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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: SYNGENTA AG MIR162 CORN LITIGATION (Hossley-Embry Group II)	No. 21-3110
In re: SYNGENTA AG MIR 162 CORN LITIGATION (Byrd/Shields II)	No. 21-3111
In re: SYNGENTA AG MIR 162 CORN LITIGATION (Kansas Common Benefit Firms)	No. 21-3121

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:14-MD-02591-JWL-JPO)

Submitted on the briefs:*

Christina J. Nielsen, Nielsen Law Firm, LLC, Talladega, Alabama, on the briefs for Appellants Hossley-Embry, LLP, Shields Law Group, LLC and Paul Byrd Law Firm, PLLC, in case numbers 21-3110 and 21-3111.

Patrick J. Stueve and Bradley T. Wilders with Stueve Siegel Hanson LLP, Kansas City, Missouri; W. Lewis Garrison, Jr. and Christopher Hood with Heninger Garrison Davis, LLC, Birmingham, Alabama; Daniel E. Gustafson with Gustafson Gluek PLLC,

* After examining the briefs and appellate record in Nos. 21-3110 and 21-3111, as well as MDL Co-Lead Counsel's response to the court's April 2, 2024 Order in No. 21-3121, this panel has determined unanimously that oral argument would not materially assist in the determination of these appeals. *See* FED. R. APP. P. 34(a)(2); 10TH CIR. R. 34.1(G). The appeals are therefore ordered submitted without oral argument.

Minneapolis, Minnesota; Christopher A. Seeger, Stephen A. Weiss and Diogenes P. Kekatos with Seeger Weiss LLP, Ridgefield Park, New Jersey; Don M. Downing and Gretchen Garrison with Gray, Ritter & Graham, P.C., St. Louis, Missouri; Scott Powell, Bruce McKee and Tempe Smith with Hare Wynn Newell & Newton, Birmingham, Alabama; William B. Chaney and Drew York with Gray Reed & McGraw, LLP, Dallas Texas; Lewis A. Remele Jr. with Bassford Remele, Minneapolis, Minnesota; William R. Sieben with Schwebel Goetz & Sieben PA, Minneapolis, Minnesota; Clayton A. Clark and Scott Love with Clark Love Hutson, Houston, Texas on the Consolidated Joint Brief of Appellees in case numbers 21-3110 and 21-3111.

Jeffrey A. Lamken, MoloLamken LLP, Washington, D.C., for Appellee Watts Guerra in case numbers 21-3110 and 21-3111.**

Patrick J. Stueve and Bradley T. Wilders with Stueve Siegel Hanson LLP, Kansas City, Missouri; Don M. Downing and Gretchen Garrison with Gray, Ritter & Graham, P.C., St. Louis, Missouri; William B. Chaney and Drew York with Gray Reed & McGraw, LLP, Dallas, Texas; Scott Powell, Bruce McKee and Tempe Smith with Hare Wynn Newell & Newton, Birmingham, Alabama for Appellant MDL Co-Lead Counsel in case number 21-3121.

Before **HOLMES**, Chief Judge, **BACHARACH**, and **McHUGH**, Circuit Judges.

HOLMES, Chief Judge.

This long-simmering attorneys' fees dispute arises out of the historic $1.51 billion settlement between Syngenta AG ("Syngenta") and numerous plaintiffs after Syngenta failed to obtain regulatory approval for its genetically modified corn seeds to be imported into China. As part of the settlement, attorneys for the plaintiffs received $503 million in attorneys' fees. The apportionment and allocation of that $503 million has spawned a great deal of litigation, and we have twice before

** Although it initially participated in cases Nos. 21-3110 and 21-3111 as an appellee, Watts Guerra LLP notified the Court on July 9, 2024, that it would decline to file merits briefing or otherwise participate in those appeals.

addressed—and rejected—various challenges to the district court's awards of attorneys' fees and its related rulings. *See In re Syngenta AG MIR 162 Corn Litig.* ("*In re Syngenta I*"), 61 F.4th 1126 (10th Cir. 2023); *Shields Law Grp., LLC v. Stueve Siegel Hanson LLP* ("*In re Syngenta II*"), 95 F.4th 1251 (10th Cir. 2024).

Today, we resolve the remainder of the pending appeals arising out of the allocation of the $503 million award of attorneys' fees: specifically, appeals from the district court's order allocating funds within the pool for individually retained private attorneys ("IRPAs"). The first appeal, numbered 21-3110, is brought by Hossley-Embry, LLP ("Hossley-Embry"). The second appeal, numbered 21-3111, is brought by Shields Law Group, LLC Plaintiffs' Counsel, and Paul Byrd Law Firm, PLLC Plaintiffs' Counsel (collectively, "Byrd/Shields"). We refer to Byrd/Shields and Hossley-Embry together as "the Objecting Firms" and refer to these appeals as the "IRPA Pool Allocation Appeals." Third, there is a contingent cross-appeal ("the Contingent Cross-Appeal"), numbered 21-3121, which is brought by MDL Co-Lead Counsel.[1]

As to the IRPA Pool Allocation Appeals, we exercise jurisdiction pursuant to 28 U.S.C. § 1291 and **affirm**. As we explained in an order requesting briefing in the IRPA Pool Allocation Appeals, there is a limited scope to what actually remains for decision—specifically, all that is at issue are challenges to the district court's

[1] MDL Co-Lead Counsel includes Stueve Siegel Hanson LLP; Gray Ritter & Graham, P.C.; Hare Wynn Newell & Newton; and Gray Reed & McGraw, LLP, on behalf of themselves and all other firms who performed common benefit work in the Kansas MDL who did not file a notice of appeal.

allocation *of* the funds within the IRPA Pool. Fatally, the Objecting Firms make no arguments that fall within this scope. They raise no actual challenge to the district court's allocation of the funds in the IRPA Pool, and they do not challenge the limited scope of the IRPA Pool Allocation Appeals, despite our explicit invitation for the parties to voice any objections that they might have to our understanding of the scope of those appeals. What arguments they do make largely challenge the total allocation *to* the IRPA Pool, and we decline to consider these nonresponsive arguments.

The outcome of the IRPA Pool Allocation Appeals dictates the fate of the Contingent Cross-Appeal. In light of our affirmance of the district court order at issue, we **lift the abatement** of the Contingent Cross-Appeal, and we **dismiss the Contingent Cross-Appeal as moot.**

I

We previously have set forth the complex history of the attorneys' fees dispute in *In re Syngenta I* and *In re Syngenta II*. *See* 61 F.4th at 1138–70; 95 F.4th at 1259–78. We will thus limit our discussion of the history of this dispute to what is necessary to understand the remaining appeals in this matter.[2]

[2] Where it is necessary to inform our discussion, we take judicial notice of filings on the district court's docket and on our own docket. *See In re Syngenta II*, 95 F.4th at 1259 n.4.

A

Syngenta, an agricultural company, developed and sold genetically modified corn seed products without obtaining regulatory approval for these seeds to be imported into China. When the genetically modified seeds were discovered in American import shipments, China closed its markets to American corn, which sent a shockwave through the corn farming and production industry.

Thousands of corn farmers and producers sued Syngenta. Hundreds of claims were brought in the United States District Court for the District of Kansas ("the district court"), as well as in Minnesota state court and Illinois federal court. Eventually, Syngenta and a class of plaintiffs reached a nationwide settlement agreement whereby Syngenta agreed to pay $1.51 billion in exchange for the release of all claims against it. In an order issued on December 7, 2018 ("the December 2018 Aggregate Fee Order"), the district court finalized its approval of the settlement and awarded $503,333,333.33 (one-third of the settlement fund) as attorneys' fees.

Later in December 2018, the district court issued another order ("the December 2018 Fee Allocation Order") accepting, in large part, a recommended decision by a special master setting forth the broad strokes of how the $503 million of attorneys' fees would be allocated. *See* Aplts.' Jt. App., Vol. I, at 123–25 (Dist. Ct. Mem. & Order, filed Dec. 31, 2018). Specifically, the district court adopted the special master's recommendation that the $503 million be split among four pools: three "common benefit pools" and an "IRPA pool." *Id.* at 133. As part of its ruling, the district court concluded that attorneys who had contingent-fee contracts with their

clients could not recover based on those contracts. Specifically, the December 2018 Fee Allocation Order provided that attorneys with contingent-fee contracts "may recover attorney fees only from the pools created by this order, allocated from the Court's total one-third fee award, and th[ose] attorney[s] may *not* recover any additional fees from the client's recovery based on any contingent-fee contract." *Id.* at 144.

The three common benefit pools—which correspond to Kansas, Minnesota, and Illinois, the three states in which the litigation against Syngenta was consolidated—were designed to compensate attorneys who had performed work that had benefitted the settlement class as a whole or the settlement negotiation process. With respect to these pools, 49% of the total fee award was allocated to the Kansas Common Benefit Pool, 23.5% was allocated to the Minnesota Common Benefit Pool, and 15.5% was allocated to the Illinois Common Benefit Pool.

The fourth pool, the IRPA pool, was designed to compensate individually retained private attorneys, IRPAs. "Creation of the IRPA pool allow[ed] the [district court] to recognize the contribution to the ultimate recovery made by the very existence of the huge number of individual claims, while at the same time limiting fees for those attorneys to a reasonable amount." *Id.* at 134; *see also id.* at 135 ("The sheer number of individual suits filed against Syngenta created enormous pressure on Syngenta, and thus the mere existence of the IRPAs and their clients contributed in a meaningful way to the ultimate resolution that benefits the entire settlement class. That contribution merits an award from the common fund.").

The district court was ultimately persuaded that "an approximate 10 percent contingent fee is reasonable and appropriate in this case for IRPAs who did not perform work (in addition to filing a case) that benefited the entire settlement class." *Id.* at 141. The district court rejected arguments that (1) the disparity in fees between common benefit firms and IRPAs should be less stark and (2) the award was improperly based off the clients' net recoveries rather than their gross recoveries, which resulted in an effective contingent fee award of closer to 7%—not 10%. As to the latter argument, the district court concluded that "this is a matter of semantics, as the key is the amount that will reasonably compensate IRPAs for having asserted individual claims" and that "an effective 10 percent contingent fee for IRPAs (as determined on the basis of the clients' actual distribution from the settlement fund) is appropriate." *Id.* at 142. The district court also reasoned that an effective 10% cap was appropriate because, *inter alia*, "the claims process . . . was intended and proved to be quite simple and streamlined, as evidenced by the fact that more than half of the claimants were not represented by individual counsel" and "the IRPAs were relieved of having to do any work to advance their clients' lawsuits or to add value to their claims." *Id.* at 138.

The district court ultimately allocated $60,400,000—12% of the total fee award—to the IRPA pool for eventual distribution to IRPAs.[3] *See id.* at 143

[3] In this respect, the district court did not accept the special master's report and recommendation, which recommended that the IRPA pool encompass only 10% of the total fee award.

("Accordingly, in order to achieve a likely effective contingent fee closer to 10 percent, the Court increases the allocation recommended in the R&R by two points, and it allocates 12 percent of the total fee award to the IRPA pool."); *see also id.* at 153. This sum would "be distributed to IRPAs on a *pro rata* basis tied to the recovery by IRPA clients." *Id.* at 143.

The district court "reopen[ed] the application period so that IRPAs who ha[d] not yet filed an application for attorney fees [could] still seek an award of fees from the IRPA Pool." *Id.* at 145. Specifically, claimants could file petitions for awards from the IRPA pool on or before January 18, 2019.[4] The district court also set forth the procedure for eventual distribution from the IRPA pool. Specifically, it explained that:

> Once the amount of each claimant's recovery from the settlement fund has been determined, the claims administrator, with oversight by the special master, shall calculate the *pro rata* IRPA award to be made from the IRPA pool to each attorney who has applied for a fee award, and the amount of an attorney's proposed IRPA fee award shall be communicated to that attorney, who shall have the opportunity to object to the calculation by the administrator. After the administrator has attempted to resolve any objection, the master shall file a report and recommendation concerning the proposed distribution of the IRPA pool to particular attorneys or law firms, in which the master shall note any outstanding objections and her recommendations concerning those objections. Objections to that report and recommendation may be filed within 14 days, and the Court will then resolve any such renewed objections.

[4] The December 2018 Fee Allocation Order provided that the deadline was reopened until January 18, *2018*. That date, however, was apparently a typographical error, as it had already passed when the district court issued the December 2018 Fee Allocation Order. Other documents indicate that the date should have instead read January 18, 2019.

Id. at 147–48.

To be clear, the December 2018 Fee Allocation Order did not award fees to individual firms; rather, it divided the $503 million pot into four pools (including the IRPA pool) and set forth the procedures for how each individual pool would be allocated.

B

Pursuant to the December 2018 Fee Allocation Order (and other subsequent orders), ninety groups of firms sought awards from the IRPA pool on behalf of themselves and their litigation partners. These included the Objecting Firms: Hossley-Embry and Byrd/Shields.[5] These applications remained pending before the special master for some time, and the district court primarily focused on the allocation of the common benefit pools in the months after the issuance of the December 2018 Fee Allocation Order.

1

Throughout 2019, the district court issued a series of orders allocating attorneys' fees *within* each of the common benefit pools. Specifically, on March 20, 2019, the district court issued an order ("the March 2019 Kansas Pool Allocation Order") that accepted the special master's report and recommendation regarding the

[5] Nineteen months after the deadline for firms to file IRPA applications, Shields Law Group moved for leave to supplement its IRPA fee petition to add claims that had been omitted from its original petition and accompanying documents. The district court denied Shields Law Group's request. Shields Law Group did not file a notice of appeal with respect to this order. Nor does it raise any argument in the instant appeals that the district court erred in denying its motion to supplement.

allocation of the Kansas Common Benefit Pool. Then, on July 16, 2019, the district court issued an order ("the July 2019 Minnesota Pool Allocation Order") regarding the allocation of fees within the Minnesota Common Benefit Pool. Thereafter, in November 2019, the district court issued an order ("the November 2019 Illinois Pool Allocation Order") regarding the allocation of the Illinois Common Benefit Pool.[6]

Various parties—including the Objecting Firms—filed notices of appeal with respect to these orders. Some firms named the December 2018 Fee Allocation Order in their notices of appeal as well. We refer to appeals from these orders (and earlier orders from December 2018) as "the Fee Allocation Appeals." *See In re Syngenta II*, 95 F.4th at 1263.

2

In September 2020—over a year-and-a half after the December 2018 Fee Allocation Order and while the IRPA pool submissions were still pending—the Objecting Firms sought reconsideration of the December 2018 Fee Allocation Order and the overall four-pool allocation scheme. *See* Aplts.' Jt. App., Vol. I, at 170 (Hossley-Embry's Mot. to Reconsider, filed Sept. 11, 2020); *id.* at 184 (Paul Byrd Law Firm's Mot. to Reconsider, filed Sept. 12, 2020); Aplts.' Jt. App., Vol. II, at 352 (Shields Law Group's Mot. for Reconsideration, filed Sept. 14, 2020).

The Objecting Firms argued that reconsideration was warranted "[b]ased on new evidence and the substantial amount of work conducted by [their] attorneys and

[6] The district court also issued an order regarding the allocation of costs and expenses.

staff post the Corn Seed Settlement Claims deadline." Aplts.' Jt. App., Vol. I, at 171. The Objecting Firms reasoned that they had spent thousands of hours assisting their clients through the settlement claims process and that the district court's prediction that the settlement claims process would be "quite simple and streamlined" was simply wrong. *Id.* at 172–73, 195–97. For example, Paul Byrd Law Firm argued that "[e]vents occurring since the Court approved the current allocation, regarding the lack of simplicity in the settlement process, leads to the inescapable conclusion that a more equitable allocation is required." *Id.* at 198. As recompense, it asked the district court to award it the contingent fee payments that it would be due under the original client contracts. The Objecting Firms supported their request with hundreds of pages of documentation showing the post-settlement work they performed.

In an order ("the December 2020 Reconsideration Order") issued three months later, the district court denied the motions for reconsideration. *See* Aplts.' Jt. App., Vol. II, at 552 (Dist. Ct. Mem. & Order, filed Dec. 2, 2020). The district court first concluded that it lacked jurisdiction over the motions because various parties had filed notices of appeal. But it nevertheless "addresse[d] the motions to make clear that it would not grant them even if the issues were remanded for consideration." *Id.* at 557.

The district court first reasoned that the motions, which were filed over a year-and-a-half after the December 2018 Fee Allocation Order, would be denied as untimely. It concluded that "[m]ovants should have anticipated at the time of the order that some additional work would be required in the claims process." *Id.* at 558.

Indeed, the Fee Allocation Appeals had already "been pending for some time." *Id.* Thus, the motions were "not timely." *Id.*

Next, the district court reasoned that the motions would "also fail on their merits." *Id.* at 560. It concluded the "[m]ovants are mistaken in asserting that the Court did not anticipate that there would be any additional work by IRPAs in the claims process." *Id.* And the district court further reasoned that, notwithstanding the Objecting Firms' assertions to the contrary, the settlement claims process proved to be relatively straightforward. The district court ultimately concluded:

> Accordingly, there is no basis for the Court to conclude that it erred in its allocation among the four pools. Nor is the Court persuaded that the award to the IRPA pool was not sufficient in light of the work performed by those attorneys, including during the claims process. Thus, there is no basis to undo the Court's previous limitation on the recovery of contractual contingent fees from clients' recoveries. For those reasons, the Court would deny on the merits the three motions for reconsideration of the Court's allocation order.

Id. at 562.

C

As mentioned above, almost a hundred different groups of firms, including the Objecting Firms, filed submissions to receive awards from the IRPA Pool. Those submissions remained pending until 2021—throughout the allocation of the common benefit pools, the filing of the Fee Allocation Appeals, and the disposition of the various motions for reconsideration.

1

On May 14, 2021, the special master issued a comprehensive report and recommendation ("the May 2021 R&R") that "contain[ed] [her] final recommendations with respect to the allocation of the IRPA pool after consideration of the IRPA applications and the appeals that were made of [her] preliminary IRPA pool allocations." *Id.* at 569–70 (Special Master's R&R, filed May 14, 2021). In short, the May 2021 R&R included the special master's recommendations on which IRPA Pool requests should be approved and which should be denied. And it included exhibits detailing each individual submission and the special master's ultimate recommendation as to each.

The special master explained that she had first made preliminary determinations as to which IRPA submissions should be accepted or rejected, and firms whose requests were preliminarily recommended for rejection had an opportunity to appeal or object to the special master. After reviewing the information submitted by IRPAs that filed appeals of her preliminary determinations, she made recommendations to the district court as to which IRPA submissions should be approved. The special master further explained that she recommended rejecting IRPA requests for a variety of reasons, including that multiple firms had tried to receive IRPA compensation for representing the same clients, the law firm did not provide the proper document, or the retainer agreement with the firm was signed after the settlement with Syngenta had been signed.

In total, the special master received 114,060 IRPA submissions, and she recommended that the district court accept 108,307 of them—about ninety-five percent. She recommended rejecting 5,753 submissions, but preliminary appeals were received for only 1,166 of these rejections. In total, then, only one percent of the IRPA submissions were recommended for rejection over a firm's objection. These included some submissions from the Objecting Firms.

Ultimately, as to the Objecting Firms' IRPA Pool submissions, the special master recommended that: (1) 790 of the 832 submissions filed by Hossley-Embry be approved and a sum of $533,242.51 be awarded to Hossley-Embry from the IRPA pool; (2) 1,835 of the 1,969 submissions filed by Paul Byrd Law Firm be approved and a sum of $994,435.09 be awarded to Paul Byrd Law Firm from the IRPA pool; and (3) 2,556 of the 2,618 submissions filed by Shields Law Group be approved and a sum of $1,388,990.43 be awarded to Shields Law Group from the IRPA pool.

2

On May 28, 2021, the Objecting Firms filed a combined objection to the May 2021 R&R.[7] *See* Aplts.' Jt. App., Vol. II, at 598 (Obj., filed May 28, 2021). But the objection did not raise arguments regarding the substance of the May 2021 R&R;

[7] The Objecting Firms assert that they "were not required to file objections to the R&R" because the December 2018 Fee Allocation Order said that they "*may*" file objections within fourteen days. Byrd/Shields's Opening Br. at 9 n.8; *accord* Hossley-Embry's Opening Br. at 6 n.6. In light of our ultimate resolution of these appeals, we need not resolve whether the Objecting Firms were in fact required to file objections to preserve their right to challenge the special master's R&R.

instead, it primarily focused on challenges to the December 2018 Fee Allocation Order, the modification of contingency-fee contracts, and the percentages allotted to each of the four pools.[8]

Specifically, the Objecting Firms argued that "[t]he R&R for [the] IRPA award does not reasonably compensate Movants for their time and work performed representing their clients," especially given the additional work that the Objecting Firms had done in guiding their clients through the settlement program after the issuance of the December 2018 Fee Allocation Order. *See id.* at 600 (bold typeface omitted). They also argued that, pursuant to the amount allocated to the IRPA pool, they would receive only 6.6% of their clients' settlement payments—an amount that did not account for their additional work and was unreasonable and inequitable. These arguments largely tracked arguments that the Objecting Firms had already made in their motions for reconsideration, as well as arguments that had been made at earlier stages of the litigation.

Notably, the Objecting Firms acknowledged that their objections were mostly in opposition to other, earlier, orders of the district court—not necessarily the May 2021 R&R. They expressly noted:

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[8] In the objection, Shields Law Group also raised an argument that the district court erred in denying its 2020 motion to supplement, *see supra* n.5. Specifically, Shields Law Group argued that it was error for the district court to decline to credit them for all of their clients' bushels of corn. The district court ultimately rejected this argument. Shields Law Group has not challenged this ruling in its opening brief, so we deem any challenge to the district court's decision on this point to be waived. *See United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019).

> Much of the opposition offered herein has been previously filed, briefed and ruled upon by the [District] Court. This argument is presented a second time, not for purpose of duplicating or delaying the proceedings, but for the purpose of preserving the Movants' rights and record on appeal. Where applicable, the prior briefing and orders of the [District] Court are incorporated herein by reference.

Id. at 598 n.1. This reality was also noted by Settlement Class Counsel,[9] who filed a response to the objection. They argued that "the objectors do not actually take issue with any of the findings or recommendations of the Special Master," and instead "seek to re-litigate issues the Court has already decided . . . without elaborating on how their ultimate IRPA award supports those arguments." Resp. to Objs. to the Special Master's R&R Regarding the IRPA Allocation, No. 2:14-md-02591-JWL-JPO, ECF No. 4600, at *2 (D. Kan., filed June 1, 2021).

3

On June 4, 2021, the district court issued an order ("the June 2021 IRPA Pool Allocation Order") adopting the May 2021 R&R and overruling all objections to it. *See* Aplts.' Jt. App., Vol. II, at 630 (Dist. Ct. Mem. & Order, filed June 4, 2021). The district court praised the special master's thoughtful review of the copious IRPA pool submissions and observed that it "did not receive a single objection relating to the matters addressed in the R&R." *Id.* at 636. And the district court accepted all of

[9] As explained in *In re Syngenta II*, Settlement Class Counsel includes attorneys Patrick Stueve, Daniel Gustafson, and Christopher Seeger. *See* 95 F.4th at 1258 n.1.

the special master's recommendations as to which IRPA pool submissions should be approved and which should be denied.

As to the objection filed by the Objecting Firms, the district court observed that the Objecting Firms had "conceded that 'much' of [their] present objection ha[d] been ruled [on] previously." *Id.* at 638. The district court ultimately overruled the arguments in the objection, reasoning that:

> [The Objecting Firms] repeat[] [their] prior arguments that the [District] Court's allocation method and allocation to the IRPA pool does not provide [them] with a sufficient fee. . . . [T]his objection does not address the particular matters contained in the R&R, and [the Objecting Firms] [have] not identified a proper basis for the [District] Court's reconsideration of its prior orders at this time. [The] objection is therefore overruled.

Id. at 638–39.

The June 2021 IRPA Pool Allocation Order thus adopted the May 2021 R&R and awarded fees from the IRPA Pool in the manner recommended by the special master. That included the awards to the Objecting Firms discussed above.

4

The Objecting Firms filed notices of appeal challenging, *inter alia*, the June 2021 IRPA Pool Allocation Order. The appeal by Hossley-Embry was docketed as No. 21-3110, and the appeal from Byrd/Shields was docketed as No. 21-3111. We refer to these appeals taken by the Objecting Firms as the "IRPA Pool Allocation Appeals."

MDL Co-Lead Counsel filed an "amended notice of conditional or contingent cross-appeal" of the June 2021 IRPA Pool Allocation Order, the December 2018 Fee

Allocation Order, and "all other underlying, subsequent, or related orders, rulings, and findings." Am. Notice of Conditional or Contingent Cross-Appeal, No. 2:14-md-02591-JWL-JPO, ECF No. 4618, at *1 (D. Kan., filed July 6, 2021) (bold typeface omitted). This was done so that MDL Co-Lead Counsel could "preserve their right to seek reversal or modification of the Court's orders or judgment in response to any successful argument made by one or more appellants adversely affecting their rights." *Id.* at *1–2. We refer to this appeal, which was docketed at No. 21-3121, as the Contingent Cross-Appeal.

D

The Fee Allocation Appeals were still pending at the time the district court issued the June 2021 IRPA Pool Allocation Order.[10] In light of that, we requested supplemental briefing in the Fee Allocation Appeals on "the effect of the district court's June 4, 2021, order allocating the IRPA pool on the substantive issues raised" in the Fee Allocation Appeals. Order, Nos. 19-3008 et al., at *1 (10th Cir., filed July 12, 2021); *see also id.* ("[T]he supplemental briefing ordered herein shall be limited to arguments regarding whether, and to what extent, the June 4 order and its allocation of the IRPA pool affect the fee allocation issues already briefed by the parties in the [Fee Allocation Appeals]."). We expressly explained that "these supplemental briefs *shall not* raise any challenge to the district court's allocation of the IRPA pool itself." *Id.* Rather, "[b]riefing as to the merits of the IRPA pool

[10] We had held oral argument in the Fee Allocation Appeals in March 2021.

allocation [would] be addressed by separate order at a later date" in the IRPA Pool Allocation Appeals. *Id.*

The Objecting Firms submitted their supplemental briefs in the Fee Allocation Appeals. In its supplemental brief, Byrd/Shields argued that the "meager" amount awarded to the IRPA Pool was insufficient—particularly given that the claims process ultimately proved to be not as simple as the district court predicted and required additional work on the part of the IRPAs. Suppl. Br. of Byrd/Shields, Nos. 19-3008 et al., at *6–8 (10th Cir., filed July 26, 2021). Byrd/Shields also argued that they were not reasonably compensated for the work they did, largely due to the arbitrarily low allocation of funds earmarked for the IRPA pool. Hossley-Embry incorporated these same arguments.

Around the same time, we consolidated the IRPA Pool Allocation Appeals and the Contingent Cross-Appeal.[11] We detailed the scope of the supplemental briefing that we had requested in the Fee Allocation Appeals, and we explained that "[a]ny challenges to the district court's allocation of the IRPA pool itself will be addressed" in the IRPA Pool Allocation Appeals. Order, Nos. 21-3111 et al., at *1–2 (10th Cir., filed July 12, 2021). But, for the time being, we abated briefing on the IRPA Pool Allocation Appeals.

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[11] These appeals were consolidated with other appeals challenging the approval of a settlement agreement between one firm, Watts Guerra, and the Appellees in *In re Syngenta I*. As explained *infra*, we ultimately dismissed for lack of subject-matter jurisdiction the appeals related to the Watts Guerra settlement agreement. *See In re Syngenta II*, 95 F.4th at 1295.

E

On February 28, 2023, we issued *In re Syngenta I*, which affirmed the district court's orders that were at issue in the Fee Allocation Appeals.

The first issue we addressed was whether we had jurisdiction over the Fee Allocation Appeals. We ultimately concluded that we could properly exercise jurisdiction. We observed that "all proceedings after the Kansas district court's [December 2018 Aggregate Fee Order] and corresponding Final Order and Judgment constitute one, post-judgment litigation that only concluded with the filing of the June 2021 IRPA Pool Allocation Order"—the order that "complete[d] allocation of the attorneys' fee award." *In re Syngenta I*, 61 F.4th at 1171, 1173. Thus, "all appeals challenging the Kansas district court's various allocation orders *after* the [December 2018 Aggregate Fee Order] and Final Order and Judgment and *before* the June 2021 IRPA Pool Allocation Order were not appeals from final orders as required for our jurisdictional purposes." *Id.* at 1173–74. But notwithstanding the lack of finality for these orders, we concluded that the appellants' premature notices of appeal had "ripened" with the issuance of the June 2021 IRPA Pool Allocation Order. *Id.* at 1174. We reasoned that "[t]he June 2021 IRPA Pool Allocation Order simply brought the fee allocation process to a completion; it did not disturb the myriad common benefit pool allocation orders at issue" in *In re Syngenta I*. *Id.* at 1176. Thus, we concluded that we had "jurisdiction over all challenges brought by Appellants, *except* any challenges the parties may raise to the IRPA pool allocation

order itself," which would "post-date the premature (ripened) notices of appeal." *Id.* at 1177.

After assuring ourselves that we had appellate jurisdiction, we turned to the merits and concluded that the district court did not abuse its discretion in crafting, *inter alia*, the December 2018 Fee Allocation Order, the March 2019 Kansas Pool Allocation Order, the July 2019 Minnesota Pool Allocation Order, or the November 2019 Illinois Pool Allocation Order. Among other things, we concluded that the district court's allocation of twelve percent of the total fee award to the IRPA pool was reasonable (as was its allocation to the other pools). *See id.* at 1196, 1205. Furthermore, we concluded that the district court did not abuse its discretion in concluding that the firms' contingent-fee contracts with their clients should be modified to produce an effective ten percent contingency fee. *See id.* at 1189–90.

We also rejected in *In re Syngenta I* the Objecting Firms' request to file additional briefing regarding their motions for reconsideration that the district court denied in its December 2020 Reconsideration Order. *See id.* at 1223–24. We reasoned that the Objecting Firms had failed to convincingly explain why they could not have raised these issues earlier in their appellate briefing. *See id.* at 1223. And we noted that, in any event, we would have rejected the arguments that they sought to present in their additional briefing on the merits:

> [W]e note that Movants' complaints about the district court's purported failure to account for the extra hours individually retained private attorneys would need to expend are irrelevant to the overall fee allocation framework. As the district court made clear on numerous occasions, and as we have elucidated here in

> parts of this opinion, the overall fee allocation framework, including the specific fee allocation to the IRPA pool, was predicated on the contributions specific attorneys or groups of attorneys made *toward the Settlement*. This was a central facet of the court's overarching "reasonableness" inquiry. Movants have not explained, either before the district court or before us, how these alleged hours more recently expended relate *at all* to "reasonableness" and why the Kansas district court's failure to anticipate such hours—even if that were true—would undermine its allocation decisions.

Id. at 1223–24.

In sum, we resolved the Fee Allocation Appeals in *In re Syngenta I* by affirming the district court's various attorneys' fees orders. But we did not purport to resolve the merits of any challenge to the June 2021 IRPA Pool Allocation Order itself. *See id.* at 1177 n.32 ("[The Objecting Firms] filed notices of appeal challenging the June 2021 IRPA Pool Allocation Order. However, the merits issues in the appeals now before us focus exclusively on the Kansas district court's orders *before* June 2021, and we have abated the appeals filed with respect to the court's June 2021 IRPA Pool Allocation Order pending our resolution of these appeals."); *see also id.* at 1169 n.26.

F

Our decision in *In re Syngenta I* did not end the attorneys' fees litigation. In particular, several appeals remained pending after our decision in *In re Syngenta I*. These included the IRPA Pool Allocation Appeals (Nos. 21-3110 & 21-3111); the Contingent Cross-Appeal (No. 21-3121); and the Objecting Firms' appeals of the

approval of a discrete settlement agreement between one law firm, Watts Guerra LLP, and the appellees in *In re Syngenta I* (Nos. 21-3021 & 21-3022).

1

A month after our decision in *In re Syngenta I*, the Objecting Firms moved to lift the stay in the appeals challenging the Watts Guerra settlement agreement and to allow full briefing in the IRPA Pool Allocation Appeals.[12] *See* Mot. to Lift Stay and Enter a Scheduling Order, Nos. 21-3110 et al., at *5 (10th Cir., filed Mar. 15, 2023). The Joint Appellees—the appellees in *In re Syngenta I*, *see* 61 F.4th at 1138 n.1—opposed this request, arguing, *inter alia*, that we should "summarily affirm[]" the judgment in the IRPA Pool Allocation Appeals because the Objecting Firms had "no non-frivolous arguments to challenge [the June 2021 IRPA Pool Allocation Order]." Jt. Aplees.' Resp. to Shield Aplts.' Mot. to Lift Stay & Enter a Scheduling Order, Nos. 21-3110 et al., at *3 (10th Cir., filed Mar. 27, 2023).

We took the Objecting Firms' motion under advisement. And, earlier this year, we granted their motion to lift the abatement in part and issued a decision dismissing for lack of subject-matter jurisdiction the Objecting Firms' appeals related to the Watts Guerra settlement agreement. *See In re Syngenta II*, 95 F.4th at 1259 (lifting the abatement in part and dismissing Nos. 21-3021 & 21-3022). At that juncture,

[12] The Objecting Firms also sought to reopen two other appeals that were brought by another group of firms, but the firms who brought those appeals agreed that further proceedings were unnecessary. We ultimately dismissed those two appeals.

only the IRPA Pool Allocation Appeals and the Contingent Cross-Appeal remained pending.[13]

2

After we issued our decision in *In re Syngenta II*, we ordered the Objecting Firms and MDL Co-Lead Counsel to file written responses addressing the need for further proceedings in their respective appeals—all of which related to the June 2021 IRPA Pool Allocation Order.

In their suggestions in support of further proceedings, the Objecting Firms again raised arguments regarding the modification of their contingent-fee contracts, which, according to them, resulted in unreasonably low fees. And they once again raised the argument that the district court should have reconsidered the amount allocated to the IRPA pool in light of the difficulties that arose in settlement claims processing.

For their part, MDL Co-Lead Counsel made clear that if we were to reject the Objecting Firms' arguments in the IRPA Pool Allocation Appeals, the Contingent Cross-Appeal should be dismissed as moot.

3

On May 28, 2024, we issued an order ("the May 2024 Briefing Order") regarding the IRPA Pool Allocation Appeals. *See* Order ("May 2024 Briefing

[13] There have been additional developments in the district court, including the district court's distribution of the funds remaining in escrow. Although we may take judicial notice of these proceedings, *see In re Syngenta II*, 95 F.4th at 1277 n.26, they are not particularly germane to the issues currently before us.

Order"), Nos. 21-3110 et al., at *1 (10th Cir., filed May 28, 2024). We concluded that it was appropriate for the parties to submit briefing on the IRPA Pool Allocation Appeals.[14] But in light of the supplemental briefing that we permitted in the Fee Allocation Appeals regarding the effect of the June 2021 IRPA Pool Allocation Order, as well as our earlier orders from July 2021, we concluded that the parties' briefs in the IRPA Pool Allocation Appeals should be circumscribed as to both topic and length.

Specifically, we observed that "the impact of the allocation of the IRPA Pool on the overall fee allocation scheme was already briefed by Byrd/Shields and Hossley-Embry and addressed by us in *In re Syngenta* [*I*]," so "[i]ssues related to the impact of the [June 2021] IRPA Pool [Allocation] Order on the overall fee allocation are thus not before us" in the IRPA Pool Allocation Appeals. *Id.* at *5. We accordingly specified that "in light of our previous decisions—including our July 2021 orders—briefing in [the IRPA Pool Allocation Appeals] is limited to the allocation *of* the IRPA Pool itself." *Id.* We directed the parties to address "this issue," which we described as "narrow," in their briefing. *Id.*

Recognizing that the Objecting Firms might disagree with our delineation of what was at issue in the IRPA Pool Allocation Appeals, we gave them an opportunity to raise arguments to the contrary. Specifically, we stated that "[i]f the parties

[14] Accordingly, we granted in part the Objecting Firms' motion to lift the stay and lifted the abatement of the IRPA Pool Allocation Appeals. We kept the abatement in place as to the Contingent Cross-Appeal. And we denied the motions to dismiss or summarily affirm the IRPA Pool Allocation Appeals.

disagree with the scope of the issues to be decided in [the IRPA Pool Allocation Appeals], they may raise arguments on this point in their merits briefing." *Id.* at *5 n.3. We observed, though, that we were bound by our published decisions in *In re Syngenta I* and *In re Syngenta II*.

After the issuance of our May 2024 Briefing Order, the parties timely filed their opening and response briefs.[15]

II

"[W]e must examine our jurisdiction even when no party raises it." *In re Syngenta I*, 61 F.4th at 1171. The doctrine of finality is one limitation on our jurisdiction. Specifically, "[w]hen it comes to *when* federal appellate courts may take a case, Congress has said that we may usually hear appeals only from 'final decisions of the district courts of the United States.'" *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1292 (10th Cir. 2011) (quoting 28 U.S.C. § 1291). "Determining finality[] . . . is a functional inquiry: when a district court has no more to do but 'execute the judgment,' we know that the decision it has entered is final for the purposes of conferring jurisdiction under § 1291." *In re Syngenta I*, 61 F.4th at 1171 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521–22 (1988)).

[15] The Objecting Firms, however, elected not to file reply briefs. Though the filing such briefs was optional, a consequence of their failure to file them is that they have waived any non-obvious rejoinders to arguments raised in the response brief. *See Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019); *see also Crosby v. Warden ADX*, No. 22-1173, 2022 WL 17826117, at *1 (10th Cir. Dec. 21, 2022) (unpublished) ("Mr. Crosby did not file a reply brief to address the respondents' mootness argument. By failing to address the mootness argument, he has waived any responses that are not obvious." (footnote omitted)).

The Objecting Firms properly appeal from a final order of the district court. Indeed, this conclusion is driven by our discussion of finality in *In re Syngenta I*. There, we concluded that it was the June 2021 IRPA Pool Allocation Order that provided the "final resolution" to the attorneys' fees litigation. *In re Syngenta I*, 61 F.4th at 1173. We reasoned that:

> [O]ur jurisdictional inquiry in this case centers on whether there is an order or judgment that has resolved all outstanding fee issues, which would render the postjudgment litigation final and appealable. Such an order did not exist before June 2021. Prior to that, we had orders that only had the effect of continually moving the Kansas district court toward a final resolution of all outstanding fee issues. That final resolution did arrive, however, with the [June 2021] IRPA Pool Allocation order.

Id.

What was true in *In re Syngenta I* remains true today. The June 2021 IRPA Pool Allocation Order qualifies as a final judgment for purposes of 28 U.S.C. § 1291. And the Objecting Firms timely filed notices of appeal after the entry of the June 2021 IRPA Pool Allocation Order. Thus, we have appellate jurisdiction over the IRPA Pool Allocation Appeals.

III

As demonstrated by the tortuous procedural history discussed above, the IRPA Pool Allocation Appeals—and the accompanying Contingent Cross-Appeal—have represented only one aspect of the Objecting Firms' sweeping challenges to the district court's various attorneys' fees orders. Specifically, the IRPA Pool Allocation Appeals challenge the June 2021 IRPA Pool Allocation Order, which adopted the

special master's May 2021 R&R that addressed which IRPA submissions should be accepted and which should be denied. Crucially, the IRPA Pool Allocation Appeals relate to the issue of the allocation of the $60 million in the IRPA pool—and *only* that issue.

In light of this reality, the Objecting Firms' challenge here to the June 2021 IRPA Pool Allocation Order stumbles out of the gate. Despite the fact that we have made clear the limited scope of what remains for decision in this attorneys' fees litigation, the Objecting Firms fail to make any arguments in their opening briefs that address the issues that are now before us. Instead, all of the arguments that the Objecting Firms raise in their opening briefs relate to issues that we have already decided, such as the propriety of the total allocation *to* the IRPA pool and the accompanying modification of the Objecting Firms' contingent-fee contracts, or to issues that are otherwise not properly before us. We decline to address these nonresponsive arguments, which fall outside the scope of the IRPA Pool Allocation Appeals.

Once we set aside the Objecting Firms' challenges that are outside the scope of these appeals, nothing else remains. Despite our explicit invitation to the parties to voice any objections to our understanding of the limited scope of these appeals, the Objecting Firms do not challenge our delineation of this scope. And they raise no arguments about the substance of the June 2021 IRPA Pool Allocation Order or the allocation of the $60 million within the IRPA pool. They have thus waived appellate

review of any challenge to the district court's June 2021 IRPA Pool Allocation Order.

Accordingly, we **affirm**. And because we affirm the June 2021 IRPA Pool Allocation Order, we also **dismiss as moot** the Contingent Cross-Appeal.

A

We begin by discussing a legal doctrine that proves to be quite important in our resolution of these appeals—the doctrine of appellate-briefing waiver. "The first task of an appellant is to explain to us why the district court's decision was wrong." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). "Recitation of a tale of apparent injustice may assist in that task, but it cannot substitute for legal argument." *Id.* And "[w]e cannot rule on those issues the appellant does not bring to our attention." *United States v. Fisher*, 805 F.3d 982, 991 (10th Cir. 2015). In keeping with these principles, "[a]n appellant's opening brief must identify 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.'" *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (quoting FED. R. APP. P. 28(a)(9)(A) (2006)).

"Consistent with this requirement, we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief." *Id.* at 1104; *see also Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Issues not raised in the opening brief are deemed abandoned or waived." (quoting *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004))). This is the doctrine of appellate-briefing waiver. Put simply, "we cannot 'make

arguments for' an appellant," *Meek v. Martin*, 74 F.4th 1223, 1276 (10th Cir. 2023) (quoting *United States v. Yelloweagle*, 643 F.3d 1275, 1284 (10th Cir. 2011)), so if an appellant fails to address an issue in its opening brief, we ordinarily deem that issue waived and decline to consider it, *see United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019). As a corollary, we also have a general rule that "appellate courts will not entertain issues raised for the first time on appeal in an appellant's reply brief." *Sawyers*, 962 F.3d at 1286 (quoting *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006)).

A species of preservation, appellate-briefing waiver is part of "the 'winnowing process' of litigation that permits a court to 'narrow what remains to be decided.'" *Walker*, 918 F.3d at 1151 (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008)). And this doctrine works harmoniously with the principle of party presentation, which undergirds our adversarial system of adjudication. *See Santucci v. Commandant*, 66 F.4th 844, 851 n.9 (10th Cir. 2023).

B

Turning to our analysis of the IRPA Pool Allocation Appeals, we conclude that we need not actually reach any of the Objecting Firms' arguments. It is clear that the Objecting Firms take issue with how the allocation of the $503 million in attorneys' fees has played out. But, at bottom, the Objecting Firms misunderstand what is at issue in these remaining appeals and they fail to make any arguments that actually challenge the district court's June 2021 IRPA Pool Allocation Order. Moreover, they have waived any challenge to the limited scope of the IRPA Pool Allocation Appeals

or to the substance of the district court's ruling. It follows that they have not met their "first task" of showing that the district court's June 2021 IRPA Pool Allocation Order was "wrong." *Nixon*, 784 F.3d at 1366.

1

"We first review what is at issue in th[ese] appeal[s]—and what is not." *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1028 (10th Cir. 2022). As demonstrated by the procedural history discussed above, we have already decided the Fee Allocation Appeals, which challenged, *inter alia*, the district court's four-pool allocation scheme, the allocation of shares of the $503 million to each pool, and the district court's modification of contingent-fee contracts. *See In re Syngenta I*, 61 F.4th at 1137–38, 1169–70. And we have concluded that we lack subject-matter jurisdiction over the Objecting Firms' challenge to the district court's approval of the Watts Guerra settlement agreement and the accompanying disbursement orders. *See In re Syngenta II*, 95 F.4th at 1295. Those issues are settled and cannot be relitigated here. *See Bay v. Anadarko E&P Onshore LLC*, 73 F.4th 1207, 1216 (10th Cir. 2023) ("[I]t is well-settled that subsequent panels follow legal rulings of earlier panels.").

The IRPA Pool Allocation Appeals challenge the district court's June 2021 IRPA Pool Allocation Order. And all that this order did was to accept the special master's May 2021 R&R, overrule objections, and approve or disapprove specific IRPA pool submissions. The June 2021 IRPA Pool Allocation Order did not allocate the $60 million *to* the IRPA pool. Nor did it modify the Objecting Firms' contingent-fee contracts with their clients.

Rather, it was the December 2018 Fee Allocation Order that earmarked $60 million for the IRPA pool and determined that the IRPAs should receive a fee equivalent to approximately ten percent of their clients' recovery. We have already affirmed many of the district court's attorneys' fees orders, including the critical December 2018 Fee Allocation Order. *See In re Syngenta I*, 61 F.4th at 1138, 1169–70. Moreover, we have already heard arguments regarding the impact of the June 2021 IRPA Pool Allocation Order on the overall fee allocation scheme. *See id.* at 1169 n.26. And we have already rejected arguments regarding the additional hours expended by IRPAs in helping their clients navigate the claims process. *See id.* at 1223–24 (rejecting the Objecting Firms' argument that the district court abused its discretion because it "faile[d] to account for the extra hours individually retained private attorneys would need to expend").

In light of our previous decisions and the parties' representations—and, importantly, to prevent relitigation of issues that we have already decided—we specifically circumscribed the length and topics of the parties' briefing in the IRPA Pool Allocation Appeals. That is, in our May 2024 Briefing Order, we instructed the parties that briefing would be "limited to the allocation *of* the IRPA Pool itself." May 2024 Briefing Order at *5. In doing so, we signaled to the parties what already should have been clear from our previous decisions: that the IRPA Pool Allocation Appeals would *not* serve as a forum for relitigation of the district court's four-pool allocation scheme, the modification of contingent-fee contracts, and the amount allocated *to* each of the pools, including the IRPA pool. *See id.* ("Issues related to

the impact of the IRPA Pool [Allocation] Order on the overall fee allocation are thus not before us . . . ."). Accordingly, the focus of the IRPA Pool Allocation Appeals should be on challenges to only the substance of the district court's June 2021 IRPA Pool Allocation Order, which allocated the $60 million within the IRPA pool by approving and disapproving IRPA submissions. *See id.*

2

The Objecting Firms failed to follow these instructions and have not tailored their briefing to the issues that are actually relevant to the IRPA Pool Allocation Appeals. Although the Objecting Firms raise three discrete arguments in their opening brief, these arguments do not fall within the scope of the instant appeals because they do not challenge the "allocation *of* the IRPA Pool." May 2024 Briefing Order at *5.[16] Their arguments are instead attempts to unwind our decision in *In re Syngenta I* and challenge the basic principles of the four-pool allocation scheme. We thus decline to reach the merits of these arguments. *See Matios v. City of Loveland*, No. 22-1394, 2023 WL 4145905, at *2 n.3 (10th Cir. June 23, 2023) (unpublished) ("This appeal is limited to the district court's sanctions order. To the extent that Mr.

[16] The Objecting Firms briefly assert that "no law firm has standing to challenge" the IRPA Pool Allocation Appeals or "to argue against Appellants' rights to a greater contingency fee because Appellants' claims 'would have no impact on the fees that a particular attorney could receive.'" Byrd/Shields's Opening Br. at 3 (quoting *In re Syngenta II*, 95 F.4th at 1287); *accord* Hossley-Embry's Opening Br. at 3. To the extent that the Objecting Firms intend this as an argument that MDL Co-Lead Counsel cannot defend the district court's order in this appeal, we find this contention to be—at first blush—completely meritless. And, in any event, it is underdeveloped and gives us no meaningful foundation to consider it further.

Matios raises arguments outside the scope of this appeal, . . . we do not address them.").[17]

First, Byrd/Shields[18] argue that the district court committed plain error when it exercised jurisdiction over (and modified) a number of contingent-fee contracts to which Paul Byrd Law Firm and Shields Law Group were parties. According to Byrd/Shields, the district court's exercise of jurisdiction over these contracts, which involve claims that were pending in Minnesota state court, was at odds with the district court's own orders and the settlement agreement with Syngenta. Thus, they argue, the district court did not have jurisdiction to modify these contingent-fee contracts. Acknowledging that this issue was not raised before the district court, Byrd/Shields argue—in a perfunctory manner—that they are entitled to relief under our plain-error standard.[19]

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[17] We rely on unpublished cases for their persuasive value only and do not treat them as binding precedent. *See United States v. Engles*, 779 F.3d 1161, 1162 n.1 (10th Cir. 2015).

[18] Hossley-Embry does not raise this argument.

[19] We note another threshold problem with this argument: Byrd/Shields's argument that they are entitled to relief under our plain-error standard is insufficiently developed to preserve the issue for our review. By their own admission, Byrd/Shields forfeited this argument by failing to raise it before the district court. Generally, litigants who forfeit an issue before the district court must "invoke[] and advocate[] for the issue under our plain error rubric" in order to be entitled to appellate review; otherwise, they effectively waive review of the issue. *In re Syngenta I*, 61 F.4th at 1181.

Although Byrd/Shields invoke our plain-error standard, they fail to adequately advocate that they are entitled to relief under that exacting standard. They devote only a single conclusory paragraph to the issue of whether they are entitled to relief

We need not, and do not, reach this argument because it is outside the scope of the issues presented by the IRPA Pool Allocation Appeals. It is clear beyond peradventure that this argument is not a challenge to "the allocation *of* the IRPA Pool itself." May 2024 Briefing Order at *5. Obviously, a challenge to the district court's exercise of jurisdiction over fee contracts from Minnesota in 2018 is not a challenge to the district court's allocation of the IRPA Pool in 2021. Indeed, Byrd/Shields themselves expressly argue that this purported error means that we should vacate the December 2018 Fee Allocation Order. *See* Byrd/Shields's Opening Br. at 5 ("Therefore, the district court's December 31, 2018 Judgment capping the contingent fee should be vacated."). They make no argument that this purportedly erroneous exercise of jurisdiction requires vacatur of the June 2021 IRPA Pool Allocation Order, which is at issue here.

Second, the Objecting Firms argue that the district court abused its discretion when it set a contingent-fee cap for IRPAs because that cap was based on a prediction about the simple and streamlined nature of the settlement-claim process—a prediction that, according to the Objecting Firms, proved to be inaccurate.

Again, we decline to reach the merits of the Objecting Firms' argument. Fatally, it does not relate to the allocation *of* the $60 million within the IRPA pool.

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under our plain-error standard. Such a barebones discussion of our plain-error standard does not suffice. *See Butler v. Daimler Trucks N. Am., LLC*, 74 F.4th 1131, 1143–44 (10th Cir. 2023); *cf. Walker*, 918 F.3d at 1151 ("[A]rguments may be deemed waived when they are advanced in an opening brief only 'in a perfunctory manner.'" (quoting *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004))).

The Objecting Firms seek to once again challenge the allocation of funds *to* the IRPA pool and the modification of their contingent-fee contracts—issues that we already addressed in *In re Syngenta I* and that, pursuant to our May 2024 Briefing Order, are outside the scope of this appeal.

Tellingly, the Objecting Firms seek to make arguments about the modification of their contingent-fee contract that they raised earlier in their motion to reconsider (and at other points in the record). But we already rejected these arguments in *In re Syngenta I* when we concluded that (1) the Objecting Firms had waived their opportunity to challenge the denial of their motions for reconsideration and (2) the Objecting Firms' arguments were unavailing because "complaints about the district court's purported failure to account for the extra hours individually retained private attorneys would need to expend are irrelevant to the overall fee allocation framework." 61 F.4th at 1223–24.

In fact, the Objecting Firms themselves essentially admit that the question of whether to adjust the total amount allocated to the IRPA Pool was not at issue in the May 2021 R&R and the June 2021 IRPA Pool Allocation Order—which, of course, are the orders underlying these appeals. *See* Byrd/Shields's Opening Br. at 10 ("The only 'particular matter' in the R&R was whether the Special Master properly apportioned the 6.6% in contingency fees among the attorneys whose claim forms had been accepted. The Special Master did not, and was never going to decide whether to adjust the 6.6% contingent attorneys' fees based on work performed."). Yet what the Objecting Firms do not see—or do not wish to see—is that challenges

to the total amount allocated to the IRPA Pool are outside the scope of these appeals. As we specifically told the parties, the briefing here in the IRPA Pool Allocation Appeals must focus on the substance of the June 2021 IRPA Pool Allocation Order: "the allocation *of* the IRPA Pool." May 2024 Briefing Order at *5. The Objecting Firms' arguments fall well outside of that scope, and we will not consider them.

Third, the Objecting Firms argue that the district court violated their due process rights when it capped their contingent-fee contracts before it knew the scope of post-settlement work and because it did not award compensation in a "fair and evenhanded manner." Byrd/Shields's Opening Br. at 17 (quoting *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 615 (1st Cir. 1992)). This argument fails for the same reason as the others: once again, it does not challenge the allocation *of* the IRPA pool—instead, like the Objecting Firms' second argument, it challenges the overall allocation *to* the IRPA pool and the modification of the Objecting Firms' contingent-fee contracts. Thus, this argument, too, falls outside the scope of the IRPA Pool Allocation Appeals, and we decline to reach it.

3

As we explained above, our May 2024 Briefing Order made clear that the IRPA Pool Allocation Appeals would not give the parties another chance to challenge the overall fee allocation scheme, which was already litigated in *In re Syngenta I*. Instead, the parties could brief matters related to the "allocation *of* the IRPA Pool," an issue that we did not reach in *In re Syngenta I*. May 2024 Briefing Order at *5.

As we have seen, none of the arguments made by the Objecting Firms in their opening briefs fall within this limited scope.

Nor is there any reason to reconsider our conclusion regarding the limited scope of the IRPA Pool Allocation Appeals. In our May 2024 Briefing Order, we invited parties who disagreed with our understanding that the only issues remaining for decision were issues related to "allocation *of* the IRPA Pool" to explain why we were mistaken in that conclusion. *Id.* Specifically, we wrote that "[i]f the parties disagree with the scope of the issues to be decided in Appeal Nos. 21-3110 & 21-3111, they may raise arguments on this point in their merits briefing." *Id.* at *5 n.3.

The Objecting Firms did not take us up on our invitation. Nowhere in the opening briefs do they challenge our May 2024 Briefing Order articulating the scope of the IRPA Pool Allocation Appeals. Put differently, they have not made any effort "to explain to us why" our understanding of the limited scope of what remained for decision "was wrong." *Nixon*, 784 F.3d at 1366. Indeed, the Objecting Firms do not even mention our May 2024 Briefing Order in their opening briefs.

The upshot is that the Objecting Firms have waived any argument that the scope of the IRPA Pool Allocation Appeals is broader than what we described in our May 2024 Briefing Order—*viz.*, "the allocation *of* the IRPA Pool," not the "impact of the IRPA Pool [Allocation] Order on the overall fee allocation." May 2024 Briefing Order at *5. Again, under the doctrine of appellate-briefing waiver, we ordinarily deem arguments not raised in the opening briefs to be waived, and we usually decline to reach the merits of waived issues. *See Walker*, 918 F.3d at 1151. That applies

with full force here: the Objecting Firms never explained if or how they "disagree[d] with the scope of the issues to be decided in [the IRPA Pool Allocation Appeals]." May 2024 Briefing Order at *5 n.3. We thus deem waived, and decline to reach, any challenge to the scope of the IRPA Pool Allocation Appeals as we have defined it.

4

Moreover, in light of the fact that the Objecting Firms raise no arguments at all in their opening briefs as to "the allocation *of* the IRPA Pool," we deem any challenge to the actual substance of the June 2021 IRPA Pool Allocation Order—which allocated the $60 million *within* the IRPA pool among the various firms by approving and disapproving IRPA submissions—to be waived. *Id.* The Objecting Firms make no effort whatsoever to show why "the district court's decision" in approving and disapproving the various IRPA submissions "was wrong." *Nixon*, 784 F.3d at 1366. That includes the district court's decision related to the Objecting Firms' own IRPA submissions. We will not—and cannot—do the Objecting Firms' jobs for them. *See Walker*, 918 F.3d at 1151; *Fisher*, 805 F.3d at 991.

5

In sum, the Objecting Firms fail to reckon with the limited scope of the IRPA Pool Allocation Appeals, and this ultimately proves fatal. *First*, it is important to recognize that the IRPA Pool Allocation Appeals are concerned only with issues related to the "the allocation *of* the IRPA Pool." May 2024 Briefing Order at *5. *Second*, the arguments that the Objecting Firms raise in their opening briefs fall outside this scope, and we accordingly decline to consider them. *Third*, the

Objecting Firms do not raise any argument in their opening briefs that we incorrectly delineated the scope of what remained for decision in the IRPA Pool Allocation Appeals. *Fourth*, they have made no argument that the district court's "allocation *of* the IRPA Pool" was erroneous, so they have waived any challenge on this point.

Once we eliminate the arguments that the Objecting Firms have waived and the arguments that fall outside of the scope of these appeals, nothing remains of the IRPA Pool Allocation Appeals (Nos. 21-3110 & 21-3111). We accordingly **affirm**.

C

Our conclusion as to the IRPA Pool Allocation Appeals also resolves the Contingent Cross-Appeal filed by MDL Co-Lead Counsel. That appeal was brought to preserve MDL Co-Lead Counsel's right to seek reversal or modification of the district court's order if the Objecting Firms ultimately prevailed. *See* ECF No. 4618 at *1–2. MDL Co-Lead Counsel has represented to this Court that if we affirm in the IRPA Pool Allocation Appeals, "the cross-appeal should be dismissed as moot." MDL Co-Lead Counsel's Resp. to the Ct.'s April 2, 2024 Order, No. 21-3121, at *6 (10th Cir., filed Apr. 16, 2024).

We agree. "One fundamental principle of our subject-matter jurisdiction is the 'constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *In re Syngenta II*, 95 F.4th at 1279 (quoting *Brown v. Buhman*, 822 F.3d 1151, 1163 (10th Cir. 2016)). The doctrine of mootness ensures that federal courts stay within the bounds demarcated by Article III. *See id.* "A 'suit becomes moot when the issues presented are no longer "live" or the parties lack a legally

cognizable interest in the outcome.'" *Brown*, 822 F.3d at 1165 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

The Contingent Cross-Appeal has become moot. Because we fully affirm the June 2021 IRPA Pool Allocation Order challenged in the Objecting Firms' appeals, there is no live case or controversy with respect to the Contingent Cross-Appeal. *See In re Syngenta I*, 61 F.4th at 1222 (dismissing a contingent cross-appeal when the underlying fee orders had been fully affirmed). Accordingly, we dismiss the Contingent Cross-Appeal (No. 21-3121).

IV

All litigation must come to an end. In their quest to get additional bites at a well-gnawed apple, the Objecting Firms have failed to raise any arguments that fall within the scope of the IRPA Pool Allocation Appeals, as defined by our May 2024 Briefing Order and other decisions. And they fail to explain why we are mistaken in our understanding of the limited scope of the IRPA Pool Allocation Appeals.

Accordingly, with respect to the IRPA Pool Allocation Appeals (Nos. 21-3110 & 21-3111), we **AFFIRM** the district court's June 2021 IRPA Pool Allocation Order, which allocated funds within the IRPA pool. With respect to the Contingent Cross-Appeal (No. 21-3121), we **LIFT THE ABATEMENT** and **DISMISS THE APPEAL AS MOOT**.