No. 21-0613

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

L&D Investments, Inc., et al., Petitioner
v.
Antero Resources Corporation, et al., Respondents

On Appeal from the Circuit Court of Harrison County
(The Honorable Thomas A. Bedell, Civ. Act. No. 13-C-528-2)

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

I. STATEMENT OF THE CASE 1

II. SUMMARY OF THE ARGUMENT 7

III. STANDARD OF REVIEW 9

IV. STATEMENT REGARDING ORAL ARGUMENT 9

V. ARGUMENT 9

1. West Virginia Law Does Not Support Petitioners' Counsel's Attorney Fee Request 9

a. Under *Boeing*, the Common Fund Doctrine Applies to Certified Class Actions and Requires that a Benefit be Conferred Prior to an Attorney Fee Award, and Unclaimed Property That Has Not Been Distributed Does Not Qualify as a "Common Fund" 10

b. West Virginia Case Law cited by Petitioners' Counsel Predates the Modern Rules of Civil Procedure and has been Supplanted by the Modern Rules and Class Action Litigation 14

2. West Virginia Law, and the Professional Rules of Conduct, Require a Written Fee Agreement Prior to an Individual or Entity Owing an Attorney's Fee 17

a. There Was No Express or Implied Contract Between the Unknown Heirs and Petitioners' Counsel 18

b. Petitioners' Counsel Sued the Unknown Heirs, and Attorney Fee Shifting is Not Supported Under the American Rule 21

c. West Virginia Has Not Adopted the Restatement of Restitution to Allow Shifting of Attorney's Fees & Public Policy Does Not Support Petitioner's Arguments 22

3. If the Court Determines that Petitioners' Counsel is Owed a Fee From the Unknown Heir's Un-Claimed Royalties, a One-Third Percentage Fee Award is Not Justified 23

VI. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Alyeska Pipeline Service Co. v. Wilderness Society,

421 U.S. 240, 95 S.Ct. 1612 10-12

Anderson v. Piercy,

20 W.Va. 282 (1882) 9, 14-15

Boeing Company v. Van Germert,

444 U.S. 472, 100 S.Ct. 745 (1980) 10-14, 22, 24

Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.,

188 W. Va. 468, 425 S.E.2d 144 (1992) 21

Carlson v. Xerox Corp.,

596 F. Supp. 2d 400 (D. Conn. 2009) 23

Central Railroad & Banking Co. v. Pettus,

113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885) 10

Cecil v. Clark,

69 W.Va. 641, 72 S.E. 737 9

Chrystal R.M. v. Charlie A.L.,

194 W.Va. 138, 459 S.E.2d 415 (1995) 9

Elmore v. State Farm Mut. Auto. Ins. Co.,

202 W.Va. 430, 504 S.E.2d 893 (1998) 18

Farinella v. Paypal, Inc.,

611 F. Supp. 2d 250 (E.D.N.Y. 2009) 23

Hall v. Children's Place Retail Stores, Inc.,

669 F. Supp. 2d 399 (S.D.N.Y. 2009) 23

Hall v. Cole,

412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973) 10

Hayseeds, Inc. v. State Farm Fire & Casualty,

177 W. Va. 323, 352 S.E.2d 73 (1986) 21

Heldreth v. Rahimian,

219 W.Va. 462, 637 S.E.2d 359 (2006) 24

Helmick v. Potomic Edison Co.,

185 W.Va. 269, 406 S.E.2d 700 (1991) 21

In re Currency Conversion Fee Antitrust Litigation,

263 FR.D. 110 (S.D.N.Y. 2009) 23-24

In re Nortel Networks,

539 F.3d 129 (2d Cir. 2008) 23

In re TJX Companies,

584 F. Supp. 2d 395 (D. Mass. 2008) 23

Kay Co. v. Equit. Prod. Co.,

749 F.Supp.2d 455 (SDWV 2010) 24

L&D Investments, Inc., et al, v. Mike Ross, Inc.,

818 S.E.2d 872, 241 W.Va. 46 (2018) 2, 3

McCoy v. Amerigas, Inc,

170 W.Va. 526, 295 S.E.2d 116 (1982) 23

Mills v. Electric Auto-Lite Co.,

396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) 10

Morris B. Chapman & Assoc., v. Kitzman,

193 Ill. 2d 560, 739 N.E.2d 1263 (2000) 16

Nelson v. West Virginia Pub. Employees Ins. Bd.,

171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982) 21

Roach v. Wilson Creek Collieries Co.,

111 W.Va. 1, 160 S.E. 860 (1931) 9, 15-16

Sally-Mike Properties v. Yokum,

179 W. Va. 48, 365 S.E.2d 246 (1986) 21

Security National Bank v. Willm,,

155 W. Va. 1, 180 S.E.2d 46 (1971) 6, 19-20

Silberblatt v. Morgan Stanley,

524 F. Supp. 2d 425 (S.D.N.Y. 2007) 23

State ex rel. DeFrances v. Bedell,

191 W. Va. 513, 446 S.E.2d 906 (1994) *18*

Sprague v. Ticonic National Bank,

307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) 10

Trickett v. Laurita,

674 S.E.2d 218, 223 W Va. 367 (2009) 15

Trustees v. Greenough,

105 U.S. 527, 26 L.Ed. 1157 (1882) 10

Walker v. West Virginia Ethics Commission,

201 W.Va. 108, 492 S.E.2d 167 (1997) 9

Weigand v. All Supply Company,

44 W.Va. 133, 28 S.E. 803 (1897) 15

Valder L. Offs. V. Keenan L. Firm,

212 Ariz. 244, 129 P.3d 966 (Ct. App. 2006) 16

Statutes

W. Va. Code § 36-8-1 1

W.V. Code § 36-8-2(a)(17) 5, 6

W. Va. Code § 55-12A-9 22

W. Va. Code § 56-6-27 6

W. Va. Code § 56-6-31 6

Rules of Civil Procedure

Rule 23 ..... ibid

Law Review Articles

Harkins, John, "Federal Rule 23 – The Early Years," 39 Ariz. L. Rev. 705 (1997) 10

Silverstein, Lee, "A Basic Introduction to the New West Virginia Rules of Civil Procedure," 61 W. Va. L. Rev. 1 (1959) 10

Reference Materials

Ann. Manual Complex Litig. § 21.33 13

Black's Law Dictionary (6th ed. 1990) 18

Restatement of Restitution 22

I. STATEMENT OF THE CASE

The Unknown Heirs of Robin Tunstall Johnson Tuck, John Forster Cooper, and Josephine Barroll (the "Unknown Heirs") of the Andrews Tract, by and through the undersigned counsel, previously appointed as guardian *ad litem* for the Unknown Heirs ("GAL"), are in an unusual position which does not appear to have ever occurred before in any recorded decision by this Court.

The Unknown Heirs have not received any money from the Andrews Tract litigation, which focused on mineral royalties from the production of oil and gas in Harrison County. A substantial sum, in excess of two million dollars, has been paid to the Circuit Court of Harrison County by and through its General Receiver, and is being held in event that any of the Unknown Heirs appear and make a claim for their share of the funds pursuant to the statutes on unclaimed property. W. Va. Code § 36-8-1 et seq.

This is a matter of first impression without any directly applicable case law or statute as to Petitioner's request for attorney's fees and expenses from Court funds held for the Unknown Heirs as described in Petitioner's Brief.

A history of the litigation follows to help understand the issues presented. "Petitioners," in this appeal, are not parties to the underlying litigation, but is really Petitioners' Counsel. Petitioners include the lead plaintiff, L&D Investments, Inc., which is a West Virginia Corporation in the real estate business, which is owned, in part, by Petitioners' Counsel, who is the president of L&D Investments, Inc. L&D Investments, Inc., initiated this litigation in 2013, claiming that the royalties from oil and gas production on the Andrews Tract were not being paid to the correct entities, which this Court ultimately agreed with in 2018.

This matter has previously been before this Court. In *L&D Investments, Inc., et al, v. Mike Ross, Inc.*, et al, this Court determined that a tax deed from 2003 held by Mike Ross, Inc., ("MRI") was void. 818 S.E.2d 872, 241 W.VA. 46 (2018). As a result of that ruling, L&D Investments, Inc., was determined to have a 6.22% interest in the mineral royalties from the 1000 Acre Andrews Tract in Harrison County. L&D Investments, Inc., acquired its interest in the Andrews Tract via quitclaim deeds in 2013. *Id.* at 875, FN6, FN7. Petitioners' Counsel additionally represents Richard Snowden Andrews, Jr., Marion A. Young Trust, Charles A. Young, David L. Young, and Lavinia Young Davis, who own, collectively with L&D Investments, Inc., 16.44% of the Andrews Tract. *Id* at 874, FN2. Other mineral owners were represented by other counsel, as noted in the 2018 decision. *Id.*

The litigation was caused by duplicative tax assessments by the Harrison County Assessor. *Id.* at 878. The same mineral royalties were assessed more than once, leading to purportedly delinquent tax assessments for interests that were not actually delinquent. *Id.*

> In sum, the Harrison County Assessor designated the assessments of the petitioners' interests as real property and placed them on the Harrison County landbooks for more than a decade prior to the tax sale to MRI. Upon receipt of the tax tickets generated from these assessments, the petitioners paid their taxes annually and received receipts for "Full Year Payment Real Property." In fact, they continued to do so, for more than ten years, after the tax deed was issued to MRI. Critically, the petitioners' oil and gas interests are real property interests pursuant to their chain of title documents. This Court has long recognized that "[f]forfeiture of lands is a harsh, even dreadful remedy, and courts lean from it and never apply it except where the law clearly warrants." *State v. Cheney,* 45 W.Va. 478, 480, 31 S.E. 920, 920 (1898). Such a result is not warranted in this instance.

Id at 881. This Court then remanded this case "for entry of an order declaring the tax deed issued to MRI void as a matter of law." *Id.* at 882.

Marcellus well(s) were drilled on the Andrews Tract, so significant mineral royalties were generated and paid primarily to MRI for many years prior to the 2018 decision. The 2003 Tax Deed to MRI was for 80% of the mineral royalty interests in the Andrews Tract. *Id.* at 878. Upon remand, the Parties to the litigation agreed to the "Stipulation and Order on Ownership" of the mineral interests in the Andrews Tract. [JA 247-252]. The Unknown Heirs collectively own 13.77% of the mineral royalties in the Andrews Tract, and are separate from Petitioners and Petitioners' Counsel. *Id.*

The Unknown Heirs are named defendants in this matter, not plaintiffs, and were sued by Petitioners' Counsel in an effort to quiet title and obtain declaratory judgment as to the ownership of the Andrews Tract.

This matter was never pled as, and is not, a class action suit.

Upon remand from the 2018 ruling, the Circuit Court set this matter for a jury trial in November 2019. [JA 302]. Prior to trial, Petitioners accepted an Offer of Judgment from MRI and separately settled with most of the other defendants. [JA 288-329, "Omnibus Order, Sept. 15, 2020].

The cross-claims between mineral producing defendants did not settle. *Id.* The claims between the mineral producing defendants and manner of the settlement are still not resolved and are before this Court in cross appeals set for argument on February 8, 2022. [No. 20-0964 and No. 20-0967]. The other pending appeals are not determinative of the issue presented in this appeal, to the best understanding of the GAL, and will not be discussed herein.

After the September 15, 2020, Omnibus Order was entered, a series of Orders were entered by the Circuit Court directing payment into Court via the General Receiver of the

Court of mineral royalties held in suspense by the mineral producers for the Unknown Heirs and Petitioners' Counsel. [JA 343, 351, 354, 358, 366]. The Orders were not "Judgment Orders" and were all agreed to by the Parties. Essentially, once the 2003 MRI tax deed was declared void, the royalties were divided by the previous owners, including the Unknown Heirs. The mineral producers who are still actively producing oil and gas are continuing to make royalty payments on behalf of the Unknown Heirs to the General Receiver of the Circuit Court.

The September 15, 2020, Omnibus Order also considered Petitioners' Counsel's request to represent, file pleadings and/or motions, and hold funds for, the Unknown Heirs. [JA 321-325]. Critically for this appeal, the following rulings were made, and were **not** appealed by Petitioners or Petitioner's Counsel, and as such, are final:

> 2. Plaintiffs provide no legal authority whatsoever upon which their legal counsel has initiated and further undertaken efforts to recover various royalty payments heretofore escheated that pertain to royalty owners of the Subject Property herein.
>
> 3. Plaintiff's legal counsel further proffers in conjunction therewith that additional motions will be filed with regard to a final distribution all [sic] thereof of recaptured escheated funds as well as disbursement of royalties presently being held in suspense for the Unknown Heirs herein by Gas Producer Defendants.
>
> **4. Plaintiffs' legal counsel has not demonstrated any legal standing upon which he should be allowed to represent or otherwise elicit further Court proceedings, as a fiduciary, on behalf of any Unknown Heirs' interests as such parties are named Defendants herein. There has been no showing of any attorney-client or fiduciary relationship between Plaintiffs' legal counsel and the Unknown Heirs herein.**
>
> **5. Any present attempt, as represented and contemplated by Plaintiffs' legal counsel, to file pleadings and/or hold such identified funds on behalf of the Unknown Heirs herein is inappropriate and not supported by any applicable legal authority.**
>
> 6. Although Plaintiffs' instant Motion for Permission makes no reference or

> allusion to any application of the "common fund doctrine" for allowing his acting on behalf of the Unknown Heirs herein for purposes limited to those addressed therein, responding Defendants all make reference to such doctrine in asserting its inapplicability herein as such doctrine does not permit legal counsel to act on behalf of non-clients.

[JA 324-325, emphasis supplied]. Accordingly, it has been conclusively determined that Petitioners' Counsel is not the attorney for the Unknown Heirs either as clients or in a fiduciary capacity.

Despite the foregoing ruling, On December 8, 2020, Petitioners' Counsel filed a Motion seeking pre-judgment interest for the Unknown Heirs, which the mineral producing defendants objected to forthwith. [JA370, 395]. Because the Circuit Court had previously determined that Petitioners' Counsel could not represent the Unknown Heirs, the Circuit Court appointed the undersigned counsel as GAL for the Unknown Heirs on January 27, 2021. [JA 441]. Thereafter, the Parties and the GAL briefed the question of whether any pre-judgment interest was owed by the mineral producing defendants to the Unknown Heirs, and the Court determined no interest was owed. [JA 673]. In that Order, which was not appealed by any party and is final, the Circuit Court held that "as a threshold matter, Plaintiffs' Counsel does not represent the Unknown Heirs as an attorney or fiduciary." [JA 679].

Thereafter, the Circuit Court noted that the Unknown Heir's Interests in the mineral royalties were subject to agreements ratifying existing oil and gas leases in 1986 and 1987. [JA 680-681]. The agreements allowed the mineral lessee, in the event no agent was appointed by lessors, now the Unknown Heirs, to "withhold any payments that may become due under and by virtue of the terms of said lease as hereby modified." *Id.* Additionally, the Circuit Court noted that the West Virginia Code, as to absent mineral

owners and unclaimed property, does not allow interest. W.V. Code § 36-8-2(a)(17). *Id.* Next, the Court held that: there had not been a jury verdict in favor of the Unknown Heirs which would support a permissible award of prejudgment interest under W.Va. Code § 56-6-27. [JA 682]. The Court then held that W.Va. Code § 56-6-31 did not support pre-judgment interest because the mineral royalties at issue were general damages, not "special damages," and special damages had not been pled or sought in the case. [JA 683-684].

The foregoing summary brings us to Petitioners' Counsel's request for an award of 33% of the money paid into Court on behalf of the Unknown Heirs as a contingent attorney's fee, $743,175.57, and "proportionate" expenses of $15,942.56. Pet. Br. At 11. The Circuit Court denied this request via Order dated July 1, 2021. [JA 93-101]. The Order, which is the only Order being appealed in this Appeal, found that the "common fund doctrine" did not support an award of fees and expenses to Petitioners' counsel. *Id.* The Circuit Court held that this case was not a class action, where common fund doctrine attorney's fee requests are commonly made, and that Security *National Bank v. Willim*, provided a constrictive view of attorney fee shifting that does not support Plaintiffs' Counsel's fee request because there was no contract for employment, express or implied, between Petitioners' Counsel and the Unknown Heirs. 155 W. Va. 1, 180 S.E.2d 46 (1971). The Circuit Court further noted that Petitioners' Counsel is an owner of the lead plaintiff, L&D Investments, Inc. [JA 99, FN4].

II. SUMMARY OF ARGUMENT

As a threshold matter, the GAL notes that his appointment is to "assist the Court and protect the interests of the Unknown Heirs" pursuant to the January 27, 2021, Order. [JA 441]. As such, in reviewing the Brief filed by Petitioners' Counsel, several points must be raised.

First, the GAL must represent and protect the interests of the Unknown Heirs. It is entirely possible that one or more of the heirs will eventually appear and make claim to these funds, and they will scrupulously review the history of the litigation and the amount of their recovery *vis a vis* any awarded attorney's fees and costs.

Second, Petitioners' Counsel has not volunteered in this litigation, has already been paid by other clients, and has recouped financial benefit for his investment company, L&D Investments, Inc., of which he is the incorporator and President. Accordingly, Plaintiffs' counsel has already been paid for his efforts, and it is unclear how much of the 6,500 hours of attorney time claimed in the Brief was solely devoted to recovery for the Unknown Heirs, if any. It may be a substantial percentage, or it may have been coincidental to work that was already being performed for the named Plaintiffs represented by Petitioners' Counsel. There is no information available to determine how much time Petitioners' Counsel devoted solely to producing a monetary recovery for the Unknown Heirs in comparison to the named Plaintiffs and his own investment corporation.

Third, based on existing West Virginia case law, the Circuit Court's ruling denying Petitioners' Counsel's fee request is not an abuse of discretion. Approving the fee request would have required creation of new law, or application of existing, antiquated, law in an entirely new manner, which is not appropriate at the trial court level.

Nonetheless, it is clear that the Unknown Heirs obtained a financial benefit, potentially, if they claim the royalties being held by the Court, through the activities of Petitioners' Counsel, and through his substantial, professional, and successful efforts in this litigation. The record and 2018 decision of this Court show that the Defendants would not have willingly paid any royalties to the Unknown Heirs absent the efforts of Petitioners' Counsel, including pursuing and winning an appeal to the West Virginia Supreme Court in 2018. Absent Petitioners' Counsel's efforts, MRI would still be receiving 80% of the royalties from the Andrew Tract, which includes the Unknown Heirs' percentage.

However, there is no directly applicable law supporting Petitioners' Counsel's fee request, and the GAL is duty bound to oppose the request to protect the best interests of the Unknown Heirs. There is no recent West Virginia case law applying the "common fund doctrine" and there are no cases cited by Petitioner from any jurisdiction applying the common fund doctrine to unclaimed mineral royalty funds being held in a Court account. The modern applications of the common fund doctrine from other jurisdictions normally arise in class action cases, and this is not a class action. Additionally, the modern common fund cases require disbursement of a benefit before a fee is owed, and there has been no disbursement in this matter to the benefit of the Unknown Heirs.

Finally, it is clear that all normal applications of attorney fee requests do not apply to this matter. Petitioners' Counsel was not hired by the Unknown Heirs, either via express or implied contract, as required by law to assert a fee claim in any traditional setting. The Unknown Heirs were actually defendants in this case, sued by Petitioners' Counsel, albeit to quiet title. For the foregoing reasons, there is no clear law that supports Petitioners' Counsel's fee request.

III. STANDARD OF REVIEW

"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to *de novo* review." Syl. Pt. 2, *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

IV. STATEMENT REGARDING ORAL ARGUMENT

The GAL believes that a published decision would be beneficial to West Virginia's jurisprudence because this case presents a matter of first impression and material questions of law as to the application of the common fund doctrine in West Virginia. The GAL believes oral argument would be beneficial in the decision-making process under Rule 20.

V. ARGUMENT

1. West Virginia Law Does Not Support Petitioners' Counsel's Attorney Fee Request

There is no law supporting an attorney's fee request for funds paid into court for abandoned or missing mineral rights owners who are not the attorney's clients, and have made no claim to the funds. This is a matter of first impression. Petitioners' Counsel relies upon a series of outdated[1] cases that occurred before the enactment of the Federal Rules of

[1] *Anderson v. Piercy*, 20 W.VA. 282 (1882); *Cecil v. Clark*, 69 W.Va. 641, 72 S.E. 737 (1911); *Roach v. Wilson Creek Collieries Co.*, 111 W.Va. 1, 160 S.E. 860 (1931)

Civil Procedure in 1938, let alone the West Virginia Rules of Civil Procedure, which provided a procedure for class action lawsuits under Rule 23. Harkins, John, "Federal Rule 23 – The Early Years," 39 Ariz. L. Rev. 705 (1997).[2] The West Virginia Rules of Civil Procedure, including Rule 23, were adopted in 1960, and prior to those rules, the Rules of Practice for Trial Courts were enacted between 1936 and 1947. Silverstein, Lee, "A Basic Introduction to the New West Virginia Rules of Civil Procedure," 61 W. Va. L. Rev. 1 (1959). Petitioners' Counsel also relies upon class action cases from other jurisdictions, which do not clearly apply to this matter. Relying upon antiquated common law that has evolved, changed, and become, in large part, controlled by subsequent procedural rules, does not provide adequate support for Petitioners' Counsel's position.

a. Under *Boeing*, the Common Fund Doctrine Applies to Certified Class Actions and Requires that a Benefit be Conferred Prior to an Attorney Fee Award, and Unclaimed Property That Has Not Been Distributed Does Not Qualify as a "Common Fund"

Petitioner relies in large part upon a 1980 decision from the United States Supreme Court. *Boeing Company v. Van Germert,* 444 U.S. 472, 100 S.Ct. 745 (1980). In that case, Boeing sought to redeem certain convertible debentures into stock, and provided a notice of a time limit for the conversion. If holders of the debentures missed the deadline, their investment was reduced to nothing. *Id.* Unsurprisingly, some investors missed the deadline and filed suit, claiming there had not been adequate notice of the deadline. The case was certified as a class action under Rule 23 in the Southern District of New York. Damages were quantified and awarded, and the only matter appealed to the Supreme Court was the

[2] The author notes that "[t]he immediate predecessor of Rule 23 was Equity Rule 38. In words well suited to the sheltering environment of equity, it quite simply provided: 'When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

issue of attorneys' fees under the common fund doctrine. Plaintiffs' counsel sought fees on the entire fund, while Boeing sought to limit those fees as to funds actually claimed by class members because "reassessment of attorney's fees against a common fund created by the lawyers' efforts was inapposite because the money in the judgment fund would not benefit those class members who failed to claim it." *Id.* at 477. The Supreme Court agreed with Boeing, and held as follows:

> Since the decisions in *Trustees v. Greenough*, 105 U.S. 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); cf. *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). The common-fund doctrine reflects the traditional practice in courts of equity, *Trustees v. Greenough, supra* 105 U.S., at 532-537, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S., at 257-258, 95 S.Ct., at 1621-1622. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. See, *e. g., Mills v. Electric Auto-Lite Co.*, 396 U.S., at 392, 90 S.Ct., at 625. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. See *id.*, at 394, 90 S.Ct., at 626.

Id. at 478. Accordingly, the Court in *Boeing* noted that there are times when creation of a "common fund" allows an attorney to make a claim for "reasonable" attorney's fees. *Id.* Next, the Court outlined criteria for application of the "common fund doctrine."

> In *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, we noted the features that distinguished our common-fund cases from cases where the shifting of fees was inappropriate. First, the classes of persons benefited by the lawsuits "were small in number and easily identifiable." 421 U.S., at 265, n. 39, 95 S.Ct., at 1625, n. 39. Second, "[t]he benefits could be traced with some accuracy . . . ." *Ibid.* Finally, "there was reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to

> those benefiting." *Ibid.* Those characteristics are not present where litigants simply vindicate a general social grievance. *Id.*, at 263-267, and n. 39, 95 S.Ct., at 1624-1626, and n. 39.
>
> On the other hand, the criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. This benefit devolves with certainty upon the identifiable persons whom the court has certified as members of the class. Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery.

Id. at 478-479. Accordingly, the Supreme Court created the following elements for application of the common fund doctrine. First, the people involved have to be "small in number and easily identifiable." Next, the monetary benefits need to be "traced with some accuracy." Third, there must be "reason for confidence that the costs of litigation could indeed be shifted with some exactitude to those benefiting." *Id.* The Court noted that in Boeing, the elements of the application of the common fund doctrine are satisfied "when each member of a **certified class** has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." *Id.* (emphasis supplied). Arguably, the fact that this case is not a class action is a bar in and of itself to the application of the common fund doctrine, without any further analysis.

In the matter at hand, there was no judgment entered for the Unknown Heirs, the number and location of heirs is a mystery, and the value for each heir cannot be determined because if any appear, their recovery will be fractionated based on the laws of inheritance, testate or intestate, and the number of heirs.

This matter was not a certified class action[3], there were no class representatives, and Petitioners' Counsel was not approved as class counsel. The Court in *Boeing* relied on the class action rules because those rules create procedural safeguards (class representatives, class counsel, approval of settlements and attorneys' fees by the courts, and so on) to allow application of the common fund doctrine. Finally, the *Boeing* Court held as follows:

> In this case, the named respondents have recovered a determinate fund for the benefit of every member of the class whom they represent. Boeing did not appeal the judgment awarding the class a sum certain.
> ...
> To claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. **The judgment entered by the District Court and affirmed by the Court of Appeals rectifies this inequity by requiring every member of the class to share attorney's fees to the same extent that he can share the recovery.**[6] Since the benefits of the class recovery have been "traced with some accuracy" and the costs of recovery have been "shifted with some exactitude to those benefiting," *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, at 265, n. 39, 95 S.Ct., at 1625, n. 39, **we conclude that the attorney's fee award in this case is a proper application of the common-fund doctrine.**

Id. at 480-481 (emphasis supplied). Accordingly, the final holding of the *Boeing* Court focuses on a critical factor; only those absent class members who present a claim and share in the recovery are liable for their proportionate share of attorney fees. In this matter, the funds being held by the General Receiver of the Circuit Court have yet to be distributed to

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[3] This distinction is critical because class counsel does in fact share an attorney-client relationship with class members. Petitioners' Counsel does not share such a relationship with the Unknown Heirs in this case. See Ann. Manual Complex Litig. § 21.33 (4th ed.) ("After certification, every class member is considered a client of the lawyers for the class.")

any of the Unknown Heirs, who are, quite literally, unknown. The Unknown Heirs have not received a benefit to justify attorney fee shifting by Petitioners' Counsel under *Boeing*. *Id.*

Finally, the West Virginia Supreme Court of Appeals has not, based upon the legal research performed by the GAL, cited or relied upon *Boeing* in a published decision. Accordingly, the *Boeing* case, and other class actions cases relied upon by Petitioners' Counsel, do not provide support for the position that mineral royalty funds being held by the Court, but not distributed, and with no plan to distribute the funds, should be subject to another party's attorneys' fees. The Order of the Circuit Court denying Petitioners' Counsel's request for attorney's fees should be upheld.

b. West Virginia Case Law cited by Petitioners' Counsel Predates the Modern Rules of Civil Procedure and has been Replaced by the Modern Rules and Class Action Litigation

There are no modern West Virginia cases that provide a logical and direct application of the common fund doctrine to support the claims made by Petitioners' Counsel in this matter. The West Virginia cases relied upon by Petitioner are reviewed below.

Petitioners' Counsel relies upon the 1882 case of *Anderson v. Piercy* as a "common fund" case. 20 W.Va. 282 (1882). However, *Anderson* addresses attorney's fees incurred by the executor of an estate pursuing debts owed to the estate, and is not applicable to the present situation, as follows:

> [I]f [the executor] brings a suit for such debt, though not promptly, he should be allowed the costs of such suit and the reasonable counsel fees paid by him, even though the debt be lost, if at the time he instituted the suit, there was a reasonable prospect of his being able to save the debt; for it was, when

> he instituted the suit, an asset of the estate, which it was his duty to endeavor to save by suit.

Id. at 284. As such, *Anderson* is about what reasonable expenses the executor of an estate may incur, and expect reimbursement for, and is not analogous to the present situation. *Anderson* is not a common fund case, does not involve mineral royalties, is not a class action, and provides no support for Petitioners' Counsel's arguments. *Id.*

Next, Petitioners' Counsel presents the 1897 case of *Weigand v. All Supply Company*, which refers to an attorney's charging lien. 44 W.Va. 133, 28 S.E. 803 (1897). We have modern case law on attorney's liens, and it clearly does not apply to the present case. In *Trickett v. Laurita*, this Court outlined the elements for an attorney's lien. 674 S.E.2d 218, 223 W.Va. 367 (2009). The first and most critical element is a contract between the attorney and client, or former client, for services. *Id.* at Syl. Pt. 8. Here, the Unknown Heirs are not Petitioners' Counsel's clients. This has been affirmatively ruled upon by the Circuit Court, and that ruling is final and was not appealed. [JA 302]. The Unknown Heirs are Defendants in this matter who were sued by Petitioners.

Next, in *Roach v. Wallins Creek Collieries Company*, from 1931, reference to a "common fund" was made in context of a bankrupt company where a trustee hired attorneys. 111 W.Va. 1, 160 S.E. 860 (1931). This case is also from before our modern rules of procedure were enacted, and is simply affirming that a trustee (then called receiver) in a bankruptcy is allowed to hire attorneys who are then compensated from the bankrupt company's funds, as follows:

> **We find no warrant in law under the circumstances for allowances out of the fund to attorneys for the parties to the suit other than to counsel for the trustee.** 'Except in rare instances, the power of a court to require one party to contribute to the fees of the counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others

> of the same class, discovers or creates a fund which enures to the common benefit of all.'

Id. at 863 (emphasis supplied, internal citations omitted). The language in *Roach*, as to "rare" instances appears to refer to modern class actions, and Roach was decided in 1931 before the "modern" Federal Rules of Civil Procedure were enacted in 1938, and West Virginia Rules of Civil Procedure in 1960.

Petitioners' Counsel cites two cases for the premise that fee shifting is not limited to class actions. Pet. Brief at 27, FN 76. In the first, from the intermediate appellate court in Arizona, which rejected application of the common fund doctrine, two different plaintiffs in a wrongful death action hired two different law firms who argued about how to split the fee. *Valder L. Offs. V. Keenan L. Firm*, 212 Ariz. 244, 129 P.3d 966 (Ct. App. 2006). This case is clearly not analogous to the matter at hand, and refers to attorneys who were retained by contract on the same case for different beneficiaries of the same decedent, and then fought about their share of attorneys' fees. *Id.* The second case is from Illinois, and also involved a dispute in a wrongful death case between law firms. *Morris B. Chapman & Assoc., v. Kitzman*, 193 Ill. 2d 560, 739 N.E.2d 1263 (2000). In *Kitzman*, the widow of the decedent retained one law firm, and the parents of the decedent retained another law firm. Both were contractually retained by law firms who fought about the attorney's fee from the case. *Id.* This does not apply to the matter at hand.

Finally, Petitioners' Counsel asserts that federal Multi-District Litigation (MDL) allows common fund attorney fee recovery. Pet. Br. at FN 77. This is true, but MDLs are a complex procedural matter, somewhat similar to West Virginia's Mass Litigation Panel. Similar claims, such as defective medical device claims, are aggregated together for discovery purposes before one District Court, but then separated for trial if settlement is

not reached. Some attorneys become lead lawyers in the case, appointed by the court, and attorney fees are controlled by the court. MDLs are not analogous to the present case and provide no support for Petitioners' Counsel's arguments.

There is no meaningful support for Petitioners' Counsel's argument that other jurisdictions have applied the common fund doctrine to an analogous case. West Virginia's common fund cases, as cited by Petitioners' Counsel, are antiquated, pre-date our modern rules of procedure, and do not directly apply to this case. The Order of the Circuit Court was not an abuse of discretion and should be upheld.

2. West Virginia Law, and the Professional Rules of Conduct, Require a Written Fee Agreement Prior to an Individual or Entity Owing an Attorney's Fee

There are two primary methods of recovery by an attorney on a contingent fee basis. The first method is through a written fee agreement, which is required under our Rule 1.5 of our rules of Professional Conduct. The second method (also involving a written fee agreement with a class representative) is in a class action under Rule 23 of the Rules of Civil Procedure.

In this matter, neither ordinary method of contingency fee recovery by Petitioners' Counsel applies. The Unknown Heirs, being unknown, have neither appeared nor signed contingency fee agreements with Plaintiffs' Counsel. This matter is not a class action under Rule 23.

a. There Was No Express or Implied Contract Between the Unknown Heirs and Petitioners' Counsel

This Court has held that "[t]he relationship of attorney and client is a matter of contract, expressed or implied." *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513,517,446 S.E.2d 906,910 (1994). Further, an attorney-client relationship begins when:

> As soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.

Id. (emphasis added).

Moreover, West Virginia law provides that "[t]he fiduciary duty is '[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law[.]'" *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430,435, 504 S.E.2d 893, 898 (1998) (quoting Black's Law Dictionary 625 (6th ed. 1990)). In addition, "[a]s a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was actually accepted by the other, and merely reposing confidence in another may not, of itself, create the relationship." *Id.* at 436, 504 S.E.2d at 899.

As the Circuit Court noted, Petitioners' Counsel sought to file pleadings on behalf of the Unknown Heirs and hold funds for them, and there was no legal support for those actions, which were not allowed by the Circuit Court.

> **4. Plaintiffs' legal counsel has not demonstrated any legal standing upon which he should be allowed to represent or otherwise elicit further Court proceedings, as a fiduciary, on behalf of any Unknown Heirs' interests as such parties are named Defendants herein. There has been no showing of any attorney-client or fiduciary relationship between Plaintiffs' legal counsel and the Unknown Heirs herein.**

5. Any present attempt, as represented and contemplated by Plaintiffs' legal counsel, to file pleadings and/or hold such identified funds on behalf of the Unknown Heirs herein is inappropriate and not supported by any applicable legal authority.

[JA 324-325, emphasis supplied].

In a case discussing the common fund doctrine considering a fee request by attorneys involving a will contest and a trust, *Security National Bank v. Willim*, the West Virginia Supreme Court stated as follows:

> The exclusionary character of the 'common fund' rule is illustrated by the language of the second point of the syllabus of *Roach v. Wallins Creek Collieries Company*, 111 W.Va. 1, 160 S.E. 860, which is as follows: **'Except in rare instances, the power of a court to require one party to contribute to the fees of counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which enures to the benefit of all.'**

180 S.E.2d 46, 53 (1971) (emphasis supplied). The "class" language presumably applies to cases pled under Rule 23 in modern jurisprudence, and does not apply to this matter. The Court further noted that,

> **A contract of employment, expressed or implied, is necessary in order to render one liable to pay for the services of an attorney. Principles relating to attorneys' fees based upon an implied contract are discussed in 7 C.J.S. Attorney and Client § 175, page 1041. A portion of that discussion, appearing on pages 1042 and 1043, is as follows:**
>
> > 'Thus, where there is even slight proof of an employment of the attorney by the client, the fact that the latter stood by without objection and allowed the attorney to render valuable services in his behalf will estop him to deny the fact of employment. **The acquiescence must be such as presumes volition on the part of the person sought to be charged, however, and there is no acquiescence where he has no choice but to avail himself of the efforts made by the attorney.**
> >
> > **On the other hand, it does not always follow that, because one receives the benefit, directly or indirectly, of the services of another, the law implies a contract to pay therefor. Thus, where**

> **the attorney, in carrying on the action does so for his own benefit and not for the nominal party to the action, the fact that such nominal party knows of his course and does not object will not make him liable for fees**; nor does a tacit acceptance of an attorney's services raise a promise to pay therefor, when the services were rendered after a distinct refusal of defendant to avail himself of, or pay for, such services. **So, where one of several parties, all of whom are equally interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees.** In such case it is held that liability cannot be imposed on the theory of unjust enrichment. **These rules are particularly applicable where the other parties benefited are minors.** If, however, the parties not directly employing the attorney, after becoming aware that he looks to them for his compensation, fail to make objection or to declare their nonliability, they are liable.'

Id. at 54-55 (emphasis supplied). The *Willem* court ultimately denied the request for attorney's fees under the common fund doctrine, which fee request was made against a *pro se* party by attorneys for a represented party. The *Willem* case is not identical to the matter at hand, but there are some parallels, because the Unknown Heirs, while potentially receiving a benefit should any of them appear to claim the funds held by the Court, never hired Petitioners' Counsel. **"Thus, where the attorney, in carrying on the action does so for his own benefit and not for the nominal party to the action, the fact that such nominal party knows of his course and does not object will not make him liable for fees."** *Id.* Here, while representing his own investment corporation and other clients, Petitioners'' Counsel clearly carried on the action "for his own benefit," and not for the "nominal party," here, the Unknown Heirs. *Id.* This matter does not support attorney fee shifting under *Willim*.

b. Petitioners' Counsel Sued the Unknown Heirs, and Attorney Fee Shifting is Not Supported Under the American Rule

The limited exceptions to the American Rule, i.e. the rule that all parties to a lawsuit bear their own attorney's fees and costs, have been outlined in detail by this Court. Petitioners' Counsel's fee request does not fit under the exceptions. *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 171 W. Va. 445, 450, 300 S.E.2d 86, 91 (1982) (As a general rule awards of costs and attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule; a public officer who willfully fails to obey the law may allow fee shifting).

"As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement except when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 9, *Helmick v. Potomic Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991) (*accord* Syl. pt. 2, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 50, 365 S.E.2d 246, 248 (1986) (contractual authority for reimbursement of attorney's fees is allowable exception); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 425 S.E.2d 144 (1992) (fraud proven by clear and convincing evidence may give rise to bad faith to allow shifting of fees); *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986) (bad faith claim against insurer may give rise to attorney fee shifting).

This case does not clearly fit any of the case law allowing attorney fee shifting as an exception to the American Rule. Accordingly, the ruling of the Circuit Court was not an abuse of discretion and should be upheld.

c. West Virginia Has Not Adopted the Restatement of Restitution to Allow Shifting of Attorney's Fees & Public Policy Does Not Support Petitioner's Arguments

Petitioners' Counsel asserts that this Court should adopt attorney fee shifting under the Restatement of Restitution for the first time. Pet. Br. at 19. There is no case law cited in support of this argument, and there are no cases from other jurisdictions provided by Petitioner. Accordingly, this argument is without merit. West Virginia already has well established law on when attorney fee shifting is allowed and those exceptions do not apply to this matter.

Petitioners' Brief asserts that the Unknown Heirs "recovered not only the monetary fund, but also the mineral property," and goes on to assert that sections of the Third Restatement of Restitution, yet to be adopted or blessed by this Court, provide Petitioners' Counsel with his requested relief. Pet. Br. At 22. However, as noted above, there has been no distribution of property or money to the Unknown Heirs. The mineral interests and royalties are being held by the Court and have not been distributed to anyone. Claims may be made, or the royalties will escheat to the State after seven years and the property will be auctioned. W. Va. Code § 55-12A-9. The Restatement language also refers to a "class" of persons, presumably a class action, although it is indefinite, and has not been adopted by this Court in any event.

Petitioners' Counsel asserts that the common fund doctrine should be expanded by this Court to support his claim for fees from the Unknown Heirs as a "laudable public policy." Pet. Br. at 28. To the contrary, the common fund doctrine already exists for a limited purpose, it does not apply to this case, and public policy does not support the claim. Any ruling by this Court expanding attorney fee shifting must be narrowly tailored because

allowing attorneys to argue that their fees should be shifted to another party any time a non-client person "obtains the benefit" from a lawsuit would lead to an unimaginable slippery slope of unwanted litigation. Pet. Br. at 28, citing *Boeing*. Many cases involve multiple plaintiffs and multiple defendants and the arguments advanced by Petitioners' Counsel could be too broadly construed to allow attorney fee shifting in many cases. This is the why the American Rule is simple and longstanding. It works.

3. If the Court Determines that Petitioners' Counsel is Owed a Fee From the Unknown Heir's Un-Claimed Royalties, a One-Third Percentage Fee Award is Not Justified

A significant body of law has developed over how "common fund" attorney's fees are awarded in class action litigation, and a 33% fee is unusual. "Class actions are a flexible vehicle for correcting wrongs ... and a court has wide discretion to award attorney's fees and costs." *McCcoy v. Amerigas, Inc.*, 170 W.Va. 526, 533, 295 S.E.2d 116 (1982). Relevant case law includes numerous class action cases where far lower percentage fees were awarded. *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425 (S.D.N.Y. 2007) (requested fees, including expenses, would have consumed 61 % of cash recovery, instead, an award of 20% of the common fund was appropriate); *In re TJX Companies*, 584 F. Supp. 2d 395 (D. Mass. 2008) (award of 6.5 million in fees out of total benefit of 177 million, approximately 3% fee); *In re Nortel Networks*, 539 F.3d 129 (2d Cir. 2008) (award of 3% fee); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400 (D. Conn. 2009) (award of 16% fee instead of 20% requested fee); *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250 (E.D.N.Y. 2009) (award of 20% instead of requested 28%); *Hall v. Children's Place Retail Stores, Inc.*, 669 F. Supp. 2d 399 (S.D.N.Y. 2009) (requested fee of 27% inappropriate, fee of 15-17% appropriate); *In re Currency Conversion Fee Antitrust Litigation*, 263 FR.D. 110

(S.D.N.Y. 2009) (fee of 15.25% reasonable). Even outside the context of class actions, attorney's fee requests are often reduced, as follows.

> The overarching concern for the trial court is that the fees awarded must be reasonable. *See Blanchard*, 489 U.S. at 92, 109 S.Ct. 939 (noting that the" 'criterion for the court is ... what is reasonable' ") . ., see also *Bostic v. American Gen. Fin., Inc.*, 87 F.Supp.2d 611 (SD.W.Va. 2000) (concluding that 15% reduction of statutory fee award was necessitated by virtue of inadequate documentation of hours ...) In reviewing the submitted fees on remand, the trial court should take note that the most critical of all the factors looked to in determining a statutory award of attorney's fees is the degree of success obtained.

Heldreth v. Rahimian, 219 WVa. 462, 473, 637 S.E.2d 359, 370 (2006) (addressing reduction of statutory attorney's fee under WV Human Rights Act).

Other cases involve "lodestar" calculations in class actions instead of common fund calculations. *Kay Co. v. Equit. Prod. Co.*, 749 F.Supp.2d 455 (SDWV 2010) ("Under the 'lodestar' method, a district court identifies a lodestar figure by multiplying the number of hours expended by class counsel by a reasonable hourly rate. The court may then adjust the lodestar figure using a 'multiplier' derived from a number of factors, such as the benefit achieved for the class and the complexity of the case.")

Assuming, *arguendo*, that this Court finds merit in Petitioners' Counsel's arguments, remand to the Circuit Court to determine an appropriate fee (if and when any money is distributed to the Unknown Heirs justifying a fee, under *Boeing*) would require weighing a multitude of factors, such as the amount of time Petitioners' Counsel actually dedicated to work to obtain funds for the Unknown Heirs *vis a vis* his own clients, and his own investment corporation. A fee of 33%, amounting to nearly $800,000, in a case Petitioners' Counsel would have pursued for his own benefit regardless of the result obtained for the Unknown Heirs, is objectively unreasonable and not supported by law.

VI. CONCLUSION

In summary, Petitioners' Counsel did not represent the Unknown Heirs and has no contractual right, express or implied to support his claim for attorney fee recovery. This case does not clearly fit under the common fund doctrine or any of the case law allowing attorney fee shifting exceptions to the American Rule. Accordingly, the ruling of the Circuit Court was not an abuse of discretion and should be upheld.

Respectfully submitted by Counsel, Guardian ad litem for the Unknown Heirs, on this 27th day of January, 2022.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Respondent Tuck, Cooper and Barroll Unknown Heirs, does hereby certify that on this 27th day of January, 2022, a true copy of the foregoing "Respondents' Brief" was served upon the counsel that have previously appeared in this matter, addressed as follows:

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