litigation, defines the members of the Panel, and grants the Panel the authority to consolidate "actions involving one or more common questions of fact" . . . for the convenience of the parties and witnesses" and to "promote the just and efficient conduct of such actions."[7]

Congress was careful to restrict the authority afforded the District Courts presiding over MDLs. District Courts are

[7] *Id.* §1407(a),(d). The provision authorizes the Panel to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." *Id.* §1407(f).

authorized to conduct "coordinated or consolidated pretrial proceedings." *Id.* §1407(b). When reviewing this limited grant of authority, the Supreme Court of the United States refused to afford District Courts additional authority under section 1407. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 28 (1998) (holding section 1407 does not authorize MDL courts to try cases, but instead, expressly limits their authority to pretrial matters).

Congress omitted from section 1407 a provision authorizing MDL courts to order fee-shifting amongst parties or attorneys. That silence speaks volumes. *Setser v. United States,* 132 S.Ct. 1463, 1469 (2012) (noting that the maxim, *expressio unius est exclusio alterius,* should be given great weight in the construction of statutes that confer particular authority on district courts).

C. *The Manual on Complex Litigation affords no authority to award attorney's fees.*

In finding it had authority to order fee-shifting, the District Court cited to the Manual for Complex Litigation ("MCL").[8]

[8](App.533)(citing §20.312). Two appellate courts have allowed a federal court, presiding over a consolidated matter, to enter fee-shifting awards as a part of its "managerial authority." *In re Diet Drugs,* 582 F.3d 524, 547 (2009); *In re Air*

However, the MCL is not a legislative act nor can it confer authority on a court where none otherwise exists. For example, the Introduction to the MCL provides:

> Users should keep in mind several things about this edition. First, it is not, and should not be cited as, authoritative legal or administrative policy. As noted at page iii, it contains analyses and recommendations of the Board of Editors, but each member of the Board does not necessarily subscribe to all parts of the Manual. It was produced under the auspices of the Federal Judicial Center, but the Center has no authority to prescribe practices for federal judges. The Manual's recommendations and suggestions are merely that. As always, the management of any matter is within the discretion of the trial judge.

The District Court cited to MCL's section 20.312. (App.533). Again, this section does not create statutory or common law authority to order fee-shifting, but merely recounts the methods by which varying federal and state judges have awarded fees to attorneys in coordinated state and federal MDLs. *Id.* Here, there was no coordinated federal-state MDL.

Crash Disaster, 549 F.2d 1006, 1012 (5th Cir. 1977). These courts do not cite any statutory authority or Supreme Court precedent supporting "managerial authority" within MDLs as a recognized exception to the American Rule.

The MCL does clearly indicate that court-appointed counsel should not receive "double payment" for the same work product, but rather should seek compensation only when it would be "inappropriate" to charge such fees to their clients. MCL §14.215. Throughout this litigation, Appellants have objected that Downing already received payment for the purported "common benefit" services based on contingency fee agreements with his farmer clients. Downing has never denied that fact. Thus, the District Court's disbursement of $72,000,000 in "common benefit" fees resulted in impermissible and unwarranted "double recovery" to Downing.

D. *Any equitable power under the Common Benefit Doctrine does not extend to MDLs.*

The District Court also claimed it had authority to order fee-shifting under the "equitable common benefit doctrine." (App.533). This doctrine is a judicially-created narrow exception to the American Rule. *Alyeska,* 421 U.S. 245-48 (tracing history of the American Rule and holding that only Congress, not the courts, could authorize an exception to the American Rule). The Supreme

Court of the United States has never held the common benefit doctrine applies to MDLs.

Traditionally, this doctrine has been applied in two types of cases: shareholder derivative suits and suits by union members against unions.[9] In cases where the doctrine applies, three elements must be established to recover fees:

(1) the class of beneficiaries should be "small in number and easily identifiable";

(2) "[t]he benefit could be traced with some accuracy"; and

(3) "the costs could ... be shifted with some exactitude to those benefiting."

Alyeska, 421 U.S. at 264-65 n. 39; *Mills,* 396 U.S. at 396-97. Even if the doctrine applies in this case, elements two and three were not proven by Downing.

[9]*Mills v. Elec. Auto–Lite Co.*, 396 U.S. 375, 394-95 (1970); *Hall v. Cole*, 412 U.S. 1, 8-9 (1973).The "common-fund" doctrine is related to the common-benefit doctrine. It applies, as its name suggests, in cases where an actual common fund has been created as a consequence of the litigation. *See Mills*, 396 U.S. at 392-93.

E. *Court-Ordered Fee Shifting in MDLs Violates the Erie Doctrine*

The District Court's fee-shifting order, whether based on purported "managerial authority" or the common benefit doctrine, is erroneous for a multitude of reasons. Significantly, these cases were removed from state to federal courts based on diversity of citizenship. 28 U.S.C. §§1322(a)(1), 1441(a). Accordingly, state law governs all substantive matters in this MDL. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Scenic Holding, LLC v. New Bd. of Trustees of Tabernacle Missionary Baptist Church, Inc.*, 506 F.3d 656, 665 (8th Cir. 2007). The question of whether attorney's fees should be awarded is substantive and thus controlled by state law.[10]

Alyeska discussed exceptions to the American Rule governing fees awards:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an

[10]*Alyeska,* 421 U.S. at 245 n.31; *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.,* 418 F.3d 168, 177 (2d Cir. 2005) (stating, in diversity case based on plaintiff's quantum meruit claim, "We apply New York substantive law to resolve the dispute regarding plaintiff's entitlement to attorney's fees"); *Corrosion Rectifying Co. v. Freeport Sulphur Co.*, 197 F.Supp. 291, 292 (S.D. Tex. 1961) ("Texas authorities and other cases clearly hold the issue of attorneys' fees to be one of substantive rights").

> ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

Alyeska, 421 U.S. at 259 n. 31 (quoting 6 JAMES WM. MOORE, ET AL., FEDERAL PRACTICE ¶ 54.77[2] (2d ed. 1974)). The creation of a common benefit fund, which takes attorney's fees from one client or his counsel and gives them to another, absent contract or other recognized legal authority, is a matter of substantive right; thus, the question of the appropriateness of such an arrangement is governed by state law. *See id.*

To rule on Downing's request for court-ordered fee shifting to the detriment of Appellants, the District Court necessarily delved into the substantive rights of the parties involved. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); *N. Heel Corp. v. Compo Indus., Inc.*, 851 F.2d 456, 475 (1st Cir. 1988) (ruling method of calculating award substantive and hence rejecting district court's use of federal "lodestar" method of calculating attorney's fees in favor of Massachusetts law which looked to party's engagement agreement with its lawyers); *Blanchette v. Cataldo*, 734 F.2d 869,

878 (1st Cir. 1984) (applying state law mandatory fee provision to reverse district court's denial of attorney's fees); *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 232 (1st Cir. 1980) (remanding to district court for calculation of attorney's fees in accordance with state law and noting that "[t]o the extent [state] law is silent or incomplete on the calculation of attorney's fees, [federal law] may well be relevant"); *cf. Powell v. Old S. Life Ins. Co.*, 780 F.2d 1265, 1267-68 (5th Cir. 1986) (acknowledging but not deciding whether method of calculation is substantive).

Here, neither Downing nor the District Court cited to state law allowing for fee-shifting. Appellants' claims against Bayer were governed by the laws of Arkansas, Mississippi, and Texas, Mississippi, and Arkansas; so, too, should Downing's request for fees from Appellants. In fact, the states in which Appellants' suits were brought prohibit fee-shifting absent an attorney-client contract and/or client consent. *E.g., Fox v. AAA U-Rent It*, 17 S.W.3d 481 (Ark. 2000) (refusing attorney's request for fees because the non-paying corporations never contracted with nor requested the work performed by attorney). Indeed, the

substantive law of most states preclude fee-shifting in cases where, like here, the client was actively pursuing his own case and, thus, not a "free rider" of court-appointed counsel's work product.[11]

[11]*Draper v. Aceto*, 33 P.3d 479, 484 (Cal. 2001) ("[A] court may award attorney's fees from a common fund to an attorney who has succeeded in preserving a fund when equity requires it, but [] this cannot be where there are multiple beneficiaries of the fund and all – or substantially all – are represented by various counsel.") (quoting *Estate of Korthe*, 9 Cal. App. 3d 572, 575, 88 Cal. Rptr. 465, 467 (Cal. Ct. App. 1970); *Traveler's Ins. Co. v. Williams*, 541 S.W.2d 587, 590 (Tenn. 1976) (The common fund doctrine "is never applied against persons who have employed counsel on their own account to represent their interests."); *Means v. Montana Power Co.,* 191 Mont. 395, 404 (Mont. 1981) ("[O]nly inactive or passive beneficiaries should be forced to bear the costs of litigation under the common fund doctrine"); *Blue Cross and Blue Shield of Alabama v. Freeman*, 447 So.2d 757, 759 (Ala. 1983) (The common fund doctrine does not apply to "one who joins as a party in the suit, assists in the prosecution or contributes toward the expense of the recovery of the fund . . . ."); *Valder v. Keenan*, 129 P.2d 966, 972 (Ariz. 2006) (holding common benefit fees could not be assessed on party "[b]ecause of the presence of counsel, actively involved on behalf of [the client]"); *Steinberg v. Allstate Ins. Co.*, 226 Cal. App. 3d 216, 221, 276 Cal. Rptr. 554 (Cal. Ct. App. 1990) ("The [common fund] doctrine does not apply [] when each party has retained counsel, and each counsel actively prosecuted the case or actively participated in the creation of the settlement."); *Hurst v. Cavanaugh*, No. 90-J-7, 1992 WL 208918, at *5 (Ohio Ct. App. 1992) (holding that common fund doctrine cannot apply to persons represented by counsel who were active in the litigation); *Estate of Korthe*, 9 Cal.App.3d 572, 575, 88 Cal. Rptr. 465, 467 (Cal. Ct. App. 1970) (explaining that the accepted rationale for common-fund recovery "applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands."); *Estate of Kierstead,* 237 N.W. 299, 300 (Neb. 1931) (denying recovery, notwithstanding "substantial benefit" conferred on defendants, where claimants "were notified that the defendants had employed another as their attorney"); *DuPont v. Shackelford*, 369 S.E.2d 673 (Va. 1988) (recognizing that there are no "free rides" where all parties are represented by counsel).

F. *Reliance on class action principles in MDLs is improper.*

The crux of the District Court's error in this case is its reliance on class action principles to order fee-shifting. Case law cited by Downing and the District Court involves class actions.[12] No statutory authority exists allowing a court to order fee-shifting in MDLs.[13] Indeed, the statute governing an MDL court's power, 28 U.S.C. §1407, is *silent* as to attorney's fees.

While class actions are underscored by public policies supporting application of the common benefit fund, these same public policies are not present in MDLs.[14] Both class actions and MDLs have numerous plaintiffs, but multiple distinctions between

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[12]*See In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); *see also In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008); *In re*: *Vioxx Prods. Liab. Litig.*, 574 F.Supp. 2d 606 (E.D. La. 2008).

[13]28 U.S.C. 1407; *see* Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal,* 62 VAND. L. REV. 107, 121-25 (2010).

[14]A starting point of the distinction between the two types of litigation is the purpose behind them. Class actions allow compensation to class counsel because, but for their efforts, no member of the class would have had a claim large enough to seek remuneration. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action"). Contrarily, MDLs involve multiple claimants, all who have "a claim large enough to warrant a conventional lawsuit. In fact, every claimant has already sued. Every claimant also has an attorney who is aggressively pushing his or her case toward resolution in a favorable court." Silver and Miller at 122.

the two types of litigation renders the common benefit doctrine inappropriate for MDLs.[15] This distinction is discussed in detail in the commentary of the most recent draft of the *Restatement (Third) of Restitution & Unjust Enrichment*:

> [b]y comparison with [fee awards in] class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court.

RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft Nov. 3, 2004).

On the one hand, the class action infrastructure has a built-in component to ensure consent to the common benefit fee. Only absent claimants who choose not to opt out ultimately pay common benefit fees, and thus, class members, by not opting out, are impliedly agreeing to pay fees. *Id.* ("The class members' right . . . to opt out . . . tends to resolve, insofar as practicable, remaining objections on the score of forced exchange."). On the other hand, MDLs with an imposed assessment work the opposite way:

[15] *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1990).

claimants cannot exclude themselves from MDLs, and, thus, judges cannot imply claimants' consent to pay lead attorneys. Indeed, many claimants have hired their own individual attorneys to prosecute their claims. *Id.*

Fee-shifting, whether attributed to case management or equitable principles, is also improper in MDLs when, as here, its aim is to tax litigants for purported "unjust enrichment" from court-appointed counsel's work product. (App.536) (creating the CBF and stating farmers who do not pay into the CBF "will be unjustly enriched by being able to use the work of leadership counsel" . . . and that courts should "rectify this unfair free-riding by requiring participation in the fund"). Significantly, the common fund doctrine and common benefit doctrine are based on the law of restitution. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. a. "The law's strong preference for contractual over restitutionary liability accounts for the general rule by which a person who seeks compensation for benefits conferred on another . . . must ordinarily found the claim on an agreement with the recipient." *Id.,* § 30 cmt. f.

There was no agreement between Appellants and Downing. Instead, Appellants contracted with their own counsel, but then were subjected to court-appointed counsel's work by court order. This is different than what occurs in a class action, where plaintiffs are allowed to choose between entering the settlement class (and consenting to payment of class counsel's fee) or "opting out" and pursuing their own action with their own attorney. *Id.*, § 30 cmt. b.

In conclusion, neither Act of Congress nor Supreme Court precedent authorizes fee-shifting in MDLs. The principles underlying fee-shifting in class actions simply do not apply in MDLs. The District Court erred in creating the CBF in this case.

II.
THE DISTRICT COURT ERRED IN ORDERING APPELLANTS TO CONTRIBUTE TO THE COMMON BENEFIT FUND

If this Court affirms the District Court's creation of the CBF, it should exempt Appellants from contributing.[16] The Supreme Court guides that plaintiffs can only be compelled to pay "common benefit" fees if the "benefit can be traced with some accuracy" and

[16]Thus far, Appellants have paid into the CBF nearly $4,000,000 and expects to pay, under the appealed order, nearly $5,000,000 once all MDL settlement proceeds are paid. (App.1843).

the fees of recovery have been "shifted with some exactitude to those recovering." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480-81 (1980); *Alyeska,* 421 U.S. at 264-65. To this aim, courts considering fee-shifting distinguish between "free riders," *i.e.,* plaintiffs who rely exclusively on the work product of court-appointed counsel, and plaintiffs who actively prosecute their cases with their own lawyers. In this case, Appellants are not "free riders."

For example, in *In re Linerboard Antitrust Litigation*, 292 F.Supp.2d 644, 662-663 (E.D. Pa. 2003), Judge DuBois ordered the plaintiffs to pay into the CBF as "tag alongs" because they joined the suit after class certification had been achieved and after a settlement had been negotiated by class counsel. He also distinguished the case from other cases where the plaintiffs "through counsel, were actively engaged in the cases from the outset." *Id.* at 663.

Additionally, in *In re Air Crash Disaster at Florida Everglades,* 549 F.2d 1005 (5th Cir. 1977), a case cited by Downing and the District Court in this case, the Fifth Circuit reviewed an award of

$270,000 in "common benefit" fees. In that case, the district court required payment into the CBF by only lawyers who had elected to do nothing and "free ride" the litigation efforts of the other lawyers. *Id.* at 1009 (stating that "the [trial] court ... made clear ... that all counsel were free to participate in discovery" and that lawyers taxed to pay the lead attorneys "conceded" that they allowed others to do the work").

There, as in many cases,[17] the lawyers who continued to participate in the litigation process were not required to pay into the CBF. *Id.* at 1019 (stating, "[t]he district judge ... exclud[ed] ... attorneys who continued to be active"); Jean F. Rydstrom, Annotation, *Construction and Application of 'Common Fund' Doctrine in Allocating Attorney's Fees Among Multiple Attorneys Whose Efforts Were Unequal in Benefiting Multiple Claimants*, 42 A.L.R. FED. 134 § 2b (2005) (noting the common benefit doctrine

[17] *See, e.g.*, *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 770 (9th Cir. 1977) ("[A]s a general rule, if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees."); *Id.*, at 771-72 ("[T]he reimbursement of the representative attorneys beyond the terms of their individual contracts was limited to that portion of the fund allocated to beneficiaries which had not participated in the suit [by hiring attorneys of their own]."); *Nolte v. Hudson*, 47 F.2d 166, 168 (2d Cir. 1931) ("[W]here [litigants] are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other [litigants].");

does not "permit the allowance of fees from a fund created where all the parties interested are represented by counsel of their own selection, *each counsel in such case being required to look to his own client for compensation*") (emphasis added).

Here, the District Court was aware that Appellants are the exact opposite of "free riders" and "tag alongs." The carried their own weight and performed legal services that not only prosecuted their claims, but also served the "common benefit" of all plaintiffs. Phipps Group attorneys: (1) filed lawsuits on behalf of 3,850 plaintiffs;[18] (2) propounded nearly 2,000 discovery requests in state court and filed MDL fact sheets on behalf of nearly 1,000 clients;[19] (3) conducted massive amounts of document discovery, including, *inter alia,* review, coding, organization, and analysis, of over 4.2 million documents; (4) attended 23 MDL depositions; [20] (5) took or defended 121 depositions through state court proceedings, including depositions of key Bayer

[18]In the Rice MDL, Appellants filed lawsuits on behalf of 872 plaintiffs; the remaining plaintiffs filed suit in state courts.

[19]Appellants prepared and filed fact sheets for its MDL clients in lieu of written discovery based on the District Court's order restricting discovery to fact sheets. (App.1844,2244-2246).

[20]When Rice MDL depositions took place, Appellants were ordered by the District Court to attending only (23 MDL depositions).

witnesses in Singapore and London, as well as the depositions of federal governmental officials; (6) investigated experts within the industry and developed, independent of Downing's experts, the testimony of four experts in the pivotal areas of rice breeding/testing standards, economics, farming individual losses, and farming past and future market losses; (7) prepared enumerated pretrial and dispositive motions and for jury trials in six cases; (8) tried two of those cases through to a verdict (one of which constituted the first punitive damage verdict against Bayer in the country and the overall highest per-acre award against Bayer); (9) defended those two verdicts against Bayer's post-verdict, post-judgment, and appellate challenges; (10) attended five mediations and/or settlement conferences; (11) orchestrated the terms of the global farmers' settlement, that ultimately resulted in two settlement agreements (one for state court farmers and one for MDL farmers). (App.1841-60,1873,1947,2244-2254).

Pure and simple, Downing's labeling of Appellants as "free riders" is sophistry that should find no purchase in this Court. The District Court erred by requiring Appellants to contribute to the

CBF. *See Polonski v. Trump Taj Mahal Associates,* 137 F.3d 139 (3d Cir. 1998) (reversing fee award because not all plaintiffs were conferred a substantial benefit); *see also In re Diet Drugs,* 582 F.3d 524, 556 (3d Cir. 2009) (Ambro, J., dissenting) (noting differing plaintiffs were benefited in varying amounts and should have paid varying amounts of common benefit fees); *In re Air Crash Disaster at Florida Everglades,* 549 F.2d at 1019; *In re Linerboard Antitrust Litigation*, 292 F.Supp.2d at 662-663.

III.
THE DISTRICT COURT ERRED IN DISALLOWING DISCOVERY, A HEARING, OR A TRIAL ON THE MERITS BEFORE AWARDING DOWNING UP TO $72,000,000 IN FEES

Downing requested and was awarded up to $72 million in fees. (App.3690). Yet, all he offered in support of the request was a generalized spreadsheet of collective hours worked by each individual, the claimed hourly rate, and Downing's *ipse dixit* that he had reviewed the underlying time sheets and determined them to be reasonable.[21] No one else saw these time sheets.

[21]For example, the law firm of Wolf Handenstein Adler Freeman & Herz LLP was awarded nearly $9,000,000 in fees for "common benefit" work. (App.980-81). The only document filed in support of their $9,000,000 request was the declaration of Adam J. Levitt. (App.1146). This document is a mere 17 pages long, most of which is spent detailing Levitt's and other attorney's curriculum

For example, the following is what was provided to Appellants, the Special Master, and the District Court as "justification" for the over $12,000,000 claimed by Downing's firm:

Timekeeper	Hourly Rate	Hours	Fees
Betsy Schrieber	$150.00	48.40	$7,260.00
Don Downing	$650.00	8,815.25	$5,729,912.50
Erica Airsman	$300.00	764.15	$229,245.00
Gretchen Garrison	$600.00	6,116.90	$3,670,140.00
Jill Kraus	$150.00	39.90	$5,985.00
Jason Sapp	$375.00	4,042.50	$1,515,937.50
Jackie Statz	$175.00	5,225.40	$914,445.00
Kaitlin Bridges	$300.00	58.00	$17,400.00
Charles Fasterling	$150.00	61.25	$9,187.50
		25,171.75	**$12,099,512.50**

(App.974). Similar "summaries" were provided by Downing's other common benefit law firms, all suffering from the same lack of explanation and documentation. (App.972-81). Downing filed a declaration assuring the objectors and the District Court that these 25,171 hours were all "common benefit" hours and reasonable. (App.958). Nobody ever has been allowed to test

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vitaes. *Id.* Appellants were denied the right to see the time sheets underlying this and all other declarations, denied the right to test the declarations in any manner, and denied the right to propound discovery, take depositions, or cross-examination those requesting $72,000,000 in fees. (App.3695). These cursory, self-serving, untested declarations are a far cry from the type of evidence that are sufficient to entitle a court to order fee shifting in the inordinate amount of $72 million. *Id.*

Downing's generalized spreadsheet, conclusory declaration, or his *ipse dixit.*

A. *Precedent regarding the scrutiny imposed on requests for fee-shifting in MDLs.*

A case relied upon repeatedly by Downing and the District Court is *In re Diet Drugs,* 582 F.3d 524 (3d Cir. 2009). There, 72 law firms requested "common benefit" fees. *Id.* at 533. There, the district court conducted a close examination of the claims of counsel:

- the district court required all law firms to submit verified copies of their contemporaneously-maintained time records to a court-appointed auditor;
- the requesting attorneys were also ordered to file a 30-volume compendium of the fee requests and supporting documents with the district court;
- any party or objector was allowed to review the compendium, to propound discovery, and to take depositions of lead counsel claiming entitlement to fees;
- following discovery, the district court held a two-day hearing;

- the district court then required the auditor to submit a report, allowed supplemental compendiums of times sheets to be filed, and held three additional hearings on the issue of fee-shifting;

Id. at 533-38.

On appeal, the objectors argued the court's process was not thorough or transparent enough. *Id.* at 538. The appellate court rejected the challenge. *Id.* It held the auditor's review of the time sheets, the public filing of the compendiums, and the discovery afforded those subjected to fee-shifting due process and allowed for a meaningful review of the award. *Id.* In terms of reliability, this case is the polar opposite.

Other cases have mirrored the scrutiny required by the *In re Diet Drugs* court. *See, e.g., In re Air Crash Disaster,* 549 F.2d at 1021 (vacating fee award and remanding so that district court could conduct a "hearing in the full sense of the word" and enter findings of fact and conclusions of law from which the court of appeals could determine whether the award constituted a fair and just enrichment of the plaintiffs' committee, should the district

court's decision be appealed); *In re Diet Drugs,* 401 F.3d at 149-50 (counsel required to submit time and expense invoice to certified public accountant to audit the records); *In re High Sulfur Content Gasoline Prods.,* 517 F.3d 220 (5th Cir. 2008) (reversing fee award because district court did not allow review, audit, or testing of lead counsel's fee request); *id.* at 235 (Reavley, J., concurring) (""Any dispute about the allocation must be resolved by the court after full and fair hearing, considering the *Johnson* factors where appropriate, explaining its decision for all and for our review"); *see also* Silver and Miller, 62 VAND. L. REV. at 111 ("This Article is the first to examine systematically the rules and norms that govern the appointment powers, compensation, and monitoring of lead attorneys in MDLs").

B. *The Manual on Complex Litigation recommends "exacting judicial review" of fee requests.*

The MCL recommends an "exacting review" of fee requests. It contemplates that specific evidence in support of the fee request will be presented to the court (and tested by the parties), as well as a hearing, before a fee distribution occurs:

- "In advance of any fee-award hearing, counsel should submit time and expense records, to the extent not previously submitted with the motion in manageable and comprehensible form, to encourage parties to reach agreements where possible and to streamline the hearing," MCL § 14.223;
- "The direct testimony of witnesses in support of the application can be in the form of declarations, with the witnesses available at the hearing for cross-examination if requested." *Id.*
- Discovery "may be advisable where attorneys making competing claims to a settlement fund designated for the payment of fees," MCL § 14.224;
- "Exacting judicial review of fee applications, burdensome though it may be, is necessary to discharge the obligation to award fees that are reasonable and consistent with governing law," MCL § 14.231;

C. *"How much deference is due the fox who recommends how to divvy up the chickens?"*[22]

Appellants argued to the District Court that Downing's fee request was exorbitant and that someone, *i.e.,* themselves, an auditor, the District Court, independent of the requesting, self-interested attorneys, should "test" Downing's claim by reviewing the time sheets and other documents underlying the spreadsheet and declarations. (App.1667). Appellants' request for oversight fell on deaf ears.[23] (App.3692). The District Court also denied Appellants' request for an evidentiary hearing or trial on the fee requests. (App.1660,3694). Instead, the District Court awarded Downing up to $72,000,000 in fees based on her mere *ipse dixit* that his attached spreadsheet summarized "common benefit" hours incurred.

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[22]*In re Diet Drugs*, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring) (contending MDL courts should scrutinize fee recommendations made by attorneys with a self-interest in the fee award).

[23](App.3692). The District Court appointed a Special Master to review Downing's fee request. (App.879). But, again, no more documentation, other than the generalized spreadsheets and conclusory declarations were provided by Downing to the Special Master, the District Court, or the objectors; in sum, no one, other than Downing and the attorney's requesting fees ever saw or reviewed the time sheets or documents underlying the generalized spreadsheet.

D. *Appellants' request for more than Downing's ipse dixit are well-founded.*

Because Downing provided only a generalized spreadsheet with the total number of hours and hourly rate (and a declaration averring the fees summarized in the spreadsheet are reasonable and for the "common benefit"), neither Appellants, the Special Master, the District Court, nor this Court have been afforded the opportunity to review the individual time sheets to determine if the work alleged was work performed for the common benefit and a reasonable amount of hours. (App.1862-1871). What can be gathered from the Downing's previous filings in state and federal court, (App.983-950;1956-1960,1953-2175), as compared to the amount of fees awarded, is that serious questions should be asked as to the reasonableness of number of "common benefit" hours claimed.

1. Downing's prior court filings call into question the validity of his claim that $72,000,000 in "common benefit" fees were incurred.

Here are the objective facts made available by the Downing prior court filings:

- Downing was appointed as Lead Counsel on April 18, 2007, (App.1);

- approximately two years later (on August 18, 2009), Downing asked the District Court to create a CBF, arguing that it had incurred **$20,000,000** in attorney's fees, (App.22-23);

- six months later, Downing filed (on March 12, 2010) a motion to intervene in one of Appellants' Arkansas state cases, claiming his fees (after trying two federal bellwether trials) had grown to **$22,000,000**, (App.1948-1952,1979);

- a little more than a year after that Arkansas filing, the "global" settlement agreement was reached with Bayer on behalf of all state and federal farmers (verbal agreement on March 31, 2011 and documents signed on July 1, 2011);

- in his final request for fees, filed a little more than a year after the global settlement was signed (September 4, 2012), Downing claims his fees grew by **$50,000,000** to a total of $72,000,000.

Yet, Downing's original attorney's fees request ($20,000,000), (App.19-23), is based on most of the same work product as his final request ($72,000,000). (App.885). ***Simply put, something is amiss.***

i. Downing's work before September 2009 — the $20,000,000 estimate.

According to Downing's 2009 Motion to create the CBF, he had already incurred $20,000,000 in fees for doing the following:

> (1) investigation and research to develop the consolidated master complaint;
>
> (2) negotiation of discovery protocols;
>
> (3) extensive discovery (including drafting and responding to numerous discovery requests, subpoenaing numerous third parties, and completing hundreds of Plaintiff Fact Sheets);
>
> (4) reviewing, coding, and managing nearly three million pages of documents;
>
> (5) taking or defending well over 100 depositions across the United States and internationally;
>
> (6) engaging in extensive and protracted meet-and-confer discussions with defendants' counsel and counsel for third parties with respect to discovery and other case-related issues and engaging in motion practice relating thereto;
>
> (7) creation of an Internet website (www.bayerricelitigation.com) for the benefit of all plaintiffs and their counsel;
>
> (8) successful effectuation of service on Foreign Bayer Defendants and opposition to defendants' motion to dismiss the claims against the Foreign Bayer Defendants for lack of personal jurisdiction;

(9) successful opposition to defendants' partial summary judgment on federal preemption grounds;

(10) coordination of pre-trial proceedings with plaintiffs' counsel in this MDL and in related state court action;

(11) briefing and litigation of class certification issues;

(12) identifying, interviewing, and selecting from numerous candidates for consulting and testifying experts;

(13) preparation of numerous opening and rebuttal expert reports (and taking discovery pertaining to defendants' experts);

(14) handling mediation proceedings before Judge Limbaugh;

(15) research, drafting, and filing summary judgment motions relating to:

(a) the Bayer Defendants' agency status;

(b) the Bayer Defendants' defense of intervening and superseding cause;

(c) the Bayer Defendants' defense of compliance with state of the art standards;

(d) the Bayer Defendants' defense of compliance with the Plant Protection Act;

(16) research, drafting, and filing expert challenges to the Bayer Defendants' experts of:

(a) Nicholas Kalaitzandonakes;

(b) Cheryl Shuffield;

(c) Robert Winter;

(d) Alan McHughen; and

(e) Ronnie Helms;

(17) selection and preparation of the Court-Ordered "bellwether" cases for trial.

(App.19-23). *All of this work falls within Downing's estimation of* ***$20,000,000*** *in fees.*

ii. Downing's work during the next six months (September 2009-March 2010): Downing incurs another $2,000,000 in Fees (total of $22,000,000)

Downing's 2010 Motion in Arkansas state court[24] mentioned the work listed above, as well as:

(1) responding to summary judgment motions by the Bayer Defendants regarding:

(a) the defense of the economic loss doctrine;

[24](App.1948-1952,1956-1958). On March 12, 2010, Downing filed a motion to intervene in an Arkansas state court case involving a plaintiff represented by Appellants. *See Kyle, et al. v. Bayer AG, et al.* In this filing, Downing outlined the work that it claimed it had done for the common benefit.

(b) the defense that all causes of action but negligence are legally barred;

(c) the defense that punitive damages are not recoverable;

(d) the defense that share-rent landlords cannot recover;

(2) prepared for and tried the first bellwether trial;

(3) prepared for and tried the second bellwether trial.

(App.1956-1958,1979). Thus, Downing claimed that *all of the work performed through March 2010, including the trying of two bellwether trials, constitutes* ***$22,000,000*** *in attorney's fees.*

iii. For his work during the one additional year (before settlement was reached) until Now — Downing claims a whopping *$50,000,000 more* in fees.

After the Arkansas state intervention filing, where Downing claimed $22,000,000 in fees (based on work including the trying of two bellwether trials), little more than a year passed before the global settlement was reached for the state and federal farmers (verbal agreement on March 31, 2011 and documents signed on

July 1, 2011). Yet, Downing's final motion for distribution sought a total of $72,000,000 in fees. (App.885).

This final motion recounts all of the same work listed above (which was performed before April 2010) and then alleges the following additional work:

> (1) Participated in 67 additional depositions (Downing now claims it took or defended 167, but 100 of those were before September 2009);
>
> (2) Tried one more bellwether case to verdict;
>
> (3) Prepared for one other bellwether trial that settled early into the trial;
>
> (4) Participated in one state court trial (Lonoke County, Arkansas);
>
> (5) Researched and drafted appellate briefing for the three bellwether trial verdicts and the state court verdict in Lonoke County, Arkansas.
>
> (6) Work performed to effectuate the MDL Global Settlement.

While these items do constitute work in addition to that performed before March 2010, there is *no logical math* that can equate this work to the additional $50,000,000 in fees awarded to Downing. With these facts, questions arise as to duplicative hours, overbilling, and other practices that are not compensable time.

Just as a comparator, this Court should consider the fees incurred by Appellants during the *entirety* of this litigation (approximately a six year period), wherein Appellants filed lawsuits on behalf of nearly 4,000 clients, conducted massive document discovery, attended/took/defended over 140 depositions, prepared for five jury trials, tried two cases to verdict, defended both verdicts on appeal, and orchestrated the overall settlement terms that eventually became the GMB and MDL Settlement Agreements — for all of this work, Appellants claimed "common benefit" fees in the amount of $13,271,247.50. (App.1859,1873). Yet, Downing claims he incurred $50,000,000 in fees in less than half this period of time for conducting less than half the amount of work. (App.885,893).

In sum, Downing provides little to no explanation for how this additional work, performed post-March 2010, constitutes an additional $50,000,000 in fees. Just a cursory review of the time expenditures—that Downing claims to have incurred in a little over one year—call into question whether the fees alleged are duplicative, not for common benefit, or unreasonable. Accordingly,

Appellants ask this Court to reverse the District Court's award to Downing and to reverse the District Court's denial of discovery, a hearing, and/or a trial on Downing's fee request.

2. An Analysis of the Amount of Hours Claimed Signals the Potential for Overbilling or Misclassification of Services as "Common Benefit" Work

Although many of the individuals submitting "common benefit" time appear to seek compensation for a reasonable amount of total hours claimed as "common benefit" work,[25] some of the attorneys' claimed hours cry out for a more in-depth analysis. For example, Don Downing claims to have incurred **8,815.25** hours of fees devoted *solely* to "common benefit" work in the Rice MDL. (App.974). Crunching this number with the objective facts of the case reveals that Mr. Downing billed approximately **42.8** hours *every* single week between the time he was appointed (on April 18, 2007) to the date the global settlement

[25]Appellants reserves the right to object to the hours submitted by any attorney upon being given an opportunity to review the time sheets describing the work performed.

was reached (on March 31, 2011) — all on *only* this case and all on *only* "common benefit" work.[26]

Looking to Mr. Downing's co-counsel, Gretchen Garrison, Downing's request claims she incurred **6,116.9** hours in fees in *only* common benefit work. (App.974). Again, crunching the numbers, this figure shows that, from the time she joined Mr. Downing's firm in 2008, even assuming she began work on January 1, 2008, Ms. Garrison billed, on average, **36.4** hours *every* single week until the settlement was reached — all on *only* this case and all on *only* "common benefit" work.

These analyses are hypothetical and are the only form of analysis Appellants can perform absent discovery and review of the underlying time sheets. Accordingly, Appellants respectfully

[26]Yet, during this same time period, filings available on Westlaw show Mr. Downing as also participating in multiple other complex cases, including: a class action suit involving organic milk consumers, *In re Aurora Dairy Corp. Organic Milk Marketing and Sales,* No. 4:08CV00280-ERW (E.D. Mo. 2009), a class action suit involving farmers regarding Roundup Ready Soybean Seed and Corn Seed, *Schoenbaum v. E.I. Dupont de Nemours,* (No. 4:05CV01108-ERW (E.D. Mo. 2009); a class action involving Vioxx, *Plubell v. Merck & Co.,* No. WD 69808 (Mo. 2009); a complex legal malpractice claim involving the State of Missouri and the National Benevolent Association, *Nat. Benev. Ass'n of Christian Church v. Weil, Gotshal & Manges LLP,* No. ED 96951 (Mo. 2009); a class action suit by internet service customers, *Schmidt v. AT&T,* No. 94856 (Oh. 2010); a potential class action involving Missouri banking customers, *Joseph v. Commerce Bank N.A.,* No. 10-0685-CV (Mo. 2010).

request this Court reverse the District Court's award to Downing and reverse the denial of discovery, a hearing, and/or a trial on Downing's request.

IV.
THE DISTRICT COURT ERRED IN AWARDING DOWNING FEES

Appellants, denied the opportunity to test Downing's generalized spreadsheet, offered objections based on the scintilla of evidence offered by Downing. If this Court agrees that discovery and a hearing/trial were unnecessary, this Court should, nevertheless, reverse the award to Downing for a variety of reasons.

A. *The fee award amounts to "double recovery" because Downing already received compensation for the same work product from his clients.*

Downing has never denied that he has been paid by his clients for the same work product outlined in his common benefit fee request. Downing did not allege that any of the work done was superfluous to the work he did or would have incurred represented his contractual clients in their individual suits against Bayer. Again, Downing opposed discovery of information underlying his

summary spreadsheet of attorney time records and of the amount of contractual fees he collected. (App.3400). It is telling that Downing has never denied Appellants' contention of "double recovery." No statute, no judicial opinion, and no advisory provision of the MCL authorizes a court-appointed attorney to be awarded double-recovery for work product performed on behalf of his contractual clients.

B. *Triple Recovery: Downing also seeks millions of dollars in "common benefit" fees for the same work product from non-farmers.*

To re-cap, Downing, for the same work product, received contingency fees from his clients and "common benefit" fees from MDL farmers. Significantly, Downing also seeks a third ("triple") payment for this same work product by claiming entitlement to common benefit fees from non-farmer plaintiffs. (App.545-46) (ordering non-farmer plaintiffs to pay 10% of recoveries into CBF). The non-farmers have paid approximately $16.8 million (10% of $168 million settlement amount) into a CBF. (App.1709). Significantly, the liability and defensive issues affecting these

cases mirrored those affecting the claims of the farmers subjected to the CBF. *Id.*

C. *Downing received substantial benefit being appointed as "Plaintiffs' Lead Counsel."*

Downing demands compensation for the work he claims benefited all farmers, but ignores the benefit he received as a result of serving as "lead counsel." As described by one legal scholar:

> Serving as [lead counsel] in a high-profile products liability MDL is a plum assignment. Lead attorneys gain prestige, enhance their ability to obtain clients and referrals, develop valuable skills, and so on.

(App.1924). This is exactly what took place in this case.

Downing, when describing the services provided in its Motion, did not discuss in detail the website he created and maintained, www.bayerricelitigation.com. (App.20). This website did not provide a service to all plaintiffs involved in the MDL; instead, it allowed Downing to take advantage of his designation as "lead counsel" and use that designation to advertise its services to prospective clients. (App.1710). The website contained the biographies of its attorneys and, at the top of the list of the documents provided is

the court order appointing Downing as "leadership counsel." *Id.* Also, in the "Q&A" section of the website, Downing provides visitors of the site with information regarding why he was appointed as lead counsel and how prospective clients can contact him to join the litigation. *Id.* This website was not built in service to the MDL, it was built to capitalize on Downing's designation as "lead counsel" and to use that designation to collect more clients. *Id.* It is inevitable that being named "lead counsel" produced additional contingency fees from new clients who hired Downing because he was "lead counsel." *Id.*

In his Motion for fee distribution, Downing highlighted that other plaintiffs' groups have not challenged the CBF. It should be noted that many of these groups are represented, at least in part, by Downing or a member of the court-appointed executive committee:

> Moreover, judges are often told that [Plaintiffs' Steering Committee] members have "agreed" to the fee level, which sounds significant since they themselves have large inventories and are therefore essentially taxing themselves. Of course, this is a fudge – since they are going to *get* the common benefit fee, they are only truly taxing the non-[Plaintiffs'

> Steering Committee] attorneys; their own taxes will indeed go into the fund, but will then go right out of the fund and back into their pockets. To be sure, some [Plaintiffs' Steering Committee] members may pay a 6% tax and, depending on their common benefit work, only get a 4% fee – but that still means that they have effectively lost only 2% of their fee, not the 6% the local lawyer has lost.

(App.1794) (William B. Rubenstein, *On What A "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87, 89 (March 2009)).

D. *Other factors warrant reversal of Downing's exorbitant fee award.*

This District Court ordered a hold back of 11% (attorney's fees comprising 8% and expenses comprising 3%) of the farmers' recoveries, stating the "amounts suggested here by the leadership group are generally reasonable." (App.539). The amount, however, is far from reasonable:

1. Downing's fee award of up to $72,000,000 constitutes 13.5% of the MDL settlement proceeds.

Of the $750,000,000 global settlement, approximately $577 of that amount is payable to MDL farmers. (App.1713). Downing attempted to lump the state court settlement in with the MDL

settlement,[27] but the District Court's Order clearly states payments into the CBF are owed by *only* the MDL plaintiffs. (App.534-35). Downing conceded in 2012 that $46,000,000 of those settlement proceeds had been paid into the CBF. *Id.* Downing was awarded up to $72,000,000 in fees. (App.3690).

When considering the $72,000,000 awarded in light of an MDL settlement value of $577,000,000, this makes Downing's fee award 12.5% of the MDL farmers' recoveries. (App.3690). This is notwithstanding the additional monies awarded Downing as reimbursement for "expenses." *Id.* This percentage vastly exceeds the amount traditionally awarded by MDL courts. In fact, research shows that the large majority of cases involving a court-ordered fee-shifting falls within the 4-6% range (for attorney's fees and expenses **collectively**):

- *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488 (E.D.N.Y 2006), 2007 WL 2340789 (E.D.N.Y. 2007) (approximately 30,000 cases in state and federal court when **1%** withheld for federal cases and **3%** withheld for state cases; court imposed 1% set aside of gross

[27]The District Court noted that Downing's request consolidated the state court farmers' settlement, the MDL farmers' settlement (together equaling $750,000,000), as well as the non-farmers' settlement (collectively equaling $918,000,000). (App.3690).

settlement as assessment for first PSC, and **3%** set aside for work of second PSC)

- *In re Vioxx Prods. Liab. Litig.*, MDL 1657, Pretrial Order No. 19 (E.D. La. 2005) (thousands of lawsuits in state and federal court when **3%** total withheld; court increased withholding to **4-8%** for attorneys signing the agreement late; as part of the MSA, PSC requesting **8%** of settlement fund as common benefit award)

- *In re Clearsky Shipping Corp.*, 2003 WL 1563820 (E.D. La. 2003) (approximately 1,500 personal injury and property damage claims filed when **4%** total withheld; counsel originally proposed 10% withholding)

- *In re Bextra & Celebrex Mktg. Sales Practices & Prods. Liab. Litig.*, 2006 WL 471782 (N.D. Cal. 2006) (approximately 1,800 cases pending in MDL when **4%** total withheld; court adopted **8%** for late signers)

- *In re Gel Breast Implants Prods. Liab. Litig.*, MDL 926, Pretrial Order No. 13 (N.D. Ala. 1993) and Pretrial Order No. 13A (N.D. Ala. 1999) (approximately 1,778 actions when **4%** total withheld; court originally set withholding at **5%** for early signers and **6%** for late signers; court subsequently reduced to **4%** and rebated one third of the prior 6% assessment)

- *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, 2008 WL 2330571 (D.S.C. May 21, 2008) (approximately 400 related actions when **6%** withheld for federal cases and **4%** withheld for state cases; court order established **6%** assessment for personal injury claims and **4%** assessment for economic loss claims)

- *In re Baycol Prods. Liab. Litig.*, 2002 WL 32155266 (D. Minn. 2002) (1,253 actions before MDL when **6%** total withheld)

- *In re St. Jude Med. Inc., Sitzone Heart Valves Prods. Liab. Litig.*, 2002 WL 1774232 (D. Minn. 2002) (two proposed classes included 10,535 and 1,000 individuals each; **6%** total withheld)

- *In re Propulsid Prods. Liab. Litig.*, 2001 WL 34134864 (E.D. La. 2001) (several thousand individual cases and 28 class actions from 30 states; **6%** withheld for federal cases and **4%** withheld for state cases)

- *In re Diet Drugs Prods. Liab. Litig.*, 553 F.Supp.2d 442 (E.D. Pa. 2008) (approximately 105,000 total plaintiffs filing lawsuits, with approximately 35,000 plaintiffs transferred to MDL and 130 class actions; **6%** withheld for federal cases and **4%** withheld for state cases; court reduced initial withholdings by one third to comport with typical withholdings in MDLs)

- *In re DePuy Orthopaedics, Inc. ASR Hip Implant Prods. Liab. Litig.,* MDL 2197, CMO 13, II(B)(2) (N.D.Ohio, Nov. 28, 2011) (**3%** for attorneys' fees and **1%** for costs for MDL cases and State Court cases using MDL work product (subject to an increase to **6%**—with **5%** being allocated for fees and 1% for expenses—for counsel entering the Participation Agreement after sixty (60) days of the entry of the Order or ninety (90) days of their first case being docketed in any jurisdiction, whichever is later.)

- *In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, MDL 1871, 2012 WL 6923367 (E.D. Pa. Oct. 19, 2012) (Approximately 4,000 cases in state and federal court when the court ordered **6.25%** of the estimated collective value of the settlements in this case (or an award of up to $143,750,000) from the fund created by

the assessments collected and an additional amount of $10,050,000 from the PTO 70 fund be awarded and held in reserve for payment of future administrative fees and expenses.)

- *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.,* MDL 2011, 2010 U.S. Dist. LEXIS 22361, 9–10 (S.D.Ill. Mar. 8, 2010) (thousands of cases in state and federal court when **6%** to **10%** assessments for MDL cases, depending on timing of participation)

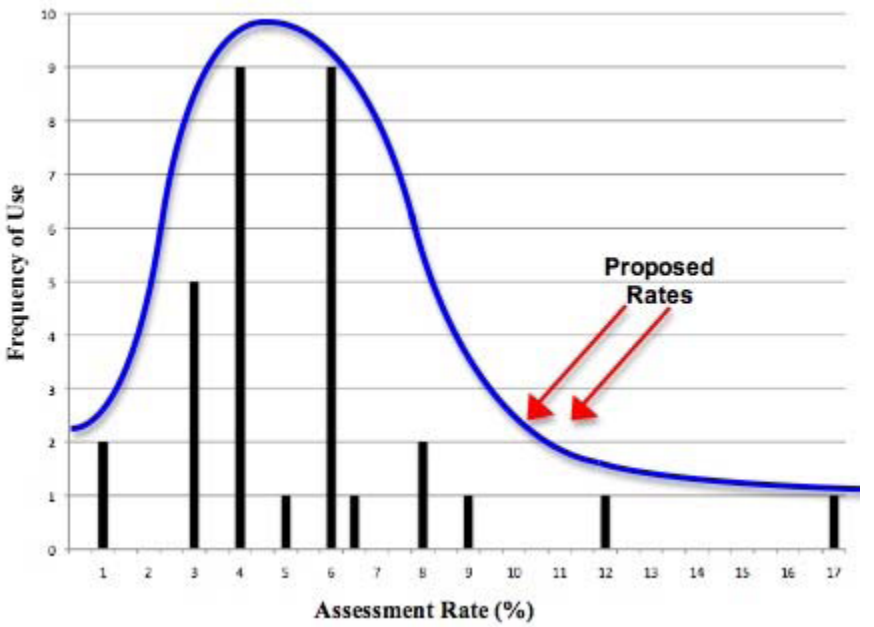
- *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010,* MDL 2179, 2011 WL 6817982 (E.D.La. Dec.28, 2011), amended 2012 WL 37373 (E.D.La. Jan.4, 2012), and *amended and superseded on reconsideration,* 2012 WL 161194 (E.D.La. Jan.18, 2012) (6% in MDL cases for private claimants and **4%** in MDL cases for State or local government claimants)

- *In re Oral Sodium Phosphate Solution–Based Prods. Liab. Action***,** MDL 2066, Order Regarding Common Benefit Fees and Expenses, at 3 (N.D.Ohio, Aug. 2, 2010) (**4%** assessment for MDL cases)

- *In re Fosamax Prods. Liab. Litig.***,** MDL 1789, CMO 17 ¶ 3(f)(3), (S.D.N.Y. Apr. 28, 2011) (**9%** assessment for non-MDL cases utilizing MDL common benefit work product or participating in a PSC-coordinated resolution and in which an Assessment Option agreement was not signed)

To say the least, Downing's award far exceeds the orders of other MDL courts.

As demonstrated by Harvard Law Professor William B. Rubenstein, who is the leading researcher in assessments, the percentage of fees awarded are at the high and rare end of the spectrum:



(App.1775).

Professor Rubenstein, who offered his opinion before Downing had inflated its request to $72,000,000 in fees opined:

> [C]ourts most frequently utilize 4% and 6% withholding rates. Indeed, in the *Diet Drugs* litigation, a case which the DOWNING cites in its supporting memoranda, Judge Bartle recognized this mean, noting 4% and 6%

> assessment rates were the norm in multidistrict litigation.

Rubenstein Expert Report, App.1775-1776.

2. The Size of This MDL Weighs in Favor of a Lower Percentage

In considering the propriety of the amount of fees awarded Downing, this Court should consider the size of this MDL proceeding, as compared to other MDLs wherein hundreds of thousands of plaintiffs are involved. *See, e.g., In re Wilson*, 451 F.3d 161, 163 (3d Cir. 2006) (30,000-35,000 plaintiffs); *In re Diet Drugs*, 369 F.3d 293, 298 (3d Cir. 2004) (18,000 individual lawsuits and 100 putative class actions); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 784 (3d Cir. 1999) ("thousands of plaintiffs" in MDL); *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996) (440,000 plaintiffs became class members for purposes of settlement in MDL); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165-66 (2d Cir. 1987) (240,000 claimants in MDL).

On his website, Downing reported that the state and federal rice litigation involves 11,000 plaintiffs (farmers and non-farmers).

(App.1717). Thus, in this case, "the relative size of this MDL cuts in favor of an assessment at the low end of the 4-6% normal range, not a range far in excess of that normal range. Put simply, in cases involving fewer claims, the common benefit lawyers will likely perform less common benefit work than they do in cases involving many thousands of claims." *Rubenstein Expert Report,* App.1776-1777.

3. *Downing's hourly rates are unreasonable.*

Appellants also objected to Downing's claimed hourly rates. (App.1718). When looking to the claimed rates, they vary greatly:

Downing Claimant	High End	Low End
Lawyer, Partner	$865	$375
Lawyer, Associate	$500	$175
Law Clerk	$175	$165
Paralegal	$290	$100
Other[28]	$175	$45

The one thing that is consistent about the rates is that they are grossly exaggerated.

[28]Administrative clerks, legal assistants, tech support, and investigators.

Appellants presented the Special Master and District Court with a spreadsheet (App.1862-1871) that lists each Downing claimant and compares the claimed hourly rate with the average hourly rate[29] reported for an attorney/staff member with the same amount of experience working in the same geographical area. (App.1862-1871). This spreadsheet shows that the overall total reported by Downing is nearly **100% greater** than the overall total when applying the state median/average hourly rate or regional rate driver[30] hourly rate:

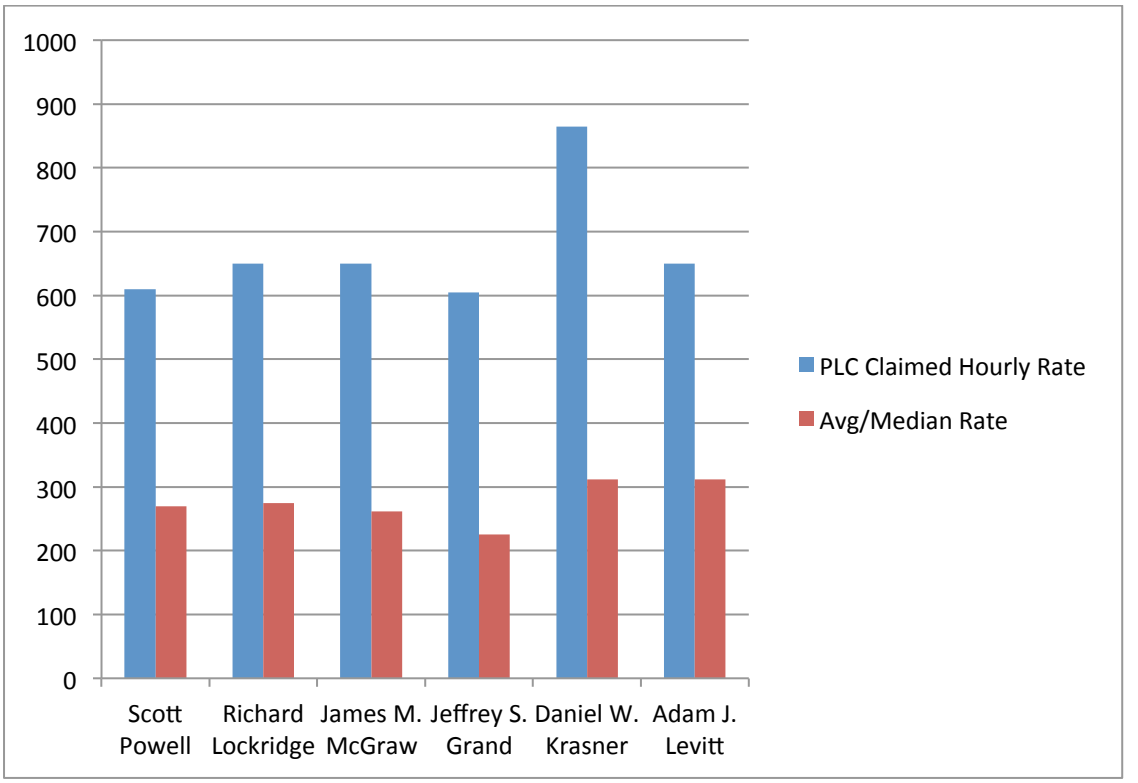
- overall fee total based on Downing's claimed hourly rate: **$51,053,603.12**
- overall fee total based on the state median/average rate: **$26,931,066.92**

[29]Dep't of Research & Analysis, State Bar of Texas, 2009 Hourly Fact Sheet (2010), *available at* www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends; National Consumer Law Center, United States Consumer Law Attorney Fee Survey Report 2010-2011 (2011), *available at* www.nclc.org/images/pdf/litigation/fee-survey-report-2010-2011.pdf.

[30]The RateDriver application by CT Tymetrix, Inc. captures information from the user including the metro area an attorney practices law in, the practice area the attorney specializes in, the size of the firm, whether the attorney is a partner or an associate in the firm, and the number of years of experience the attorney has.

- overall fee total based on the regional rate driver: **$29,467,107.05**

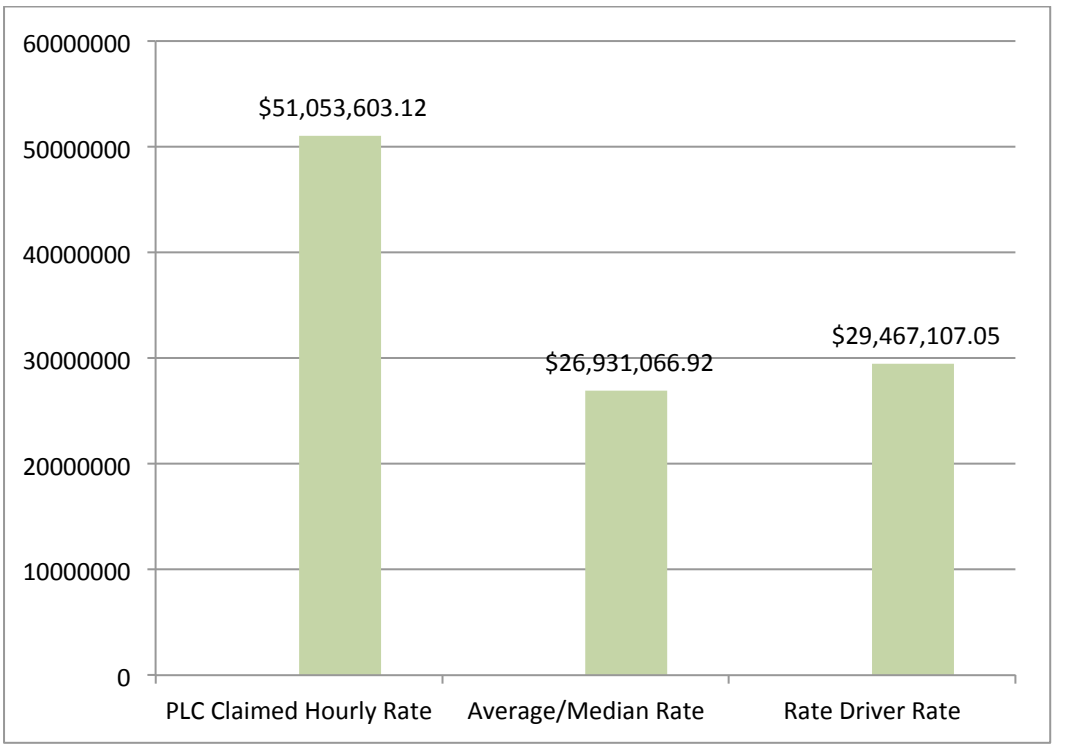
(App.1862-1871). For example, Downing's claimed rate is almost always double the hourly rate for the average attorney practicing in the same area of the law, with the same level of experience, in the same geographical region:



(App.1864-1865,1868-1869).

When these inflated hourly rates are factored into the overall amount of fees awarded to Downing, the variation between

objective rates and the self-serving rates claimed by Downing is astounding:



(App.1864-1865,1868-1869).

As a result, for this and the reasons listed above,[31] this Court should reverse Downing's fee award.

[31]Another error presented by the District Court's incomplete review of Downing's fee request is its award of "fees" for the work of non-attorneys. The MCL distinguishes between attorney's fees and expense (the latter of which may encompass paralegal fees, expert fees, law clerk fees, and other non-attorney services provided). MCL § 14.216. In this case, the District Court awarded Downing all "expenses" requested. (App.3694). No one objected to Downing's expenses. Yet, in addition to the expenses awarded, the District Court awarded Downing over $2,000,000 in "fees" for the work of non-attorneys. *Id.; see* (App.981) (Downing requested $51,053,603.13 in "fees"); (App.3672,3694) (Downing awarded $51,584,012.54 in "fees"); (App.3672,3694); (App.962, 972-981, 988, 995, 1004-05, 1014, 1058, 1064,

V.
THE DISTRICT COURT ERRED IN DENYING APPELLANTS' REQUEST FOR FEES

Appellants maintain their contention that the American Rule governs this case and that all litigants should pay their own way. However, if this Court affirms the District Court's determination that it is entitled to enter fee-shifting orders to compensate attorneys for "common benefit" work, then the standard should be applied fairly and equally.[32]

A. *The District Court acknowledged that attorneys other than lead counsel can contribute to the "common benefit."*

In the Order creating the CBF, the District Court specified that all attorneys performing work that contributed to the common benefit are entitled to compensation from the CBF. (App.22). The District Court stated it was creating the CBF to "hold funds as provided in this Order to compensate attorneys for services rendered for the plaintiffs' common benefit." (App.20). "At the

1074, 1108, 1115, 1128, 1129, 1149-51, 1170, 1179-80, 1199, 1276) (showing $2,368,194.22 of "fees" requested by Downing was for work provided by law clerks, paralegals, and other non-attorney personnel). These and other errors show the District Court failed to perform the "exacting review" demanded by case law and the MCL when considering self-serving fee applications.

[32]Appellants claimed that they expended 29,665 hours of common benefit work. (App.1873).

appropriate time, any plaintiffs' counsel (whether part of the leadership group or not) may petition for distribution of funds if that counsel believes he or she has provided a common benefit to plaintiffs other than his or her own clients." (App.22).

B. *Downing conceded that state court litigation served the "common benefit."*

In his request for $72,000,000, Downing relied heavily on the work performed in state court cases. (App.905,913) (seeking compensation for "coordinat[ing] with state court counsel for the taking of depositions", "common benefit attorneys went to trial . . . in Lonoke County, Arkansas . . . lasted five weeks and once again resulted in a plaintiffs' verdict", common benefit attorneys defended the Arkansas state verdict on appeal to the Arkansas Supreme Court, "which held Arkansas' punitive damages cap unconstitutional"). Thus, Downing conceded that he sought and received fees based on state court work. *Id.*

C. *Appellants' state court work served the common benefit.*

Appellants, who spearheaded the state court litigation, contend they, too, are entitled to fees for work that served the "common benefit" of MDL plaintiffs. (App.1728,1841-

1860,1873,2244-2254). As stated by Professor Rubenstein, in MDLs, "[t]he common benefit lawyers simply do not do 100% of the legal work." (App.1792) (Rubenstein, 3 CLASS ACTION ATTORNEY FEE DIGEST at 89). In MDLs, all lawyers contribute to the final result. *Id.* In many MDLs, the bargaining power in settlement negotiations is directly attributed to the quantity and quality of plaintiffs represented. *Id.* In this case, Appellants represented nearly 5,000 clients, filed suit on behalf of nearly 4,000 plaintiffs, propounded discovery and fact sheets for thousands of state and MDL farmers, and submitted claims for approximately 20% of the total rice acreage involved in this litigation. (App.1844,2244-2254). For a more detailed list of the common benefit work performed by Appellants, please see Section II of this Brief and the descriptions of each case prepared for trial and appeal, the discovery preceding the trial, the expert witnesses developed, and the legal drafting and briefing involved, as enumerated within Appellants' Memorandum of Law filed with the District Court. (App.1727-45).

For example, the following chart, which shows ***all*** trials occurring in the Rice Litigation, was presented to the District

Court -- the cases that are shaded/bolded were those prepared, prosecuted, and defended by Appellants:

TRIAL	TRIAL DATE	RESULT	DAMAGES	PUNITIVES
1st MDL Bellwether (federal)	11/2/09-12/4/09	Verdict[33]	$326/acre	NO
2d MDL Bellwether (federal)	1/11/10-2/4/10	Verdict[34]	$218/acre	NO
***Kyle v. Bayer* (state: Arkansas)**	**2/11/10-3/8/20**	**Verdict[35]**	**$733/acre**	**YES**
Schafer v. Bayer (state: Arkansas)	3/24/10-4/15/10	Verdict[36]	$719/acre	YES
3d MDL Bellwether (federal)	6/21/10-7/14/10	Verdict[37]	$122/acre	NO
***Sims v. Bayer* (state: Arkansas)**	**7/19/10-7/28/10**	**Verdict[38]**	**$250/acre**	**NO**

[33]Suit involved 6,167 acres, with damage award totaling $2,008,723; costs taxed $292,733.23 (D.E. 2828, 2829 and 2897).
[34]Suit involved 6,896 acres, with damage award totaling $1,500,841; costs taxed $31,580.40 (D.E. 2828, 2829 and 2897).
[35]Suit involved 727 acres, with compensatory damages ($532,643) and punitive damages, totaling $1,032,643.
[36]Suit involved 8,315 acres, totaling compensatory damages at $5,975,605, along with a $42 million punitive damages award.
[37]Suit involved 4,103 acres, with compensatories totaling $500,248 Costs taxed $33,214.56, note regarding common costs of $251,293.97 (D.E. 3278 and 3333).
[38]Suit involving 3,783 acres, with compensatories totaling $946,263.

Warren v. Bayer **(state: Arkansas)**	**8/2/10 setting**	**Continued to 4/25/11 setting**	**N/A**	**N/A**
Briggs v. Bayer **(state: Arkansas)**	**9/20/10 setting**	**Continued after Pre-Trial Hearing**	**N/A**	**N/A**
4th MDL Bellwether (federal)	10/12/10 - 10/14/10	Settled four days into trial.	N/A	N/A
Meins v. Bayer **(state: Arkansas)**	**2/14/11 setting**	**First State Court Settlement after Pre-Trial Hearing**	**N/A**	**N/A**
Riceland v. Bayer (state: Arkansas) Deacon Law Firm	2/14/11-3/18/11	Trial on Riceland's Cross-Claim in *Meins v. Bayer*	$11,800,000	$125,000,000
Spain v. Bayer **(state: Arkansas)**	**4/6/11 setting**	**Settled – Informal Global Settlement reached days before trial.**	**N/A**	**N/A**
Underwood v. Bayer **(state: Arkansas)**	**8/22/11 setting**	**Settled – in conformance with GMB Settlement Agreement.**	**N/A**	**N/A**
Plantiff TBD v. Bayer **(state: Arkansas)**	**11/24/11 setting**	**Plaintiff to be chosen from Cross County pool.**	**N/A**	**N/A**

(App.1735-36).

In this case, Appellants created immense bargaining leverage by keeping their clients out of MDLs and prosecuting their claims before state juries. This strategy forced the Bayer Defendants to do battle on several fronts and preserved the possibility of obtaining trial verdicts in state courts chosen by plaintiffs. One commentator, examining the Vioxx MDL, noted that Merck had to defend thirteen trials "before juries in state courts in New Jersey, California, Texas, Alabama, Illinois, and Florida" because non-DOWNING lawyers kept their clients' cases *out* of the Vioxx MDL. Eldon E. Fallon, Jeremy T. Grabill and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2335 (2008). Because some of these trials produced enormous verdicts, Merck was pressured to pay more in settlement.[39]

[39] *See, e.g.,* Snigdha Prakash *Vioxx Jury Adds $9 Million in Punishing Merck*, http://www.npr.org/templates/story/story.php?storyId=5336787&ps=rs (visited Sep. 1, 2009) (reporting that a New Jersey jury added $9 million in punitive damages to a $4.5 million compensatory award in favor of a Vioxx plaintiff); Aaron Smith, *Jury: Merck negligent, Merck blamed for death in Vioxx suit; jury awards $253 million in damages. Drug giant to appeal*, CNNMONEY (August 19, 2005), http://money.cnn.com/2005/08/19/news/fortune500/vioxx/index.htm (visited Sep. 1, 2009) (reporting that a Texas jury ordered Merck to pay $253 million in compensatory and punitive damages to a Vioxx plaintiff).

D. *The Horse's Mouth: Even Bayer acknowledged that Appellants' state court work increased the overall settlement value.*

During mediation efforts, Bayer relied heavily upon Appellants' state court work. (App.1947). Bayer published to the negotiating plaintiffs a chart listing six trials and their verdicts. *Id.* Among those trials were the *"Kyle"* trial and *"Desha"* trial prosecuted by Appellants. *Id.* Bayer noted that, of the trials, Appellants' *Kyle* trial had received the highest "damages per acre." *Id.* (noting $733 per acre). Bayer's chart calculated that the *Kyle* verdict, when aggregated with the other verdicts, resulted in an average price per acre of $394. *Id.* Bayer also noted that this amount, "Extrapolated Across All 2006 Rice Acres: $862,206,864." *Id.*

The District Court also received evidence of the multitude of meetings between Bayer's settlement team and Appellants, demonstrating that Appellants were the driving force behind the global settlement benefiting all farmers. (App.2176-2243). Within email communications, Bayer told Appellants that "[o]verpaying . . . is a more feasible option if we know that we can . . . get

[Appellants] out of the courtroom"; "in [the Downing's bellwether trials,] all juries have discounted future damages somewhat, with most recent juries substantially discounting." (App.2176, 2195-96).

E. *Downing's contention that Appellants' work did not serve the "common benefit" was, again, based solely on his ipse dixit.*

Significantly, Downing did not contest the amount of hours worked or rates claimed by Appellants. (App.3848). Rather, Downing simply contended Appellants' work was not "common benefit" work because Appellants work was not "directed" by Downing and that Appellants should receive no common benefit because they have already been "unjustly enriched" based on their state court contingency fees. (App.3856-72).

Downing offered no legal basis or reasoning for his conclusion that Appellants' work did not benefit the farmer plaintiffs. Ironically, if Downing's analysis applied to his own claims, then he, too, should receive no common benefit award. He, like Appellants, received compensation from his contractual clients; he, like Appellants, provided services that also benefited his individual

clients; and, he, like Appellants, vigorously pursued what he believed to be the best course of action for his clients.

In sum, Appellants maintain their position that the American Rule should apply and that no fee-shifting is permissible in MDLs. However, should this Court uphold an MDL courts authority to do so and uphold the process undertaken by the District Court in this case, then this Court should require the District Court to apply the standard for common benefit analysis even-handedly and across the board -- not just to the counsel it hand selected as "lead counsel."

CONCLUSION

Appellants respectfully request that this Court reverse the CBF orders entered by the District Court. If this Court agrees that the District Court lacked authority to order fee-shifting, this Court should render judgment in favor of Appellants and hold that Downing and Appellants take nothing in their requests for CBF fees. Alternatively, if this Court finds that the District Court had authority to order fee-shifting but determines that the District Court erred in ordering Appellants to contribute to the CBF, this Court should render judgment that Appellants are exempt from the District Court's CBF orders and remand the case to the District Court for the entry of an order refunding Appellants the amounts contributed. If this Court agrees that the District Court erred in denying Appellants' request for discovery, a hearing, or a trial on the merits of Downing's claims, this Court should remand the case to the District Court and require the District Court to allow discovery and/or conduct a complete evidentiary hearing regarding Downing's fee request. If this Court agrees that the District erred in denying Appellants' request for CBF fees, this

Court should render judgment providing that Appellants are entitled to the fees that the requested (the amount of which Downing did not contest) or remand the case to the District Court for consideration of Appellants' fee request.

Respectfully submitted,

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FED.R.APP.P. 35(a)(7)(C) AND 8TH CIR. R. 28A STATEMENT

This brief has been prepared pursuant to Fed.R.App. 35(a)(7)(B). The brief has been printed in 14-point Bookman Old Style font using Microsoft Word for Macintosh v. 14.3.2. Based upon the word-count function of that word processing application, the brief contains 13,661 words.

/s/ Kimberly S. Keller

CERTIFICATE OF SERVICE

This brief has been submitted for review through the Court's CM/ECF system on April 4, 2013, to be served electronically upon counsel registered to receive notification by that system.

/s/ Kimberly S. Keller