ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7058

In re: Domestic Airline Travel Antitrust

Appeal from the United States District Court
for the District of Columbia, MDL Docket No. 2656; Misc. No. 15-1404 (CKK)
(Hon. Colleen Kollar-Kotelly)

BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF JURISDICTION

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Court-Appointed Amicus Curiae

October 26, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under D.C. Circuit Rule 28(a)(1), court-appointed amicus curiae Erica Hashimoto states the following:

A. Parties and Amici

Except for the following, all parties and amici appearing before the district court and this Court are listed in appellants' Certificate as to Parties, Ruling, and Related Cases (Dkt. No. 24):

Erica Hashimoto from the Appellate Litigation Clinic at Georgetown University Law Center is court-appointed amicus curiae in support of this Court's jurisdiction.

B. Rulings Under Review

References to the rulings at issue appear in the appellants' Certificate as to Parties, Ruling, and Related Cases (Dkt. No. 24).

C. Related Cases

This case was not previously before this or any other court.

Two related cases, filed by other settlement objectors and consolidated with this appeal, have since been voluntarily dismissed. Case No. 19-7059 was filed by objector Stephan Willett and Case No. 19-7060 was filed by objector Michael Argie. Both cases were consolidated

with this case on June 20, 2019. Both cases were voluntarily dismissed on July 30, 2019.

Undersigned counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

**Authorities upon which we chiefly rely are marked with asterisks.*

Statutes

Rules

GLOSSARY

Abbreviation	Meaning
American	American Airlines, Inc.
Delta	Delta Air Lines, Inc.
MDL	Multidistrict Litigation
Panel	United States Judicial Panel on Multidistrict Litigation
Southwest	Southwest Airlines Co.
United	United Airlines, Inc.

STATEMENT OF JURISDICTION

This is an appeal from a district court order approving class action settlements between plaintiffs and two of four defendant airlines in multidistrict litigation (MDL). The cases now in this MDL were originally brought under the Sherman and Clayton Acts against four defendants—American, Delta, Southwest, and United Airlines. *See* 15 U.S.C. §§ 1, 3, 15, 26; ECF 91 ¶¶ 1, 8. Accordingly, the transferor district courts—the United States District Courts for the Northern District of Illinois, Northern District of California, Eastern District of New York, and District of Columbia—had subject matter jurisdiction over these actions. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1337(a).

The United States Judicial Panel on Multidistrict Litigation transferred these cases to the United States District Court for the District of Columbia for coordinated pre-trial proceedings pursuant to the Multidistrict Litigation statute. *See* ECF 1; 28 U.S.C. § 1407. Transfer was appropriate because the cases were "civil actions involving one or more common questions of fact [that were] pending in different districts" and therefore could "be transferred to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a).

Two defendants—Southwest and American Airlines—entered preliminary settlement agreements with plaintiffs in the MDL. *See* ECF 197; ECF 249. Several objectors, including appellants M. Frank Bednarz and Theodore Frank, challenged the fairness of those settlements. *See* ECF 329; ECF 354 at 61–68. On May 10, 2019, the district court rejected those challenges and entered an order granting plaintiffs' motion for final approval of the American and Southwest Airlines settlements. ECF 373.

Bednarz and Frank, as objectors, are parties to the American and Southwest settlements for purposes of appealing the settlement approvals. *See Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002). They timely appealed the district court's settlement approval on June 10, 2019. *See* Fed. R. App. P. 4(a)(4)(A); Fed. R. App. P. 26(a)(1)(C) (noting that where, as here, the last day of a thirty-day period to appeal falls on a weekend, "the period [to appeal] continues to run until the end of the next day that is not a [weekend]"). Undersigned counsel was appointed to brief whether this Court has jurisdiction over this appeal. As discussed below, the district court's order approving the American and Southwest settlements under Federal Rule of Civil Procedure Rule 23 was final under 28 U.S.C. § 1291, giving this Court jurisdiction. *See infra* at 19–

34. In the alternative, the order approving the settlement had the practical effect of granting an injunction so this Court has jurisdiction over Bednarz and Frank's interlocutory appeal under 28 U.S.C. § 1292. *See infra* at 34–37.

STATEMENT OF THE ISSUES

1. Whether, in multidistrict litigation (MDL), an order rejecting a challenge to a fair-settlement determination, dismissing settling defendants with prejudice, and finalizing settlement terms is final and appealable by settlement objectors under 28 U.S.C. § 1291 even when plaintiffs have pending litigation in the MDL against non-settling defendants.

2. Alternatively, whether such an order, if it compels the settling defendants to take actions under the threat of sanction, is appealable on an interlocutory basis under 28 U.S.C. § 1292(a)(1) and the "practical effect" doctrine of *Carson v. American Brands*, 450 U.S. 79 (1981).

STATUTES AND REGULATIONS

All pertinent statutes and regulations are included as an addendum at the end of the brief.

STATEMENT OF THE CASE[1]

This MDL arises out of an alleged conspiracy by American, Delta, Southwest, and United Airlines to anticompetitively drive up passenger ticket prices, from the first quarter of 2009 to the present, in violation of Sections 1 and 3 of the Sherman Antitrust Act (15 U.S.C. §§ 1, 3). Plaintiffs, travelers on the defendant airlines, filed suit under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover treble damages, equitable relief, costs, and attorneys' fees. *See* ECF 91 ¶¶ 1, 8, 11–22. Plaintiffs allege, among other things, that the four airlines colluded to limit passenger capacity as part of a scheme to fix prices for air passenger transportation services in the domestic United States. *Id.* ¶ 1. The airlines denied these claims. *See* ECF 106 at 12.

Plaintiffs originally filed separate lawsuits in multiple districts, each of which alleged the same Sherman Act violations against all four defendants. *See, e.g.*, *Blumenthal v. Am. Airlines, Inc.*, No. 1:15-cv-01056 (D.D.C. July 6, 2015) (listed in ECF 1 at 4). In October 2015, the Judicial

[1] Undersigned counsel was appointed solely to present arguments in support of this Court's jurisdiction. Accordingly, the Statement of the Case is limited to the procedural history necessary to provide context for the jurisdictional analysis.

Panel on Multidistrict Litigation consolidated the twenty-three then-pending antitrust actions against the four defendant airlines and transferred them to the United States District Court for the District of Columbia for pretrial proceedings pursuant to 28 U.S.C. § 1407. ECF 1. After this original transfer, the Panel continued to transfer additional related cases. *See, e.g.*, ECF 73 (noting seventy-four additional actions had been transferred as of January 2016). There are currently 105 cases consolidated in this MDL. ECF 374 at 2.

The district court designated co-lead interim class counsel, ECF 76 at 3–4, to manage plaintiffs' interests in the litigation. *See* ECF 38 at 2–3. Plaintiffs then filed a consolidated complaint in March 2016. ECF 91. Soon after, defendants filed a motion to dismiss, ECF 106, which the district court denied. ECF 123. The district court then entered a scheduling order, and discovery began in January 2017. *See* ECF 152.

A. The Settlement Agreements

Plaintiffs moved for preliminary approval of settlement agreements with Southwest in December 2017 and American in June 2018. ECF 196 (Southwest); ECF 248 (American). Southwest agreed to make a $15 million payment to plaintiffs, while American agreed to $45 million. ECF

373-1 Ex. A ¶ 37; ECF 373-1 Ex. B ¶ 37. Both airlines agreed to cooperate with plaintiffs in the ongoing litigation against Delta and United, including by producing documents and making one or more employees available for depositions and/or trial. *See* ECF 373-1 Ex. A ¶¶ 45–55; ECF 373-1 Ex. B ¶¶ 45–50. In exchange, plaintiffs agreed to release both Southwest and American from any further liability arising from the action. ECF 373-1 Ex. A ¶¶ 38–39, 41; ECF 373-1 Ex. B ¶¶ 38–39. The district court preliminarily approved the Southwest settlement in January 2018, certifying a settlement class that included "[a]ll persons and entities that purchased air passenger transportation services" from Southwest for flights in the domestic United States between July 1, 2011 and December 20, 2017. *See* ECF 197 ¶ 3. In June, the district court preliminarily approved the American settlement, certifying a similar class of people who purchased air passenger transportation services from American. *See* ECF 249 ¶ 3.

Plaintiffs then moved for approval of a settlement notice program. ECF 257. The program included, among other things, direct emails to settlement class members, print and online advertisements, and a dedicated website. *See* ECF 257-1 at 4–6. The settlement notices also

advised class members of their right to opt out of the settlements. *See id.* at 11. The district court approved the settlement notice program, *see* ECF 267, and plaintiffs provided that notice. *See* ECF 299-1. Plaintiffs then filed a motion for final approval of the settlement agreements with Southwest and American in December 2018. *See* ECF 299.

B. Bednarz and Frank Enter the Litigation to Object to the Settlement

Members of the American and Southwest settlement classes were then permitted to object to or opt out of the proposed settlements. M. Frank Bednarz and Theodore Frank, members of the American and Southwest settlement classes who had not appeared as named parties in any of the litigation against the four defendant airlines, filed an objection on January 31, 2019. *See* ECF 329.[2] Bednarz and Frank objected on a number of grounds, including the possibility that the entire settlement fund would be distributed *cy pres*; the request to pay attorneys regardless of whether the fund was distributed to class members or *cy pres*; the

[2] Frank originally filed objections on behalf of himself and Bednarz on January 4, 2019. *See* ECF 307. After Frank amended those objections twice, *see* ECF 310, 328, the district court ordered Frank to file a consolidated objection with all corrected declarations and exhibits. *See* Minute Order entered January 31, 2019. The corrected objections were docketed at ECF 329.

inadequacy of the notice provided to class members; and the inadequacy of the total dollar amount of the settlements. *See id.* at 3–7.

The district court held a fairness hearing on March 22, 2019, to determine whether to approve the settlement. *See* ECF 354. Before hearing from the objectors, the court asked class counsel and defendants to address the timing of any settlement approval. In particular, the court sought the parties' views about whether it should wait to finally approve the settlement until the case was resolved against Delta and United because resolution of the claims against them might increase the total settlement fund amount. *Id.* at 39–41.

In response to the court's question, class counsel and the settling defendants' counsel spoke at length about the need for finality to secure the settling defendants' cooperation in the ongoing litigation. *See id.* at 41–60. Class counsel emphasized that because the settling defendants' cooperation in the ongoing litigation would be "invaluable," immediately finalizing the settlement was preferable. *Id.* at 41. Counsel for Southwest also emphasized the need for finality, explaining that if the settlement were not finally approved, it would deprive defendants of the bargained-for finality and create the risk that they would need to be

ready to "gear up" for trial at any moment. *Id.* at 44; *see also id.* at 51 (counsel for American echoing the need for finality). Accordingly, plaintiffs' proposed order included language that would direct entry of final judgment under Rule 54(b). *See* ECF 351 ¶ 18; Fed. R. Civ. P. 54(b).

On May 10, 2019, the district court approved plaintiffs' motion for final approval of the settlement agreements. *See* ECF 373; ECF 374. The district court explained that the settlement was fair, reasonable, and adequate. *See* ECF 374 at 8–21 (citing Fed. R. Civ. P. 23(e)). Turning to Bednarz and Frank's objections, the district court concluded that none called into question the fairness or adequacy of the settlement agreements. *See id.* at 25, 27–31. After addressing the objections, the district court noted the discussion from the fairness hearing about the need for finality to ensure defendants' cooperation. *Id.* at 31–33. Crediting the parties' stated interest in finality, the district court approved the settlements under Rule 23(e), rather than waiting for the conclusion of the litigation with Delta and United. *See id.* at 33–34; ECF 373.

The "Order Approving Plaintiffs' Motion for Final Approval of Settlement Agreements" dismissed Southwest and American from the

litigation with prejudice. *See* ECF 373 at 5. The two payments from the settling airlines were combined into a single $60 million settlement fund. *Id.* at 4. "Without affecting the finality of this Order in any way," the court retained jurisdiction over attorneys' fees and the settlement fund. *Id.* at 5. The district court's order did not include plaintiffs' suggested language directing entry of a final judgment under Rule 54(b).

C. Bednarz and Frank Appeal the Settlements' Approval and Seek a Rule 54(b) Final Judgment in the District Court

Bednarz and Frank filed a notice of appeal on June 10, 2019. *See* ECF 384. In August 2019, they also filed a motion in the district court requesting that the settling parties be required to show cause why the final approval should not be rescinded, because the settling parties' failure to move for entry of a Rule 54(b) final judgment showed that they had misrepresented their need for finality at the fairness hearing. In the alternative, Bednarz and Frank requested that the district court enter a final judgment under Rule 54(b). *See* ECF 408.

The settling parties, citing Bednarz and Frank's Rule 54(b) motion before the district court, filed a motion in this Court to dismiss the appeal because the district court's order approving the settlement was not final (as Bednarz and Frank's Rule 54(b) motion necessarily admitted). In

response, Bednarz and Frank filed a motion in this Court to hold the appeal in abeyance, arguing that it would be "wasteful and pointless" to dismiss the appeal before the district court considered the pending motion for Rule 54(b) judgment. This Court granted Bednarz and Frank's motion in a per curiam order holding the appeal in abeyance until the district court resolved the Rule 54(b) motion.

On November 5, 2019, the district court denied Bednarz and Frank's motion to enter a Rule 54(b) judgment.[3] *See* ECF 424. The court explained that it had discretion to direct entry of a final judgment as to fewer than all claims if it "expressly determines that there is no just reason for delay" but that there were in fact reasons for delay. *See* ECF 425 at 8–9 (citing Fed. R. Civ. P. 54(b)). In particular, the court expressed its "hesitancy" to enter a final order in multidistrict litigation "where two of [the] defendant airlines had proffered money and cooperation in exchange for dismissal from this case; two airlines continue to litigate; attorneys' fees and future litigation expenses were stayed; and the amount of Settlement Funds is unknown and could increase

[3] The district court also denied the motion to issue a show cause order. *See* ECF 424.

exponentially depending on what happens with the continued litigation." ECF 425 at 14–15. Its order finally approving the settlement, the court noted, "struck a balance" by allowing plaintiffs to secure the cooperation of the settling defendants "at the same time that it prevents a fragmented appeal with regard to issues that have been determined by this Court to be obviously premature (attorneys' fees, *cy pres*, and the settlement fund allocation plan)." *Id.* at 15.

After the district court refused to issue a final judgment under Rule 54(b), this Court ordered that the motion to dismiss be referred to the merits panel. It set a briefing schedule and directed the parties to address in their merits briefing the jurisdictional issue, and in particular the effect of *Hall v. Hall*, 138 S. Ct. 1118 (2018), and *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015), on the finality issue. Finally, the Court appointed undersigned counsel as amicus curiae to present arguments in support of this Court's appellate jurisdiction.

SUMMARY OF THE ARGUMENT

This Court faces a novel question: In light of *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015), do objectors to a partial settlement involving only two of four defendants in an MDL have the right to appeal an order finding the settlement fair under Rule 23(e) when plaintiffs in the underlying MDL are still litigating against the non-settling MDL defendants?

The answer—because of the distinctive structure and function of MDL proceedings and the nature of the objectors' role—is yes. The ordinary rule that Section 1291 finality in multi-party cases exists only when all claims of all parties are final, *see Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 221 (D.C. Cir. 2011), typically makes sense: when a district court issues a final judgment in such cases, all parties can appeal from that final judgment, and an appellate court can consider all claims simultaneously. But as the Supreme Court explained in *Gelboim*, MDL cases are different. In an MDL, unlike in most multi-party litigation, the MDL district court may not fully resolve the litigation. Instead, once pretrial proceedings are completed, the MDL court must transfer the underlying cases (if they have not yet been

terminated) back to the district courts in which they originated. 28 U.S.C. § 1407(a). As *Gelboim* observed, if and when that happens, a litigant whose claims have been finally disposed of in the MDL may not be able to appeal, because such a transfer order—and any other subsequent order concerning the non-finalized litigation—would not represent "the dispositive ruling [the appellant] seek[s] to overturn on appeal." *Gelboim*, 574 U.S. at 415. To avoid this "quandary," the "sensible solution" is to grant immediate appeal when a litigant's role is finalized in an MDL. *Id.* at 414–15.

Bednarz and Frank's appeal, challenging the district court's fair-settlement determination in the American and Southwest cases, demonstrates why finality is analyzed differently in MDL litigation. If the Delta and United litigation does not settle prior to the conclusion of pretrial proceedings, the MDL court will transfer the litigation back to the numerous originating courts. It would then be unclear when, or if, Bednarz and Frank could appeal the district court's adverse determination. And the nature of the settlements—which require the settling defendants to take specified, difficult-to-revoke actions—only

reinforces the conclusion that this is a final judgment. *See* ECF 373-1 Ex. A. ¶¶ 45–55; ECF 373-1 Ex. B. ¶¶ 45–50.

Bednarz and Frank's appeal also has a completely "separate identit[y]" from the rest of the MDL, which further demonstrates finality. *Gelboim*, 574 U.S. at 413. There is no doubt that the district court order that Bednarz and Frank appeal is final under Federal Rule of Civil Procedure 23(e) and would be a final judgment were there no other defendants present in the MDL. *See* Fed. R. Civ. P. 23(e); ECF 373; ECF 374. The presence of Delta and United in the MDL does not defeat the finality of Bednarz and Frank's appeal because, as (at most) putative class members, they have no connection with that ongoing litigation. *See Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 297 (D.C. Cir. 2020). Bednarz and Frank entered the litigation only to object to the settlements, giving them a limited and singular role unconnected to the rest of the MDL. *See Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). The order approving the settlement and ending their distinct role in the MDL thus necessarily is final under Section 1291. *See Gelboim*, 574 U.S. at 413.

In the alternative, even if this is not a Section 1291 final judgment, Bednarz and Frank can appeal pursuant to Section 1292(a)(1) because

the district court's order approving the settlement agreements had the practical effect of granting an injunction. *See Carson v. Am. Brands*, 450 U.S. 79, 83 (1981). Such practical effect orders are appealable where they "affect[] predominantly all of the merits" of the litigation. *Salazar v. District of Columbia*, 671 F.3d 1258, 1262 (D.C. Cir. 2012) (internal citations and quotations omitted). The order approving the settlement has the practical effect of an injunction because it requires the settling defendants to cooperate with plaintiffs in the ongoing litigation against Delta and United under threat of contempt. *See* ECF 373 at 5; *Salazar v. District of Columbia*, 602 F.3d 431, 442 (D.C. Cir. 2010). And the district court's approval of the settlement resolves the merits of Bednarz and Frank's entire appeal. ECF 373 at 5. These settlements therefore constitute a practical effect order under *Carson* that may be immediately appealed under Section 1292(a)(1).

ARGUMENT

This Court has jurisdiction under 28 U.S.C. § 1291 because Bednarz and Frank may lose the right to appeal if they cannot appeal now and because the district court's order approving the American and Southwest settlements finally resolved Bednarz and Frank's objections to the settlements. *See Gelboim*, 574 U.S. at 414–15. Bednarz and Frank's objections to the settlement agreements—which would be final if there were no other defendants in the litigation—have a "separate identit[y]" from the rest of the MDL that weighs in favor of Section 1291 finality. *Id.* at 413; *see* ECF 373. In the alternative, even if this is not a final judgment, Bednarz and Frank can appeal pursuant to Section 1292(a)(1) because the district court's order approving the settlement agreements had the practical effect of granting an injunction. *See Carson*, 450 U.S. at 83.

I. THE DISTRICT COURT'S DETERMINATION OF SETTLEMENT FAIRNESS IN THIS MDL IS FINAL AND APPEALABLE UNDER 28 U.S.C. § 1291.

Even when other litigation is ongoing in an MDL, a litigant may appeal from a final decision in an MDL when two conditions are met. First, immediate appeal must be necessary to avoid the prospect of a litigant being permanently denied appeal due to MDL-specific

considerations. *See Gelboim*, 574 U.S. at 414–15. Second, the litigant's appeal must have a "separate identit[y]" from the other cases in the underlying MDL. *Id.* at 413. Bednarz and Frank's appeal meets both conditions and is thus final under Section 1291.[4]

A. The Unique Nature of MDL Litigation Means that Bednarz and Frank May Lose the Right to Appeal if this Order is Not Final.

Just as in *Gelboim*, the unique structure of an MDL may leave Bednarz and Frank with no chance to appeal if this judgment is not final. In an MDL, parts of the litigation may fail to resolve in the MDL court, and the doubts *Gelboim* identified as to whether the plaintiffs there could later appeal if the constituent cases were transferred back to the originating courts apply equally to Bednarz and Frank. *See Gelboim*, 574 U.S. at 414–15.

In *Gelboim*, plaintiffs appealed an MDL court's order dismissing their claims. 574 U.S. at 408. Because other plaintiffs with other claims continued to litigate in the MDL, the MDL court still had jurisdiction to

[4] This Court, in appointing undersigned counsel, asked counsel to consider the effect of *Gelboim* and *Hall v. Hall*, 138 S. Ct. 1118 (2018), on this Court's jurisdiction. This brief focuses primarily on *Gelboim* rather than *Hall*, given *Gelboim*'s particular relevance to MDL litigation. *Hall*, by contrast, concerned Rule 42(a) consolidation. *See Hall*, 138 S. Ct. at 1123.

issue additional pre-trial orders in that litigation. *Id.* at 414–15. The MDL court might even have needed to issue orders returning constituent cases to their originating courts, which would have raised the possibility of the originating courts issuing additional orders to resolve those constituent cases. *Id.* at 415. But any later order from the MDL court or originating court—which would bear no relation to the plaintiffs' claim—would not "qualify as the dispositive ruling [plaintiffs sought] to overturn on appeal." *Id.* It therefore would not trigger plaintiffs' right to appeal. *See id.*; *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (describing the usual rule that a "losing party" has "legal remedy by the ordinary process of appeal[ing]" an adverse dispositive order). As a consequence, if the order dismissing the *Gelboim* plaintiffs' claims was not final, those plaintiffs might never have been able to appeal because those later orders may not have given rise to an appeal right. The "sensible solution" to this "quandary" was to deem the order dismissing their claim final so that they could immediately appeal. *Gelboim*, 574 U.S. at 414–15.

To understand why MDL partial settlements present finality concerns similar to those presented in *Gelboim*, it is helpful to

understand how MDL settlements differ from other settlements. In the typical, non-MDL context, objectors to a partial settlement are not permanently harmed by having to wait for finality as to all claims of all parties: any order finally resolving all of the claims of all parties would be entered by the same court. That court would therefore have "disposed of all claims against all parties," which would clearly trigger an objector's appeal right. *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 221 (D.C. Cir. 2011).

But MDL litigation is different. As *Gelboim* emphasized, while it is possible that not-yet-decided cases would settle or be dismissed by the court conducting the MDL, it is also possible that those cases will fail to resolve in that court. *See* 574 U.S. at 415. In that event, the MDL court—which has jurisdiction over the cases only for "pretrial proceedings"—must transfer those cases back to their originating courts. 28 U.S.C. § 1407(a); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40–41 (1998) (holding that Section 1407(a)'s plain language precludes MDL courts from holding trials on parts of an MDL not determined in pretrial proceedings, and that those cases must instead be remanded to their originating courts for trial).

This creates an MDL-specific problem for those, like Bednarz and Frank, who want to appeal a decision that has been finally determined against them by the MDL court even as other cases remain pending before that court. If the MDL court returns the Delta or United litigation to the originating courts, the transferal order "would not qualify as the dispositive ruling [Bednarz and Frank] seek to overturn on appeal." *Gelboim*, 574 U.S. at 415. Requiring them to wait even longer for those returned cases to be *adjudicated* by the originating courts before appealing would make even less sense: those cases would no longer be any part of the consolidated MDL action, and there would thus be no justification for treating them as "a judicial unit" with the settled cases. *Id.*[5]

The upshot of *Gelboim* is that, for Bednarz and Frank, appeal may be now or never. If this Court denies appeal now and the Delta or United

[5] Indeed, if the objectors had to wait until transferred cases were adjudicated in their originating courts, further questions would arise. For example, assuming that not all of the transferred litigation would resolve at the same time in the originating courts, could objectors take appeal from the first resolved case? The last? And how would the objectors know which one starts the jurisdictional clock for filing a notice of appeal? *See Gelboim*, 574 U.S. at 414 (seeking to avoid "quandar[ies] about the proper timing of . . . appeals").

litigation does not resolve in the MDL court, Bednarz and Frank may never be able to appeal. This Court can and should avoid this potential "quandary" with the same "sensible solution" as in *Gelboim*: recognizing the finality of the district court's order. *Gelboim*, 574 U.S. at 414–15; *see also Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 796 (7th Cir. 2018) (reasoning that finality existed where a defendant might but might not have a second chance to appeal an interim attorneys' fees award because not allowing appeal would "put defendants in a bind" concerning whether and when to appeal and, post-*Gelboim*, such jurisdictional "dilemmas should be avoided."). Concluding that this is a final judgment appropriately recognizes the MDL-specific difficulties discussed in *Gelboim*, and—regardless of how the Delta and United aspects of the litigation resolve in the district court—guarantees Bednarz and Frank a right to appeal their claim.

Finally, the difficulty of later appeal is heightened by the specifics of the American and Southwest settlements, which require those defendants to take specific actions. In the settlements, both Southwest and American agreed to produce documents and to make employees available for informal interviews and for depositions to assist the

plaintiffs with their ongoing litigation against Delta and United. *See* ECF 373-1 Ex. A. ¶¶ 45–55; ECF 373-1 Ex. B. ¶¶ 45–50. If a court concluded in a later appeal that (a) the settlements were unfair, but (b) undoing the settlements would unfairly harm American and Southwest (who had acted in reliance on the settlements), it is unclear how a court could fairly resolve that issue. But it is clear how this Court can avoid it. By recognizing jurisdiction over Bednarz and Frank's appeal, this Court avoids the potential issues of a later appeal and honors *Gelboim*'s focus on preserving appeal rights in MDLs. *See Gelboim*, 574 U.S. at 414–15; *see also Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002) (noting that "appealing the approval of the settlement is [an objector's] only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.").

B. Bednarz and Frank's Completed Role in the MDL is Separate from the Named Plaintiffs' Litigation Against Delta and United Airlines.

Bednarz and Frank, as objectors, have a separate and distinctive role within the MDL, thus meeting *Gelboim*'s second finality requirement. They are parties to the American and Southwest litigation solely for the

purpose of appealing the approval of those settlements. They are not (and have never been) named plaintiffs in any of the constituent cases, and they entered the MDL only to challenge the fairness of the American and Southwest settlements that the district court has now approved. *See* ECF 329. Bednarz and Frank's limited and singular role as objectors challenging the settlement approval therefore gives them a distinct and separate identity from the MDL litigation. Because of this distinctive identity, the order ending their participation in the MDL necessarily gives rise to Section 1291 finality.

1. The district court's Rule 23(e) order approving the settlements resolved Bednarz and Frank's limited role in the litigation as objectors to the American and Southwest settlements.

Now that the district court has rejected Bednarz and Frank's challenge to the fairness of the settlements, *see* ECF 373, 374, they have a right to appeal that determination. *See Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). That appeal, however, is limited *solely* to challenging the district court's approval of the settlements—and Bednarz and Frank are parties only for that purpose. *See id.* (noting that, on appeal, objectors are parties only for the limited purpose of challenging a settlement fairness determination).

Moreover, this appeal is the totality of Bednarz and Frank's participation in the broader MDL. Bednarz and Frank are not parties to, or participants in, the Delta or United litigation. No class in the Delta and United litigation has yet been certified. *See* ECF 197 at 2 (certifying a class pursuant only to the Southwest settlement); ECF 249 at 2 (certifying a class pursuant only to the American settlement). Although certified class members are parties for some limited purposes, such as appealing the approval of a settlement or tolling the statute of limitations, *see Devlin*, 536 U.S. at 10, "*putative* class members . . . are *always* treated as nonparties." *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 297 (D.C. Cir. 2020) (first emphasis added). Because the class in the Delta and United litigation has not yet been certified, Bednarz and Frank are, at most, putative class members and therefore, "by definition," not parties before the district court in the Delta and United litigation. *Id.* at 298 (internal citations and quotations omitted).

If this Court were evaluating only Bednarz and Frank's role as objectors to the American and Southwest settlements, without considering the ongoing Delta and United litigation, the district court's Rule 23(e) approval of the settlement agreements would be a final

appealable judgment under Section 1291. The settlement agreements resolve all aspects of the litigation relating to American and Southwest's liability. *See* ECF 373 at 4–5. First, the total money to be paid into the settlement fund by each settling defendant is final. *See id.* at 4. This satisfies a "well-established principle" of finality by expressly determining the damages owed on the basis of that liability. *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1104 (D.C. Cir. 2001) (damages must be determined on liability for a decision on that liability to be considered final for purposes of judicial review). Moreover, the settling parties have agreed that the distribution to each class member will be "pro rata" with a "per capita return to class members," and class members will receive a second notice with an opportunity to file claims. ECF 374 at 19–20. The order therefore clarifies "who is entitled to what from whom," another important marker of finality. *See Franklin v. District of Columbia*, 163 F.3d 625, 628–29 (D.C. Cir. 1998) (quoting *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 591 (7th Cir. 1990)).

To be sure, the district court retains jurisdiction to implement the settlement, but that does not preclude finality. After Rule 23 finalization the district court may—and indeed often must—play a continued role in

settlement administration even where the settlement is final for purposes of appeal. *See, e.g.*, *Pigford v. Perdue*, 950 F.3d 886, 887–90 (D.C. Cir. 2020) (noting the continued jurisdiction retained by the district court over the administration of a consent decree finalized in 1999); *see also Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000) (exercising jurisdiction over appeal of the terms of the consent decree). But the district court's ongoing administration of these settlements cannot alter any of the underlying decisions regarding liability embodied in the agreements—it simply ensures that the settlements are executed as agreed. *See Dukore v. District of Columbia*, 799 F.3d 1137, 1140 (D.C. Cir. 2015) (a final decision under Section 1291 "leaves nothing for the district court to do but execute the judgment") (internal citations and quotations omitted). Therefore, the district court's continued jurisdiction to execute the judgment, which cannot alter any determination on the merits, does not preclude finality under Section 1291.

The two aspects of the settlements' execution that remain to be determined—attorneys' fees and the amount of the pro rata distribution of the settlement fund to class members—are unrelated to the resolution of American and Southwest's liability and do not affect the settlement

agreements' finality under Section 1291. Open questions about attorneys' fees and costs, *see* ECF 373 at 5, do not preclude finality under Section 1291. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988). Continued jurisdiction over the execution of the settlement fund's distribution also does not prevent finality because determining the settlement fund's final total and subsequent pro rata distribution amounts cannot "alter . . . or moot" the settlement terms. *See id.* at 199–200 (citing *White v. N.H. Dep't of Emp. Sec.*, 455 U.S. 445, 451 (1982)). Arriving at a total amount of funds from *all* defendants for distribution will not alter or change the key aspects of these settlement agreements—the money paid by American and Southwest, the means of distributing and processing claims, and the pledge to cooperate in ongoing litigation—and therefore does not prevent finality.

Lastly, the district court intended to "conclusively resolve" the litigation against American and Southwest. *See Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1027 (D.C. Cir. 2020); *see also N. Am. Butterfly Ass'n v. Wolf*, -- F.3d --, No. 19-5052, 2020 WL 6038920, at *6 (D.C. Cir. Oct. 13, 2020) (noting the importance for Section 1291 finality of "the district court's intention that its order finally end the case"). The

district court's order approving the final settlements was called a "Final Approval" and stated that the district court's continued jurisdiction over administration would not "affect[] the finality of this Order in any way." ECF 373 at 1, 5. In approving the settlements, the district court credited the settling parties' arguments in favor of finality, *see supra* at 10–11, and "communicate[d] an unambiguous message of finality" as to the settling defendants. *Fiore v. Wash. Cty. Comm. Mental Health Ctr.*, 960 F.2d 229, 235 (1st Cir. 1992); *see also Keepseagle v. Vilsack*, 815 F.3d 28, 35 (D.C. Cir. 2016) (district court's continuing jurisdiction over fund distribution must be interpreted in light of finality language in the settlement).

That the district court declined to certify the settlements for immediate appeal under Rule 54(b), *see* ECF 425, does not undermine the finality of the settlements under Section 1291. The Rule 54(b) standard—whether there is "no just reason for delay[ing]" appeal—is a separate question from whether the order finalizing the settlement agreements with American and Southwest was meant to be final *as to those two defendants*. Fed. R. Civ. P. 54(b); *see also Gelboim*, 574 U.S. at 416 (noting that Rule 54(b) certification and its uses are fundamentally

distinct from finality under Section 1291). The settlement agreement therefore is final as to defendants American and Southwest.

2. As objectors, Bednarz and Frank have a separate identity from the rest of the MDL.

Bednarz and Frank's participation is limited to challenging the fairness of the American and Southwest settlements. When the district court rejected their challenge to those settlements, it ended the entirety of Bednarz and Frank's role in the MDL. *See* 28 U.S.C. § 1407(a) (noting that the MDL court can end cases instead of transferring them back to originating courts). And when an order ends a litigant's role as a party in an MDL, that litigant is "no longer [a] participant[]" in the broader MDL, *see Gelboim*, 574 U.S. at 414, and so may appeal under Section 1291. *See id.* at 413. Indeed, other courts have recognized as much. *See Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1225, 1227, 1231 (11th Cir. 2020) (applying *Gelboim* to find that a final order granting a motion to voluntarily dismiss a party was final because the dismissal "terminate[d] [the] action"); *In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 267 (3d Cir. 2018) (applying *Gelboim* to find that when a district court's order resolved all of the plaintiffs' claims in an MDL, it represented a final order under Section 1291).

Bednarz and Frank's limited role as objectors, *see Devlin*, 536 U.S. at 9, gives their case a "separate identit[y]" from the named plaintiffs' cases in the MDL, which further establishes the order as final and appealable. *Gelboim*, 574 U.S. at 413. When objectors like Bednarz and Frank enter litigation by objecting to the fairness of a settlement, they take on a singular, irreplaceable role in the litigation that is, "by definition," completely distinct from the litigants who are advocating for settlement approval. *Devlin*, 536 U.S. at 9; *see Pearson v. Target Corp.*, 968 F.3d 827, 838 (7th Cir. 2020) ("Genuine adversary presentation is supplied [in the settlement context], if at all, only by objecting class members."). Bednarz and Frank's challenge to the settlements' fairness also constitutes their entire involvement in the MDL. *See Devlin*, 536 U.S. at 9. Their singular and limited role therefore gives Bednarz and Frank a fully "separate identit[y]" from the parties in the MDL. *Gelboim*, 574 U.S. at 413. And under *Gelboim*, when an order—like the district court's order approving the settlements over Bednarz and Frank's objections—"dispos[es] of" a litigant's distinctive role in an MDL, that order represents "an appealable final decision." *Id.*

At bottom, *Gelboim* dictates that where later appeal of an issue completely separate from the pending claims might be denied, the dispositive order resolving that issue is final and appealable in an MDL. *Id.* at 414–15. Based on how MDLs function and the specifics of this appeal, there is a significant risk that Bednarz and Frank would not be able to appeal the district court's settlement fairness determination at any later time. The district court's order is therefore final within the meaning of Section 1291, and this Court has jurisdiction over this appeal.

II. THE DISTRICT COURT'S DETERMINATION OF SETTLEMENT FAIRNESS IS APPEALABLE AS AN INTERLOCUTORY ORDER UNDER 28 U.S.C. § 1292(a)(1).

Even if the order is not final, it is appealable as an interlocutory order under 28 U.S.C. § 1292(a)(1) because it has the "practical effect" of an injunction. *See Carson v. Am. Brands*, 450 U.S. 79, 83 (1981). Like an injunction, the order approving the settlement requires the settling defendants to take certain actions. *See* ECF 373-1 Ex. A. ¶¶ 45–55; ECF 373-1 Ex. B. ¶¶ 45–50. The district court's approval of the settlement also resolves the merits of Bednarz and Frank's case. *See Salazar v. District of Columbia*, 671 F.3d 1258, 1262 (D.C. Cir. 2012) (*Salazar II*). It therefore is appealable under Section 1292(a)(1). *Id.*

The district court's order has the practical effect of an injunction because it requires American and Southwest to take certain specified actions. Under the finalized settlements, both settling airlines, though no longer parties in the MDL, must continue to cooperate with plaintiffs in the litigation. This cooperation will include among other things continued document production and participation in depositions. *See* ECF 373-1 Ex. A. ¶¶ 45–55; ECF 373-1 Ex. B. ¶¶ 45–50. Requiring defendants to perform certain acts under the threat of contempt is classically injunctive relief. *See I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus.*, 789 F.2d 21, 24 (D.C. Cir. 1986) (noting that injunctive relief is relief "directed to a party, enforceable by contempt, and designed to protect some or all of the substantive relief sought by a complaint in more than preliminary fashion") (internal quotations and citations omitted); *see Salazar v. District of Columbia*, 602 F.3d 431, 442 (D.C. Cir. 2010) (*Salazar I*) (noting that, so long as the terms of a settlement order are "clear and unambiguous," such an order may be enforced by civil contempt).

Most cases evaluating practical effect orders under *Carson* have struggled with the difficulty of determining when a *denial* of a certain

order (often, a consent decree) is properly characterized as having the practical effect of a denial of injunctive relief. *See, e.g.*, *Salazar II*, 671 F.3d at 1264–65 (debating, and ultimately leaving undecided, whether an "order rejecting only one of two grounds supporting a motion to dissolve an injunction" has the effect of dissolving that injunction). The settlements at issue here present an easier case: the injunctive relief is not hypothetical and is being undertaken since the settlements have been approved. *See S. Ute Indian Tribe v. Leavitt*, 564 F.3d 1198, 1207 (10th Cir. 2009) (finding that a combination of two orders "enforceable by contempt" that directed that the parties "enter into [a] contract through specific means" may have had the practical effect of granting injunctive relief even though not appealable under other *Carson* requirements). These settlements, therefore, constitute a practical effect order under *Carson*.

Additionally, the order "affect[s] predominantly all of the merits" of Bednarz and Frank's case so it is appealable under Section 1292(a)(1). *Salazar II*, 671 F.3d at 1262 (quoting *I.A.M.*, 789 F.2d at 24 n.3). This Court, in creating this path to Section 1292(a)(1) for orders having the practical effect of an injunction, ensured that in potential appeals in cases

with multiple claims, only orders "where all predominant issues [are] settled in the injunction" are appealable under Section 1292(a)(1). *Ctr. for Nat'l Sec. Stud. v. CIA*, 711 F.2d 409, 413 (D.C. Cir. 1983). The district court's order approving the settlement conclusively determined the entirety of Bednarz and Frank's case. As shown in Part I, *supra* at 25–34, their case involves only a challenge to the fairness of the American and Southwest settlements. Accordingly, the approval of those settlements—and of the injunctive relief within them—"affect[ed] . . . all of the merits" of Bednarz and Frank's case and is appealable under Section 1292(a)(1). *Salazar II*, 671 F.3d at 1262 (quoting *I.A.M.*, 789 F.2d at 24 n.3).

CONCLUSION

This Court should hold that it has jurisdiction because the district court's order approving the settlements is final and appealable under Section 1291. In the alternative, this Court should hold that it has jurisdiction because the district court's order approving the settlement had the practical effect of an injunction and is thus appealable under Section 1292(a)(1).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,213 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on October 26, 2020, a copy of Appointed Amicus Curiae's Final Brief in Support of the District Court was served via the Court's ECF system on all counsel of record.

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Statutory and Regulatory Addendum

Table of Contents

Statutes

Federal Rules

15 U.S.C. – Monopolies and Combinations in Restraint of Trade

15 U.S.C. § 1 – Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 3 –Trusts in Territories or District of Columbia illegal; combination a felony

(a) Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. [Omitted].

(b) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce in any Territory of the United States or of the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia, and any State or States or foreign nations, shall be deemed guilty of a felony[.] [Omitted].

15 U.S.C. § 15 – Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy[.] [Omitted.]

15 U.S.C. § 26 – Injunctive relief for private parties; exception, costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue[.] [Omitted].

28 U.S.C. § 1291 – Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292 – Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.] [Omitted].

28 U.S.C. § 1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337 – Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: [Omitted].

28 U.S.C. § 1407 – Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

Fed R. Civ. P. 23 – Class Actions

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) Notice to the Class.

(A) Information That Parties Must Provide to the Court. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) Grounds for a Decision to Give Notice. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class-Member Objections.

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Fed R. Civ. P. 54 – Judgment; Costs

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.