16-646

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

IRA HOLTZMAN, individually and as the representative of a class of similarly situated persons,

Petitioner,

v.

GREGORY P. TURZA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Phillip A. Bock, *Counsel of Record*
BOCK, HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Ste. 1000
Chicago, IL 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
phil@classlawyers.com

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QUESTION PRESENTED

Whether a proportionate share of the fees awarded to lawyers who represented a successful class may be assessed against the unclaimed portion of the fund created by the judgment?

In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 473 (1980), the Court answered yes, but in this case, the Seventh Circuit answered no.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Ira Holtzman ("Plaintiff") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit below is reported at *Holtzman v. Turza*, 828 F.3d 606 (7th Cir. 2016). App., *infra*, 1a-5a. The prior opinion of the Seventh Circuit affirming judgment for Plaintiff and the class is reported at *Ira Holtzman, C.P.A. & Assocs. Ltd. v. Turza*, 728 F.3d 682 (7th Cir. 2013), *cert. denied sub nom. Turza v. Holtzman*, 134 S. Ct. 1318 (2014). App., *infra*, 12a-26a. The opinion of the district court granting summary judgment for Plaintiff and the class is reported at *Holtzman v. Turza*, No. 08 C 2014, 2011 WL 3876943 (N.D. Ill. Aug. 29, 2011). App., *infra*, 32a-43a. The opinion of the district court granting in part and denying in part cross-motions for summary judgment is reported at *Holtzman v. Turza*, No. 08 C 2014, 2010 WL 4177150 (N.D. Ill. Oct. 19, 2010). The opinion of the district court granting class certification is reported at *Holtzman v. Turza*, No. 08 C 2014, 2009 WL 3334909 (N.D. Ill. Oct. 14, 2009). The opinion of the district court denying Defendant's motion to dismiss is reported at *Holtzman v. Turza*, No. 08 C 2014, 2008 WL 2510182 (N.D. Ill. June 19, 2008).

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2016. App., 1a. Fourteen days later, Plaintiff filed a timely Petition for Rehearing or for Rehearing En Banc on July 22, 2016. Fed. R. App. P. 35(c), 40(a)(1). The court of appeals denied Plaintiff's petition on August 12, 2016. App., *infra*, 6a-7a.

This petition is timely because it is being filed within 90 days of the Seventh Circuit's denial of Plaintiff's petition for rehearing en banc. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5. This Court has jurisdiction to hear this petition under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is a class action arising from Defendant's facsimile transmission of 8,630[1] unsolicited advertisements to 221 persons in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. App., *infra*, 34a-35a. The TCPA allows for recovery of $500 per violation. 47 U.S.C. § 227(b)(3). The district court had federal question jurisdiction over Plaintiff's TCPA claims.

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[1] Five class members requested exclusion from the class, so only 8,430 faxes were sent to persons who remained in the class to judgment. App., *infra*, 43a.

Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740 (2012).

The district court granted Plaintiff's motion for class certification. *Ibid.* at 33a. As later modified, the district court defined the class as:

> All persons who: (1) during the period September 2006 through March 2008; (2) received a "Daily Plan-It" fax identifying "Gregory P. Turza" and his telephone number (847-647-0200) or email address (greg@myestateplan.net); and (3) had not previously consented to receiving such advertisements.

Ibid.

After class counsel sent notice to the class, Defendant moved for summary judgment. *Ibid.* Defendant argued, *inter alia*, its fax transmissions were not "advertisements" as defined by the TCPA. *Ibid.* Plaintiff cross moved for summary judgment. *Ibid.* The district court denied Defendant's motion for summary judgment and granted Plaintiff's motion in part. *Ibid.* The district court found that neither Plaintiff nor Defendant had resolved the issue of how many faxes were actually received by the class members, but Plaintiff had otherwise proved its case. *Ibid.*

Plaintiff filed a second motion for summary judgment based on new evidence that proved receipt

by all class members. *Ibid.* Defendant responded by moving to decertify the class and opposing the motion. *Ibid.* at 39a-40a.

On August 29, 2011, the district court granted Plaintiff's second motion for summary judgment and denied Defendant's motion to decertify the class. *Ibid.* at 43a. That same day, the district court entered judgment in the amount of $4,215,000 ($500 per fax) in favor of Plaintiff "Ira Turza, individually and as representative of a class" and against Defendant Gregory P. Turza. *Ibid.* at 30a. Defendant appealed the judgment.

The district court later entered a "remedial order" addressing the issues of: (1) an incentive fee for Plaintiff as class representative; (2) attorney fees and costs; and (3) a *cy pres* beneficiary for any leftover funds. *Ibid.* at 27a-29a. Defendant also appealed the remedial order.

The Seventh Circuit consolidated the appeals and affirmed the "judgment" for $4,215,000 but vacated the "remedial order." *Ibid.* at 12a-26a. In affirming the judgment and class certification, the court wrote, "The record establishes which transmissions were received and which were not. ... [N]o reasonable juror could conclude that these data are inaccurate." *Ibid.* at 15a. The court vacated the remedial order granting a *cy pres* award because of the "absence of an adversarial presentation – and the considerable doubt that [Defendant] will be able to pay enough to allow full payment to class members who submit

claims – means that such a decision would be premature." *Ibid.* at 26a.

The Seventh Circuit's opinion concluded:

> The district court's decision on the merits is affirmed, but the remedial order is vacated. The case is remanded with instructions to enter a judgment requiring [Defendant] to remit to the registry or to a third-party administrator. Once the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied. It may also be necessary to reconsider the "incentive award" to the representative plaintiff (which appears to be a "disincentive award") and the way in which class counsel are compensated. *See Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

Ibid.

Upon remand, Plaintiff moved for payment on Defendant's $6,343,822.50 supersedeas bond posted to stay enforcement of the district court's now affirmed $4,215,000 class judgment. *Ibid.* at 2a. Facing foreclosure on its bond, Defendant agreed, and the district court entered an order requiring Defendant to deposit $4,224,214.48 in an escrow account under the court's control. *Ibid.*

Later, the district court ordered one third of the judgment distributed to class counsel as a

reasonable attorney fee. *Ibid.* The district court ordered the remaining two thirds distributed to class members in the amount of $333 per fax (2/3 of $500). *Ibid.* To the extent class members could not be located or refused to cash their checks, there would be a second distribution to the other class members up to a total payment of $500 per fax. *Ibid.* To the extent any residue might still remain, it would be returned to Defendant. *Ibid.* at 2a-3a.

Defendant appealed and the Seventh Circuit reversed. *Ibid.* The Seventh Circuit held that the fees could not be assessed against the undistributable or uncashed portion of the fund created by the judgment. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Importance of the Question Presented.

Class actions for small claims are not feasible unless the class representatives and class counsel can shift the expenses to the absent class members if they prevail. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980). *Boeing* reasoned that "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 representative may bear additional costs." *Ibid.* at 480. To enable an equitable distribution of the costs, *Boeing* held, "[A] proportionate share of the fees awarded to lawyers who represented a successful

class may be assessed against the unclaimed portion of the fund created by the judgment." *Ibid.* at 473.

In direct contradiction of *Boeing,* the Seventh Circuit held that class counsel, who successfully obtained a money judgment in favor of the class and forced Defendant to deposit the full amount of that judgment with the district court, could not assess fees against any undistributed portion of the collected judgment. App. *infra*, 3a-4a. The Seventh Circuit's decision also creates a split in the circuits because it is contrary to a decision by the Ninth Circuit that applied *Boeing* to hold that where a certified class prevailed in a suit seeking statutory damages "attorneys' fees sought under a common fund theory should be assessed against every class members' share, not just the claiming members." *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

The Seventh Circuit's decision impermissibly mischaracterized *Boeing* and rejected its holding, thus jeopardizing the viability of small claim class actions *Boeing* aimed to protect. If allowed to stand, the Seventh Circuit's decision will effectively reverse *Boeing* and limit class counsel's fees for a successful class action to the portion of any judgment recovered that is able to be distributed and cashed. The Court should now grant this petition for certiorari and reverse to preserve *Boeing* and the viability of small claims class actions.

II. The Seventh Circuit Improperly Nullified *Boeing* and Created a Split with the Ninth Circuit.

The Seventh Circuit's decision attempts to evade the clear holding of *Boeing* by incorrectly applying irrelevant jurisdictional case law and mischaracterizing the *Boeing* opinion and the judgment entered for the class in this case.

First, the decision asserts that a "genuine common fund" can only exist where the class members' claims could be aggregated for purposes of the "matter in controversy" for federal jurisdiction under 28 U.S.C. § 1332. App., infra, 3a (citing *Snyder v. Harris*, 394 U.S. 332 (1969); *Travelers Property Casualty v. Good*, 689 F.3d 714 (7th Cir. 2012)). This is plainly wrong because the class members' claims in *Boeing* (losses on individual debentures) could not have been aggregated for purposes of the "matter in controversy." The fatal flaw in the Seventh Circuit's reasoning is further illustrated by *Six Mexican Workers*, which like this case concerned statutory damages. 904 F.2d at 1311. In addition, prior to the decision below, no case had imported the "matter in controversy" jurisdictional case law to understand the completely unrelated equitable common fund doctrine. Finally, it is illogical to do so because the purpose of that equitable doctrine is to "spread[] fees proportionately among those benefitted by the suit," which has nothing to do with what Congress meant by the

phrase "matter in controversy" when it enacted 28 U.S.C. § 1332(a).

Second, the Seventh Circuit's decision cites a footnote in *Boeing* to argue the class action judgment below was merely "security for payment rather than a common fund." App. *infra*, 3a (citing 444 U.S. at 481 n.5). This is plainly wrong, however, because the judgment's form was indistinguishable from that in *Boeing*. *Compare* App., *infra*, 30a *with* 444 U.S. at 481, n.5. While *Boeing* noted that it might be permissible for a class action judgment to make "liability ... contingent upon the presentation of individual claims," *Boeing* also held that "[w]here noting in the court's order" manifested such an intent; it was not mere "security." 444 U.S. at 481, n.5. Nothing in the judgment in this case manifests an intent to make Defendant's liability contingent, so, as in *Boeing*, it cannot be mere "security" as the Seventh Circuit held. App., *infra*, 30a.

Finally, the Seventh Circuit's decision will render *Boeing* a dead letter and defeat the policies that drove that landmark decision. It is entirely equitable to assess the fees and costs of a class action against the benefitting class members regardless of whether those class members can be found or accept their shares. Class members who do not want to participate already have the opportunity to opt out of the prosecution of the action. By electing not to do so, all remaining class members avail themselves of counsel's services. In contrast, there is nothing

equitable about rewarding a defendant for fighting to the bitter end, so that it can reclaim some portion of the judgment against it because, for example, its delay has rendered distribution of the judgment to its rightful owners more difficult.

A. The Meaning of "Matter in Controversy" in the Context of Federal Diversity Jurisdiction is Irrelevant to the Equitable Common Fund Doctrine.

The Seventh Circuit's decision was premised on the erroneous notion that class actions that recover a judgment for "discrete wrongs" to the class members cannot create a "common fund" against which fees may be equitably assessed. App, *infra*, 3a. This notion is clearly wrong because *Boeing* was a judgment for "discrete wrongs" and the Court held it was a "common fund." 444 U.S. at 479-480.

The Seventh Circuit's error stems from its misplaced reliance on cases considering whether class member claims can be aggregated to satisfy the "matter in controversy" requirement for diversity jurisdiction. App. *infra*, 3a (citing *Snyder*, 394 U.S. 332; *Travelers*, 689 F.3d 714). Contrary to the Seventh Circuit's reliance on it, *Snyder* never uses the phrase "common fund" and never considers attorney fees in class actions at all. 394 U.S. 332, 341. *Travelers* happens to use the phrase but only in the context of the "matter in controversy" and never with respect to the equitable common fund doctrine. 689 F.3d 724. In fact, no case prior to the Seventh

Circuit's decision has held that the equitable common fund doctrine has anything to do with whether claims can be aggregated for federal jurisdictional purposes. Moreover, this conclusion was diametrically the opposite of the holding in *Boeing*.

Boeing considered a class that sought recovery for losses on the class members' securities. 444 U.S. at 474. The claims in *Boeing* arose in part under federal securities laws, so federal jurisdiction was not at issue. *VanGemert v. Boeing Co.*, 520 F.2d 1373, 1375 (2d Cir. 1975). Nevertheless, the claims for recovery of the class members' individual losses on their securities could not have been aggregated to satisfy the "matter in controversy" minimum for federal diversity jurisdiction under *Snyder* because the class was not "unit[ing] to enforce a single title or right in which they ha[d] a common and undivided interest." *Snyder*, 394 U.S. at 335. The class merely joined "separate individuals for the damage suffered by each due to the alleged conduct of the defendant." *Travelers*, 689 F.3d at 722 (quoting *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1427 (2d Cir. 1997)). If the *Boeing* court had felt compelled to limit the equitable common fund doctrine for assessment of attorney fees against a class judgment under the non-aggregation rule from *Snyder*, it could not have reached the result it reached.

Boeing shows that the test of whether an equitable common fund has been created for the purpose of charging class counsel's fees against the entire fund is not the same as the test of whether class claims can be aggregated to satisfy the "matter in controversy" requirement for federal diversity jurisdiction. By equating these two distinct and different tests, the Seventh Circuit impermissibly nullified *Boeing* and its decision should not stand.

1. Snyder shows the decision below was wrong.

The Seventh Circuit cited *Snyder* to support its deviation from *Boeing*, but *Snyder* shows why the Seventh Circuit was wrong. *Snyder* was the first Supreme Court decision after the 1966 overhaul of Rule 23 to address the meaning of the phrase "matter in controversy" in Section 1332. *Snyder* considered two class actions filed in federal court invoking diversity jurisdiction. The first alleged a class of shareholders suffered damage when the company's board of directors sold their personal shares for a price above market value to enable the buyer to gain control over the company. *Ibid.* at 333. The named plaintiff in the class action claimed her personal damages were only $8,740, but the class included more than 4,000 shareholders that had lost a total of approximately $1,200,000. She argued this satisfied the $10,000 "matter in controversy" then required for diversity jurisdiction. *Ibid.*

The other case alleged that a gas utility had collected a city franchise tax outside the applicable city limit. *Ibid.* at 334. The named plaintiff claimed he paid only $7.81 in improper taxes, but the class of more than 18,000 had paid in total more than the $10,000 minimum to satisfy the "matter in controversy." *Ibid.*

Prior to 1966, "[u]nder old Rule 23, class actions were divided into three categories which came to be known as 'true,' 'hybrid,' and 'spurious.'" *Ibid.* at 335. "True class actions were those in which the rights of the different class members were common and undivided." *Ibid.* "Spurious class actions ... were in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact." *Ibid.* "Spurious" class actions allowed for "one-way intervention" where class members could benefit by a win but not be bound by a loss. Fed. R. Civ. P. 23(c)(3) advisory committee's note (1966). The 1966 amendments eliminated the "spurious" class action and "provide[d] that the [class] judgment will include all members of the class who have not requested exclusion." *Snyder*, 394 U.S. at 336.

Aggregation for purposes of the "matter in controversy" had been allowed for "true" class actions but not for "spurious" ones. *Ibid.* The *Snyder* plaintiffs argued the 1966 amendments to Rule 23,

which "abolished the distinctions between true and spurious class actions," should likewise change the test for determining the "matter in controversy" under 28 U.S.C. § 1332. *Ibid.*

The Court rejected this argument, holding:

> The doctrine that separate and distinct claims could not be aggregated was never, and is not now, based upon categories of old Rule 23 or of any rule of procedure. That doctrine is based rather upon this Court's interpretation of the statutory phrase "matter in controversy."

Ibid. Thus, the distinction between the "true" and the "spurious" class action survived for purposes of the "matter in controversy" as used in Section 1332, even though it was abolished for purposes of Rule 23 and class action procedure. *Ibid.; see also, Ibid.* at 343-344 (Fortas, J., dissenting); *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 299 (1973) (holding that a class alleged under Rule 23(b)(3) was a "spurious" class and could not aggregate its claims to meet the matter in controversy minimum).[2] Thus, *Snyder* was

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[2] The practical significance of *Snyder* and *Zahn* has been greatly diminished by the 2005 Class Action Fairness Act which amended Section 1332 to create specific rules governing diversity jurisdiction for all

limited to the context of jurisdiction. And contrary to the Seventh Circuit's decision, *Snyder* cannot be read to have any intended impact on class action law, such as that made by *Boeing's* holding that the equitable common fund doctrine can apply to class actions for individual discrete claims that have been certified under Rule 23(b)(3).

2. The Seventh Circuit improperly applied the "matter in controversy" jurisdictional test to the equitable common fund doctrine recognized in *Boeing*.

The Seventh Circuit's decision describes the rule of law the court applied to this case as being the same whether the question is the minimum "matter in controversy" under Section 1332, or whether the issue is whether class counsel's fees can be assessed against a class action judgment before individual claims are made. The decision states:

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class actions regardless of the divisible or indivisible nature of the class's claims. 28 U.S.C. § 1332 (d). Under CAFA, even "spurious" class action claims can now be aggregated to meet a $5,000,000 minimum "matter in controversy" for federal diversity jurisdiction. *Id.*

> [S]uits under the Telephone Consumer Protection Act seek recovery for discrete wrongs to the recipients. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 263-267 & n.39 (1975) (explaining the difference between common-fund cases and class actions that aggregate individual claims); *Snyder v. Harris*, 394 U.S. 332 (1969) (same); *Travelers Property Casualty v. Good*, 689 F.3d 714 (7rth Cir. 2012) (same). Under our 2013 decision the $4.2 million represents security for payment not a genuine common fund (see *Boeing*, 444 U.S. at 479-80 n.5).

App., *infra*, 3a. *Alyeska* and *Boeing* considered attorney fees but not federal jurisdiction; *Snyder* and *Travelers* considered only jurisdiction, not fees. The two lines of cases are not analogous, and their rules do not cross over to one another.

Alyeska was not a class action. It was an action by environmental groups to enjoin construction of the trans-Alaska pipeline. 421 U.S. at 241. The court of appeals adopted a "private attorney general theory" to shift half of the plaintiffs' attorney fees onto the defendants because the suit sought to "vindicate 'important statutory rights of all citizens.'" 421 U.S. at 245 (quoting *Wilderness Soc. v. Morton,* 495 F.2d 1026, 1032 (D.C. Cir. 1974) (en banc) *rev'd sub nom. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)). This Court reversed, holding the federal judiciary had no

equitable power to shift fees under a private attorney general theory. Notably, and contrary to the Seventh Circuit's parenthetical, *Alyeska* did not "explain[] the difference between common-fund cases and class actions that aggregate individual claims." In fact, *Alyeska* never mentions class actions or aggregation.

To the extent *Alyeska* touches on anything relevant to the Seventh Circuit's decision it undermines it. *Alyeska* states, "[T]he historic power of equity ... permit[s] ... a party ... recovering a fund for the benefit of others ... to recover his costs, including attorney fees ... directly from others enjoying the benefit." 421 U.S. at 257. Whether those "others" interests are "discrete" or indivisible from their champion has no relevance to whether equity should make them pay their proportionate share of the costs incurred by their champion.

The Seventh Circuit's decision specifically cites footnote 39 from *Alyeska*, but that footnote further undermines the decision's holding, stating

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting.

Ibid. at 264, n.39. The *Alyeska* concern was not, as the Seventh Circuit states, whether the beneficiaries' claims were "discrete," but whether the costs that would be deducted could be traced with "exactitude." *Ibid.* Contrary to the Seventh Circuit's holding, costs can be shifted with as much "exactitude" to beneficiaries in proportion to their "discrete" claims as to their indivisible claims, just as *Boeing* held. 444 U.S. at 477-478.

Snyder and *Travelers* were concerned only with jurisdiction and never discussed fees, but *Travelers* also shows the Seventh Circuit's holding is untenable because it concerned a class action that settled for $16 million with no reversion for unpaid claims that was payable mostly from the defendant's insurance assets. 689 F.3d at 716. After settlement, the named plaintiff brought a collection action against the insurer, which removed the action to federal court on the theory that the "matter in controversy" exceeded $75,000. *Ibid.* The court held that, notwithstanding the $16 million judgment and insurance policy, the "matter in controversy" did not exceed $75,000 because the individual claims of the class members that made up the class settlement were not "common and undivided." *Ibid.* at 721. Thus, the fact that the class claims were settled made no difference under *Travelers*.

In contrast, when the Seventh Circuit affirmed the class judgment in this case, it noted that class settlements with no reversion create a "common-

fund." 728 F.3d at 689. Moreover, the *Boeing* rule that class counsel's fees can be assessed against the entire fund before claims are made is common place and well-established in class action settlement jurisprudence. 7B Charles Allen Wright, *et al.* FED. PRAC. & PROC. CIV. § 1803 (3d ed. April 2016 update); MANUAL FOR COMPLEX LITIG., FOURTH § 14.121 (Fed. Jud. Ctr. 2004). While there may be issues as to the true value of a settlement fund where there is a reversion to the defendant, there is no valuation difficulty where, as here, "the 'harvest' created by class counsel was an actual, existing judgment fund." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) (emphasis added); *see also Six (6) Mexican Workers*, 904 F.2d at 1311 (affirming attorney fees of 25% of class action judgment, even though many class members could not be located and their share of the judgment fund would be distributed via *cy pres*).

Snyder offers no support to the Seventh Circuit's decision in this case because *Snyder* says nothing about class judgments, and *Travelers* undermines the Seventh Circuit's decision because it shows the "matter in controversy" analysis of class claims is inapposite to the question of class judgments and the assessment of class counsel fees against them.

Like *Alyeska*, *Boeing* was concerned with fees but not jurisdiction, and never even hinted that the divisible or indivisible nature of the class members' claims had any bearing on its holding. To the extent

that *Boeing* notes the possibility of a class judgment as "mere security" for payment, it does so only in the context of a judgment that expressly so states and makes no reference to whether the class members' claims are "discrete." 444 U.S. at 480 n.5.

The Seventh Circuit's decision cannot be reconciled with *Boeing*. *Boeing* is controlling authority that governed this case and the Seventh Circuit's refusal to follow it should be reversed. The Seventh Circuit's decision also creates a circuit split with the Ninth Circuit's decision in *Six Mexican Workers* that where a certified class prevailed on claims for statutory damages at trial, a "common fund" was created and the "attorney fees sought under a common fund theory should be assessed against every class members' share, not just the claiming members" under *Boeing*. 904 F.2d at 1311. This Court should accept certiorari to resolve that split.

B. The Class Judgment for $4,215,000 Was Not Merely "Security for Payment."

The Seventh Circuit decision states that the underlying judgment—"Ira [Holtzman], individually and as representative of a class recover from the defendant *(name)* Gregory P. Turza the amount of

$4,215,000.00 dollars ($4,215,000.00)"—was merely "security for payment." App. *Infra*, 3a. If this were true, a class action judgment for a Rule 23 (b) (3) class would never be more than "security for payment."[3] The Seventh Circuit's decision cites footnote five in *Boeing* for the foregoing assertion, but that footnote expressly stated that an identical judgment was not "mere security:"

> The District Court explicitly ordered that "plaintiff in behalf of all members of the plaintiff class ... shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest ..." Nothing in the court's order made

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[3] Even assuming the judgment was merely security for payment, Defendant did, in fact, pay the entire judgment amount at which point there was a fund under the district court's jurisdiction and security was no longer needed. App. *infra*, 2a. If this were not a class action there would be no question that the lawyers who secured the payment of the judgment could place a lien against it and collect their fees regardless of whether their clients wanted to accept their payment. *See Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 547 (7th Cir. 2003).

> Boeing's liability for this amount contingent upon the presentation of individual claims. Thus, we need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common fund doctrine.

444 U.S. at 480 n.5. The $4,215,000 judgment in the present case is for the sum total of the claims of the class members who elected to remain in the class and have their claims prosecuted as part of the class action. The judgment is identical in substance and form to the judgment entered in *Boeing* and "nothing in [it] made [Defendant's] liability for this amount contingent upon the presentation of individual claims." *Id.* The Seventh Circuit's decision holding to the contrary is wrong.

The Seventh Circuit's decision also states that the prior decision in this case held that the class judgment was "mere security" and that the prior holding is now "law of the case." App., *infra*, 3a. First, the prior decision never cited footnote five of *Boeing*, and never stated the judgment the panel affirmed was mere "security for payment." App., *infra*, 26a. The panel merely cited *Boeing* generally and ordered that fees be assessed in accord with *Boeing*, which held that fees should be assessed against the entire judgment before claims were made. *Ibid.* To find now that it was "law of the case"—that the district court should have done the

opposite of what this Court did in *Boeing*, because of a footnote never cited in the Seventh Circuit's prior opinion and which merely mused about a possible exception to *Boeing's* holding, an exception that could not possibly apply given the form and substance of the district court's judgment—stretches the law of the case doctrine far beyond any reasonable bounds. *United States v. All Funds on Deposit with R.J. O'Brien & Associates*, 783 F.3d 607, 623 (7th Cir. 2015) ("The 'law of the case doctrine is discretionary,' ... and 'is not designed to perpetuate error.") (quoting *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 381 (7th Cir.1992)). Moreover, even assuming it could be law of the case, the Seventh Circuit's decision expressly states that it does not rely on law of the case for its holding. App. *infra*, 3a ("We think then, and think now...."). The decision goes on to create precedent that for the first time establishes that every judgment entered on the merits in every class action is "mere security" for payment even where it is for a sum certain payable to the named plaintiff as the representative of a certified class. The Seventh Circuit's decision should not stand.

C. The Seventh Circuit's Decision Is Revolutionary and Unprecedented and Will Render Small Claims Class Actions Non-Feasible.

The "central concept of Rule 23" is to enable the practical prosecution of small claims shared by large

classes by spreading the expenses, "particularly attorney's fees across the entire class." *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980); see also *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015); *Hughes v. Kore of Indiana Enters., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013). In *Deposit Guaranty*, this Court explained:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23.

445 U.S. at 338 n.9.

Assuming for the sake of argument that the Seventh Circuit's decision stands, it would immediately and dramatically change the calculus for determining when the risk of undertaking a small claims class action is justified by the fee it can

generate if successful. Contrary to the cost-shifting principle articulated in *Deposit Guaranty*, the claims rate will become as important as the strength of the class's claims in determining the practical viability of a class action. In many cases, such as *Hughes*, the case will not be viable and the "deterrent" purpose will be lost completely. 731 F.3d at 677.

In particular, the decision below means the potential fee will be equal to the aggregate value of the potential class claims against the defendant divided by both the likelihood of success on the merits and the likely claims rate. To illustrate: if one imagines a prospective class action lawyer considering taking on a case for a class of 100,000 with claims worth $20 each, a solid 60% chance of class certification and a 60% chance of success on the merits, with an expected claims rate of only 15%, and for a benchmark fee of 25% of only the claims paid, then, the lawyer would value such a case as, on average, worth only $27,000 in fees (100,000 x $20 = $2,000,000 x 60% = $1,200,000 x 60% = $720,000 x 15% = $108,000 x 25% = $27,000). *See Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 706 (W.D. Pa. 2015) (13% claims rate on $9.50 claims not unusual).

As the present case illustrates, however, successful class action litigation often takes years of work and no sane lawyer would undertake hypothetical claims like the one above expecting such meager average returns. This would be doubly

true in cases like *Mullins* where class members are difficult to locate. 795 F.3d at 658. Finally, this creates a disincentive for class counsel to fight for ultimate victory and a strong incentive to seek a settlement that does not maximize the class recovery. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782-783 (7th Cir. 2014); *see also Six Mexican Workers*, 904 F.2d at 1311 (affirming attorney fee award of 25% of class action judgment, where "the litigation lasted more than 13 years, obtained substantial success, and involved complicated legal and factual issues").

The Seventh Circuit decision states, "But if a given recipient cannot be located, or spurns the money, counsel are not entitled to be paid for that fax." App., *infra*, 4a. Why not? Class counsel should be paid for winning the lawsuit and making money available to a class member who chose to remain in the class after notice of the opportunity to opt out, even if that class member later cannot be found or "spurns" the money. *See Six Mexican Workers*, 904 F.2d at 1306 ("In a majority of class actions at least some unclaimed damages or unlocated class members remain.") The recovered money belongs to the class member, and under *quantum meruit* he owes attorney fees to class counsel because they obtained it for him; but the Seventh Circuit has decided both the money and the fees must be refunded to Defendant. This unconditional "satisfaction guaranteed or you need not pay your share of attorney fees" rule will apply only to class

action attorneys working on a contingency basis, as the contingency changes from success on the merits to individual class member satisfaction after success on the merits.

Finally, class actions for small claims are likely to have low claims rates, but their viability depends on the ability to spread the costs, especially attorney fees, across the entire class. By making the claims rate the ultimate determinant of the size of the fund against which attorney fees can be assessed in a class action where class counsel has secured a judgment and its payment for the class, the Seventh Circuit's decision effectively makes impossible the small claims class action.

This is a revolutionary change in class action law, contrary to this Court's governing and dispositive decisions.

CONCLUSION

For the foregoing reasons, The Court should now grant this petition to reverse the Seventh Circuit's decision.

Respectfully submitted,

/s/ Phillip A. Bock

Phillip A. Bock
Counsel of Record
BOCK, HATCH, LEWIS & OPPENHEIM, LLC
134 N. La Salle Street, Ste. 1000
Chicago, IL 60602
Telephone: (312) 658-5500
Facsimile: (312) 658-5555
phil@classlawyers.com