ORAL ARGUMENT NOT YET SCHEDULED
No. 19-7058

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION

Erica Joan Hashimoto,
Amicus Curiae

On Appeal from the U.S. District Court
for the District of Columbia,
MDL No. 2656, No. 15-mc-01404-CKK
(Hon. Colleen Kollar-Kotelly)

OPENING BRIEF FOR APPELLANTS M. FRANK BEDNARZ AND THEODORE H. FRANK

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October 26, 2020

Certificate as to Parties, Rulings, and Related Cases

As Circuit Rules 12(c) and 28(a)(1) require, Appellants certify the following:

Parties and Amici

Objectors-Appellants: M. Frank Bednarz and Theodore H. Frank

Additional Objectors in District Court: Edward M. Anaya, Michael Argie, Monica J. Baietti, Russ Baker, Kathleen Bruno, Howard Chen, Richard Croft, Paul DeMott, John Doe, Michael Gyda, Sherry Harris, Janis Johnson, Sean Klover, Jason Liebich, Anthony J. Mungovan, Paige Nash, Michael B. Suessmann, Kenneth A. Weissman, Shimshon Wexler, Stephen Willett, Payam Yazdani, Alexander J. Zajac, Michelle K. Zajac

Plaintiffs-Appellees: Steven Yeninas, Boston Amateur Basketball Club, III, Ltd., Katherine Rose Warnock, Cherokii Verduzco, Kumar Patel, Samantha White, Howard Sloan Koller Group, Breanna Jackson, Stephanie Jung, Elizabeth A. Cumming

Additional Plaintiffs in District Court: Elliot J. Blumenthal, William Youmans, Shawn Jain, Rachel Golian, Colleen Panzino, Christopher DeVivo, Jack Sniado, Julia L. Holt, Jay Winton, Lilian M. Raji, Steven Hersh, Kenneth A. Nelson, Jonathan Shankle, Bradford Tomlin, Whitney Tomlin, Michael Kromar, Sheri Rosalia, Christopher Turtzo, Josh Stamps, Richard Warchol, Kayla Repan, State-Boston Retirement System, Curtis Palmer, Charles Curley, Dmitriy Bangiyev, Stella Bangiyev, Eileen Silver, Amy Bess, Kathryn Lavin, Michele Andrade, Michael Backus, Barbara E. Hartley, Ethan Brodsky, Jeffrey Robb, Valbona Alla, Lois Giordano, Yvette Wheeler, Peter Everitt, Elsie M. Jones, Chong Hummel, Jeffrey Hardimon, Leon Coats, Ron Coats, Solomon Friedman, Larry Morrison, Gabriel Watkins, James L. Stewart, Dean

Ted, Bonnie Foster Patrick, Lorrie Ann Coates, Delia Mellen, David Markun, Amelia Bell, Judah Nathanson, Richard P. Ieyoub, Sr., Paula A. Ates, Jennifer Berday, Rajesh Patel, Aaron Lay, Theresa Brown, Michael Garzel, Guillermo de la Garza, Gail Wolfe, Angelina Chandler, Charles G. Dibrell, III, William B. Cottrell, Michael Ohlstein, Xavier Bess, Jordan Leigh, Alana Costantino, Vincent Panfil, Richard E. Kraft, Larissa D. Kosits, Jonathan Schumacher, Elizabeth Walker, Martin Pomeroy, Nelson Valdes, Linda Williams, Howard Robinson, Lax & Company, Inc., Brian Bank, Gloria Goldblatt, David McEnerney, Seth Lyons, Christina Cleveland, Garrett Kindelspire, Edward Park, Sarah Tran, Judy A. Reiber, Mingli Chen, Richard King, Michael Coffey, Jr., James Grimes, Charles Carte, Carolyn Collins, Howard Collins, Brian Connelly, Anthony Deninno, Christopher Falconetti, Nathan Frank, Craig Kelly, Judah Michael, Kevin Scribner, Richard Price, Jon Kellam, Andrew Nemit, Israel Katz, Levin Simes LLP, Keith Anderson, Anooshirvan Bidgoli, Barbara Hunter, Annie Migdal, Barbara Lawrence Cone, Alexia Attard, Robert Deringer, Jacob Dombroski, Marisa Dombroski, Tina Evans, Larry Horwitz, Kent Busek, Jeffrey Larson, John-Gabriel Licht, Audrey Ondrade, Sharon Price, James J. Riley, Robert Rolland, Shearson Publishing, Timothy St. Cyr, Steven M. Traut Wells, Inc., Jay Tilak, David Wells, Edward Lawrence, Michael Martin, Rosemarie Gabrielle, Union Labor Life Insurance Company, Jennifer M. McMahon, Edward C. Phillips, Gail Ware, Aria Wint, Karen Bruzda, Arvind Sundar, Ullico Inc., Paul Macolino, Eric Stetzler, William Rubinsohn, Aaron Mulvey, Carolyn Mulvey, Catherine Richmond, Joseph Hall, Elizabeth Montgomery

Defendants-Appellees: American Airlines, Inc., Southwest Airlines Co.

Additional Defendants in District Court: Delta Airlines, Inc., United Airlines, Inc., Frederick Isaacson, United Continental Holdings, Inc., American Airlines Group, Inc., Southwest Airlines Co., ABC Corps. 1-100, John Does 1-100, Air Canada

Non-Party Respondent: International Air Transport Association

Intervenors: The Court has not granted any motions to intervene at this time, nor have any motions been filed.

Amicus Curiae: Erica Hashimoto, Georgetown University Law Center

Rulings Under Review

Appellants appeal the Order Approving Plaintiffs' Motion for Final Approval of Settlement Agreements with Southwest Airlines Co. and American Airlines, Inc., Dkt. 373, filed May 9, 2019, in *In re: Domestic Airline Travel Antitrust Litigation*, MDL No. 2656, Case No. 1:15-mc-01404-CKK, U.S. District Court for the District of Columbia, Judge Colleen Kollar-Kotelly (JA__) and the Memorandum Opinion, Dkt. 374, filed May 13, 2019, in the same case (JA__).[1] The case citation for the Memorandum Opinion is 378 F. Supp. 3d 10 (D.D.C. 2019). There is no case citation for the Order.

Related Cases

The case on review was not previously before this Court or any other court other than the U.S. District Court for the District of Columbia for the underlying proceedings and the district courts where the individual cases were filed prior to transfer by the Judicial Panel on Multidistrict Litigation to the U.S. District Court for the District of

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[1] "Dkt." refers to the district court docket in this case. "JA" refers to the deferred joint appendix to be filed under Fed. R. App. P. 30(c).

Columbia. Appellant is aware of no related cases. Objectors Argie and Willett filed notices of appeal, assigned case numbers 19-7059 and 19-7060 by this Court, which were voluntarily dismissed on July 30, 2019.

Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of Federal Rule of Appellate Procedure 26.1, Theodore H. Frank and M. Frank Bednarz are individuals and, as such, are not subsidiaries or affiliates of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by them.

Statement Regarding Deferred Appendix

Appellants intend to utilize the deferred joint appendix option as described in Federal Rule of Appellate Procedure 30(c). *See* Statement of Intent to Use Deferred Joint Appendix (July 22, 2019).

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* Authorities upon which we chiefly rely are marked with asterisks

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Jurisdictional Statement

The district court had federal-question and antitrust jurisdiction pursuant to 28 U.S.C. § 1331 and § 1337 because the underlying suit alleged violations of the Clayton Act, 15 U.S.C. § 15 and the Sherman Act, 15 U.S.C. § 1.

Whether this Court has jurisdiction under 28 U.S.C. § 1291 is an issue of first impression and is addressed in Section I below. The district court ordered final approval of the settlements at issue in this appeal on May 9, 2019, and filed its memorandum opinion on May 13, 2019. Dkt. 373 (JA__); Dkt. 374 (JA__). Objectors Theodore H. Frank and M. Frank Bednarz filed a notice of appeal on June 10, 2019. Dkt. 384 (JA__). This notice is timely under Fed. R. App. P. 4(a)(1)(A). Appellants Frank and Bednarz, as class members who objected to settlement approval below, have standing to appeal a final approval of a class action settlement without the need to intervene formally in the case. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

The district court has not issued a final judgment under Federal Rule of Civil Procedure 54(b) (or under Rule 58). The district court characterized its final approval order as "final" and discussed the importance of finality in its memorandum opinion. Dkt. 373 (JA__); Dkt. 374 at (JA__). Frank subsequently moved the district court to issue an order to show cause why it should not rescind its final approval order or to issue final judgment under Rule 54(b). Dkt. 408. The district court denied Frank's motion. Dkt. 424; Dkt. 425 (JA__). If, however, the district court's final approval order does constitute a final decision for purposes of 28 U.S.C. § 1291, then appellants may appeal notwithstanding the lack of a Rule 58 separate judgment. *Bailey v. Potter*, 478 F.3d 409, 411 (D.C. Cir. 2007).

Standard of Review

The Court addresses the issue of its own jurisdiction to review appealed orders *de novo*. *United States v. Scantlebury*, 921 F.3d 241, 246 (D.C. Cir. 2019). "The court reviews the fairness of a settlement agreement for abuse of discretion," except that "the court owes the district court no deference in its legal interpretations." *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 (D.C. Cir. 2008). "'A district court by definition abuses its discretion when it makes an error of law.'" *Id.* (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)). The district court's interpretation of rules and laws, including Federal Rule of Civil Procedure 23 and whether notice of a proposed settlement satisfies due process, is a question of law which the Court reviews *de novo*. *See Yousuf v. Samantar*, 451 F.3d 248, 251 (D.C. Cir. 2006).

Statement of the Issues

1. Whether the district court's "final approval order" of May 9, 2019, is a final decision under 28 U.S.C. § 1291 requiring class members to appeal immediately to preserve their rights.

2. Federal Rule of Civil Procedure 23(e)(2)(C)(ii) requires a court to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims" before approving a settlement. May a court ignore Rule 23(e)(2)(C)(ii) and approve a settlement without considering this factor when the settlement provides no binding proposal for distributing any relief to the class?

3. Notice to the class leaves open the possibility that the entire settlement fund will be distributed to as yet-unnamed charities of the plaintiffs' choosing, and the

settlement provides no mechanism to receive notice or to object to any part of this yet-undisclosed decision.

a. Does a settlement notice that leaves these material terms undisclosed before the objection deadline comply with due process and Federal Rule of Civil Procedure 23? *E.g.*, *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012).

b. Does a settlement and settlement class certification that permits class counsel to choose to divert the entire settlement fund to its favorite charities at the expense of the class comply with Rule 23(a)(4), Rule 23(b)(3), Rule 23(e), and Rule 23(g)? *E.g.*, *Frank v. Gaos*, 139 S. Ct. 1041, 1047-48 (2019) (Thomas, J., dissenting); *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014).

Statutes and Regulations

Federal Rule of Civil Procedure 23. Class Actions.

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

…

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

…

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

…

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

…

(2) Notice.

…

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

…

(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:

…

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

…

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

…

(g) Class counsel.

…

(4) Duty of Class Counsel. Class counsel must fairly and adequate represent the interests of the class.

Statement of the Case

This appeal arises from the district court's approval of two class-action settlements in a multi-district litigation in which plaintiffs and two remaining defendants continue to litigate.

A. Class action complaints against four airlines alleging violation of the Sherman Act are consolidated and transferred to the district court.

In 2015, multiple complaints were filed against Southwest Airlines Co., American Airlines Inc., Delta Air Lines, Inc., and United Airlines, Inc. alleging that the airlines violated Section 1 of the Sherman Act, 15 U.S.C. § 1 by colluding to limit capacity and increase prices for domestic airfares. Dkt. 374 at 2 (JA__). The Judicial Panel on Multidistrict Litigation consolidated the cases before U.S. District Court Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia on October 13, 2015, and subsequently transferred additional related actions. *Id.* After the district court appointed interim co-lead counsel, plaintiffs filed a consolidated amended class action complaint against the four major airlines. Dkt. 91; *see also* Dkt. 184.

B. Plaintiffs settle with Southwest and American, and the district court preliminarily approves the settlements.

Plaintiffs settled with Southwest and moved for preliminary approval of the settlement on December 27, 2017. The Southwest settlement class includes all persons and entities that purchased air passenger transportation services for flights within the United States from the four defendants between July 1, 2011 and December 20, 2017. Dkt. 373-1, Ex. A at 5 (JA__). The settlement requires Southwest to make a cash payment of $15 million and to cooperate with plaintiffs in their case against the then-

three non-settling defendants. *Id.* at 10-19 (JA__-__). Class members, in turn, release Southwest from any and all claims that were or could have been alleged in the case that share an identical factual predicate with the claims alleged in the case. *Id.* at 8-9 (JA__-__). The settlement provides that the allocation of the settlement fund among the class will be subject to an unspecified plan of allocation to be proposed by plaintiffs' counsel and approved by the Court. *Id.* at 11 (JA__). Southwest agrees to take no position on the plan of allocation and to have no involvement in the claims process. *Id.* The district court preliminarily approved the Southwest settlement on January 3, 2018. Dkt. 197 (JA__).

Plaintiffs then settled with American and moved for preliminarily approval on June 15, 2018. The American settlement class includes all persons and entities that purchased air passenger transportation services for flights within the United States from the four defendants between July 1, 2011 and June 14, 2018. Dkt. 373-1, Ex. B at 5 (JA__). The settlement requires American to make a cash payment of $45 million and to cooperate with plaintiffs in their case against the two non-settling defendants. *Id.* at 10-14 (JA__-__). As in the Southwest settlement agreement, class members release American from any and all claims that were or could have been alleged in the case subject to the identical factual predicate limitation. *Id.* at 8-9 (JA__-__). The American settlement also provides, as in the Southwest settlement, that the allocation of the settlement fund among the class will be subject to an unspecified plan of allocation to be proposed by plaintiffs' counsel and approved by the Court. *Id.* at 11 (JA__). American agrees to take no position on such plan and to have no involvement in the

claims process. *Id.* The district court preliminarily approved the American settlement on June 16, 2018. Dkt. 249 (JA__).

Both the Southwest and American settlements require plaintiffs to "seek entry of an order granting final approval and entering final judgment in a form to be agreed upon the Parties which shall: …. determine under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay, and directing [sic] that the final judgment of dismissal as to [Southwest/American] shall be entered…." Dkt. 373-1, Ex. A ¶ 25 (JA__-__); Dkt. 373-1, Ex. B ¶ 25 (JA__-__). The agreements become final on the "Effective Date," defined as the date time to appeal expired "and entry of the final judgment" or, if an appeal was taken, "affirmance of such final judgment in its entirety." Dkt. 373-1, Ex. A ¶ 26 (JA__); Dkt. 373-1, Ex. B ¶ 26 (JA__).

At the time of preliminary approval, plaintiffs' counsel did not submit a proposed plan of allocation for approval by the district court.

The class comprises approximately 100 million class members. Dkt. 374 at 7. The district court approved plaintiffs' proposed combined notice for both settlements by direct email to known class members, supplemented by print, media, and online services. Dkts. 267, 268. With respect to "Distribution of the Settlement Proceeds," the notice stated:

> At this time, it is unknown how much each eligible Settlement Class Member will receive. Given the number of Settlement Class Members, it may not be economically practical to make a direct cash distribution to Class Members until additional settlements or judgments are achieved. It is possible that after deductions for any attorneys' fees, litigation expenses, settlement administration expenses, and

> class representative incentive awards approved by the Court, the remaining amount will be distributed to charities, governmental entities, or other beneficiaries approved by the Court. No money will be returned to the Settling Defendants once the Court approves the Settlements. A distribution plan will be prepared later or at the conclusion of the litigation based on other settlements or a judgment.

Dkt. 257-2, Ex. 4 at 4-5 (JA__-__). The notice did not disclose to class members how class counsel will determine whether a distribution was economically practical, which third-party beneficiaries will be selected to receive the funds, or how class counsel will select such beneficiaries.

With respect to the claims process for any distribution, the notice stated that class members "need to file a valid claim form before the claims period ends." Although the claims period had not yet begun, the notice informed class members that they can register to receive future notice about the claims process or future settlements at a designated settlement website. *Id.* at 5 (JA__). The notice did not disclose to class members what the claims process will require from them. Neither the settlement nor the notice alluded to the possibility of a second notice, objection, and claims period after a distribution plan is proposed.

On December 5, 2018, plaintiffs moved for final approval of the settlements and award of $15 million in attorneys' fees, reimbursement of litigation expenses of nearly $1.6 million, and approval of $3 million to fund future litigation expenses. Dkts. 299, 300. In their proposed order, plaintiffs included the sentence: "The Court finds, pursuant to Rules 54(a) and (b) of the Federal Rules of Civil Procedure, that Final Judgments of Dismissal with prejudice as to the Settling Defendants ("Judgments")

should be entered forthwith and further finds that there is no just reason for delay in the entry of the Judgments, as to Final Judgments, in accordance with the Settlement Agreements." Dkt. 351 at 7.

C. Frank and Bednarz object to the settlement and class counsel's Rule 23(h) request and reserve the right to object to settlement class certification.

Frank and Bednarz (collectively, "Frank") filed a timely objection to the settlement and attorneys' fee request. Dkt. 329 (JA__). First, they argued that the settlement is unfair because it explicitly leaves open the possibility that the entire fund will be distributed to third parties as *cy pres*, while proposing to pay the attorneys a disproportionate more than 40% of the settlement fund. This structure is problematic because *cy pres* should not be counted as a benefit to the class to justify a fee award, and even if the funds are distributed directly to the class, the disproportion between the fee award and class benefit make the settlement unfair under Rule 23(e). Second, they argued the settlement is also unfair because it leaves open the possibility that the entire settlement fund will go to *cy pres*, which provides no benefit to the class. Third, they objected to the Rule 23(h) request because it proposes to pay the attorneys regardless of whether the settlement fund is distributed to the class members or *cy pres*. Fourth, they objected that the class notice was deficient because it failed to disclose (i) the allocation plan for the settlement fund; (ii) the identity of the charities being considered as possible *cy pres* recipients and a procedure for notice to the class or opportunity to object to the recipients; and (iii) the basis for attorneys' fees. Fifth, they objected to the proposal to pay class counsel for unsupervised future expenses. Sixth, they objected to

the possibility, and even likelihood, of class action abuse suggested by the combination of the recovery of only 1% of alleged damages in this nuisance settlement, combined with the opacity of the allocation and *cy pres* process and class counsel's track record of *cy pres* abuse.

Frank reserved the right to object to the settlement class certification under Rules 23(a)(4) and (g) if the parties were to engage in only nuisance settlements or the defendants were to avoid liability altogether, with the entire fund from the American and Southwest settlements diverting to *cy pres*. Frank emphasized the risk of this result based on lead counsel having diverted $5.1 million of settlement money away from the class in another case to fund development of future litigation and to make a sizable donation to his *alma mater*. Dkt. 329 at 1 (JA__) (citing Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007) ("Roberts")). Frank also pointed out that because the settlement administrator used methods of email distribution that resulted in class members' email systems filtering the notice as spam, the percentage and number of objectors would be very low and the court should not use that as a reason to disregard objections or find the settlement fair. *Id.* at 2 (JA__).

D. Plaintiffs respond to objections.

In plaintiffs' response to class member objections, they acknowledged that whether the settlement funds will be distributed to *cy pres* "cannot be known at this stage" of the process, Dkt. 334 at 18, and that settlement funds that cannot be "economically distributed to class members may be subject to potential *cy pres*," *id.* at 2. Plaintiffs stated that they would submit a proposed *pro rata* distribution plan "at a later

date," so as to combine the distribution of the Southwest and American settlement funds with any future settlement or judgment proceeds from United and Delta, and at that time class members would have an opportunity to object to the proposed plan. *Id.* at 12-14.

E. After a fairness hearing, the district court approves the settlements.

The district court held a fairness hearing on March 22, 2019. Frank appeared at the hearing on behalf of himself and Bednarz. At the fairness hearing, the district court inquired whether it could "postpose final approval" until the court could comply with the Rule 23(e)(2)(C)(ii) requirement of considering the effectiveness of "a plan of allocation and distribution" and have "more information." Dkt. 354 at 39:24-40:9 (JA_-__); *see also id.* at 26:9-27:2 (JA__-__). The court wanted "a better sense of what the allocation and distribution is" and expressed concern "as to whether [it] ha[s] enough information." *Id.* at 43:24-25, 44:22-45:5 (JA__-__); *see also* 57:22-58:6 (JA__-__) (discussing lack of formula for distribution and allocation of fund). The court also expressed concern because "the class members I don't think really received much information about how the funds are going to be disbursed." *Id.* at 26:23-25 (JA__).

The settling parties protested, arguing that a delay in approving the settlements would jeopardize the cooperation from settling defendants (*Id.* at 41:15-22, 44:8-12, 55:20-56:10 (JA__-__, __-__. __-__)), deprive them of critically important finality (*id.*; *id.* at 51:15-25 (JA__)), and have the drastic consequence of "set[ting] down a market foreclosing *any* future interim settlements in antitrust litigation" (*id.* at 82:23-83:17 (emphasis added) (JA__-__)). Plaintiffs told the court that they "d[id] not anticipate any

distribution other than *per capita* at the end" and once settlements with the other defendants were reached, they would provide notice to the class and give them an opportunity to file a claim and object to the proposed settlement distribution. *Id.* at 27:20-29:25 (JA__-__). Plaintiffs did not mention an opportunity to opt out. Plaintiffs further stated the distribution would be a *pro rata* distribution based on the dollar amount of qualifying ticket purchases. *Id.* at 30:18-21 (JA__). And they stated they had "no intention to *cy pres* this entire fund." *Id.* at 74:21-24 (JA__). With respect to the claims process, plaintiffs stated it was "impossible to tell what type of detail [will be] necessary" for claims members to file a claim at a later date. *Id.* at 76:12-13 (JA__).

On May 13, 2019, the district court issued an opinion and order granting plaintiffs' motion for final approval of the settlements with Southwest and American. Dkt. 374 (JA__). The court noted class counsel's assertion that distribution of the settlement funds would be deferred until the end of the entire case, at which time class members would be notified regarding the claim process and their right to object. *Id.* at 18-19 (JA__-__). Despite the lack of a distribution plan, the district court found that plaintiffs had "demonstrated the adequacy of the Settlements with regard to their proposed means of distributing and processing claims, which will be done through a second notice to Class Members, followed by a right to object and/or file a claim." *Id.* at 20 (JA__). The district court acknowledged that "[w]hether the need for a *cy pres* distribution will arise, and if so, in what amount cannot be known at this stage of the proceeding." *Id.* at 25 (JA__). The court also noted class counsel's asserted intention to maximize distribution to the class and the court's "own disinclination toward *cy pres* distributions," but issued no order or other binding commitment with respect to *cy pres*.

Id. The court recognized that there could be a *cy pres* distribution if there were insufficient claims and funds remain or if there are too many claims and insufficient funds to make it worthwhile to make distributions. *Id.* at 23 (JA__).

The Court concluded that it "finds that Settlement Class Counsel has demonstrated the adequacy of the Settlements with regard to their proposed means of distributing and processing claims, which will be done through a second notice to Class Members, followed by a right to object and/or file a claim." *Id.* at 20 (JA__).

Citing the parties' arguments regarding finality at the fairness hearing, the district court's order discussed the importance of finality at length. Dkt. 374 at 31-33 (JA__-__). The court expressly relied upon and extensively quoted the representations of the settling parties regarding finality. For example, the district court discussed defense counsel's assertion that delaying final approval of the settlements would create a "real risk" to the cooperation they agreed to provide and the finality they bargained for in the settlement agreements. *Id.* Although the district court characterized its order as "final," it did not issue a final judgment under Federal Rule of Civil Procedure 54(b) and did not include the sentence from plaintiffs' proposed order finding final judgment should be entered forthwith and finding "no just reason for delay in the entry of the judgments, as Final Judgments." *Cf.* Dkt. 351.

The district court issued a separate order granting plaintiffs' request for $1,573,192.48 in claimed litigation expenses. Dkt. 375. Although plaintiffs initially had also requested $15 million in attorneys' fees and $3,000,000 in future litigation expenses, the court held their fee request in abeyance, as well as plaintiffs' request for $3 million to fund future litigation expenses. *Id.* at 4. The district court considered any objections

relating to attorneys' fees premature and thus did not address their merits. Dkt. 374 at 22 (JA__).

Plaintiffs continue to litigate against defendants Delta Air Lines, Inc. and United Airlines, Inc.

F. Frank timely appeals and the settling parties move to dismiss his appeal, while the district court does not enter final judgment under Rule 54(b).

Frank and Bednarz timely appealed the court's final approval order and accompanying memorandum opinion. Notice of Appeal on June 10, 2019. Dkt. 384 (JA__).

Paragraph 25(f) of the Settlements required the parties to seek Rule 54(b) judgment. Dkt. 373-1, Ex. A at 6; Dkt. 373-1, Ex. B at 6 (JA __). Although the district court's final approval order did not include a paragraph making findings under Federal Rule of Civil Procedure 54(b), Frank did not want to have waived his appellate rights if the settling parties argued that a Rule 54(b) judgment was not necessary for the "Final Approval Order" to be final under 28 U.S.C. § 1291 or if the settling parties subsequently moved for a Rule 54(b) judgment to expedite the appeal process to ensure an earlier effective date for the settlements. Dkt. 408 at 5.

On August 2, 2019, when the district court still had not entered final judgment under Rule 54(b), Frank moved the district court to issue an order to show cause why it should not rescind its final approval order or to issue final judgment under Rule 54(b). Dkt. 408. Prior to filing his motion, Frank repeatedly offered to stipulate to a motion for Rule 54(b) judgment to avoid unnecessary multiplication of proceedings and to expedite consideration of appeal by this Court, but the settling parties refused. *See id.* at

6. Frank argued there was a discrepancy between what the parties represented at the hearing—the need for finality, what they agreed to in their settlements; and their refusal to move for or stipulate to entry of a Rule 54(b) judgment, which would postpone finality under paragraph 26 of the Settlements and multiply proceedings. Dkt. 373-1, Ex. A at 6-7 (JA__); Dkt. 373-1, Ex. B at 6-7 (JA __).

On August 5, 2019, plaintiffs and settling defendants American and Southwest moved this Court to dismiss Frank's appeal for lack of jurisdiction on the ground that the final approval order is not an appealable final judgment under 28 U.S.C. § 1291 and Federal Rule of Civil Procedure 54(b). Frank opposed the motion to dismiss and cross-moved for an order to hold the case in abeyance until the district court ruled on the pending motion for Rule 54(b) judgment. On October 22, 2019, this Court granted Frank's motion to hold the case in abeyance pending further order of the district court and directed the parties to file motions to govern further proceedings.

The district court denied Frank's motion for a Rule 54(b) judgment. Dkt. 425 (JA__). The court reasoned that its order "struck a balance insofar as it allows Plaintiffs to obtain cooperation from the Settling Defendants (because Southwest and American have been dismissed with prejudice from the litigation) 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). Accordingly, this Court sees no reason to issue a Rule 54(b) judgment." *Id.* at 15 (JA__). The court did not address that the Settling Defendants had no obligations to cooperate under the Settlements without a Rule 54(b) judgment (Dkt. 373-1, Ex. A at 6-7 (JA_);

Dkt. 373-1, Ex. B at 6-7 (JA __)) and the conclusion of any possible appeals, and the resulting inconsistency between its two orders.

G. The Court issues a briefing schedule and appoints amicus curiae to argue in support of jurisdiction.

The Court subsequently removed the case from abeyance and ordered that the motion to dismiss be referred to the merits panel for the appeal. On August 24, 2020, this Court issued an order setting a briefing schedule for the case and appointing Erica Hashimoto, Georgetown University Law Center, amicus curiae to present arguments in support of the Court's jurisdiction. The Court directed the parties to address the issues presented in the motion to dismiss in their merits brief.

Preliminary Statement

Attorneys with Hamilton Lincoln Law Institute's Center for Class Action Fairness bring the objection and appeal of Bednarz and Frank (both attorneys with the organization). The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013, at A12 (calling Frank "the leading critic of abusive class action settlements"); Editorial Board, *The Class-Action Con*, Wall St. J. (Feb. 11, 2018); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work); *In re Classmates.com Consol. Litig.*, 2012 U.S. Dist. LEXIS 83480, 2012 WL 3854501, at *11 (W.D. Wash. June 15, 2012) (same); Decl. of Theodore H. Frank,

Dkt. 329-1. This appeal is brought in good faith to establish correct principles of Rule 23 jurisprudence.

Summary of Argument

Appellants Frank and Bednarz seek to protect their appellate rights in a piecemeal settlement in the underlying multidistrict litigation. The settlements at issue—resolving all of the claims against two of the four defendants—were approved by the district court, despite there being no proposed method for distributing relief to the class as required by Federal Rule of Civil Procedure 23. *See* Section II. The absence of this safeguard is particularly problematic here because the class notice and settlements leave open the possibility that class counsel will direct the full settlement fund to third-party charities rather than as relief to the absent class members. A settlement that provides only *cy pres* relief is legally infirm under multiple subparts of Rule 23: It suggests inadequate representation under (a)(4) and (g), lack of superiority of the class action device under (b)(3), and unfairness under (e). *See* Section III.B. Accordingly, the stakes are high for objecting class members such as Frank who risk losing their rights to object to or opt out of settlements that allow class counsel to make these decisions. *See* Section III.A. Though the parties have bound themselves to provide additional notice to the class about the distribution, because the settlement notice indicated that a full *cy pres* distribution may be made at a future date, if Frank does not object now, class counsel may argue later that it is too late to object to the fairness of an all-*cy pres* settlement.

A threshold question, however, is whether this Court has jurisdiction to review the district court's final approval order at this time. The settlement required the parties to seek a Rule 54(b) judgment, and Frank asked the parties to stipulate to a motion for entry of a Rule 54(b) judgment and asked the district court to enter such judgment, however, neither the parties nor the district court did so. As a result, Frank is left to pursue his appeal without a Rule 54(b) judgment so as to avoid appellees later claiming that he waived his right to appeal. The Court nevertheless could find, as a matter of first impression, that it has § 1291 jurisdiction under an extension of *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015), that allows objectors in piecemeal MDL settlements to appeal settlements that fully resolve the claims of one or more defendants even in a consolidated action. Otherwise, class-action objectors could be completely shut out of the appeal process where the MDL court never enters judgment because the remaining cases are sent back to their originating courts. *See* Section I.A. If the Court does not have jurisdiction, Frank asks the Court to expressly state that the final approval order at issue is not a final decision for purposes of 28 U.S.C. § 1291, such that he has no obligation to appeal the approval of the settlements until a formal final judgment is issued. *See* Section I.B.

Argument

I. The Court may have jurisdiction to decide the appeal; if the Court determines otherwise, it should expressly state that the "final approval order" is not a "final decision" ripe for appeal.

A. The Court may have jurisdiction because otherwise the piecemeal MDL settlement process risks depriving Frank of all appeal rights.

Under 28 U.S.C. § 1291, an unsuccessful litigant may take an appeal as a matter of right from a "final decision[] of the district court[]." A "final decision" is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). In cases with multiple claims, Federal Rule of Civil Procedure 54(b) "relaxes 'the former general practice that … *all* the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them.'" *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015). Rule 54(b) permits a district court to "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." Without such express determination by the court, "any order or other decision, however designated, that adjudicates fewer than all the claims … does not end the action as to any of the claims or parties and may be revised at any time before entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Ordinarily, then, the lack of a Rule 54(b) judgment means there is no appellate jurisdiction under 28 U.S.C. § 1291 when there are multiple parties and not all claims are resolved.

Here, the underlying action consists of multiple cases consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the district court pursuant to 28

U.S.C. § 1407 for consolidated pretrial proceedings. Section 1407(a) provides that each of the consolidated actions "shall be remanded" to the originating court "at or before the conclusion of such pretrial proceedings," and, further, that the JPML may separate and remand any claim before the remainder of the action is remanded. *Gelboim* held that "[c]ases consolidated for MDL pretrial proceedings ordinarily retain their separate identities, so an order disposing of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision"; however, a transferee court may treat a master consolidated complaint, such as the consolidated complaint filed in this action, as merging the discrete actions and superseding prior individual pleadings for the duration of the MDL pretrial proceedings. 135 S. Ct. at 904 & n.3.

The American and Southwest settlements at issue in this appeal fully resolved all claims by the plaintiffs and the class against those two defendants. There are no merits issues left to be decided with respect to these defendants; the only action remaining is for the district court to direct entry of final judgment. Whether Frank can appeal in the current posture of the case, where the claims against two defendants are fully resolved, the district court has declined to enter a Rule 54(b) judgment, and class counsel filed a consolidated complaint, however, appears to be an issue of first impression. Frank and the parties all acknowledge that the district court's "final approval order" does not meet the requirements of Rule 54(b). *See* Dkt. 424 (declining to enter Rule 54(b) judgment). The Court might still have jurisdiction to review this appeal, however, based on the purpose of Rule 54(b) and a "practical rather than a technical construction" of § 1291. *See Gelboim*, 135 S. Ct. at 902 (internal quotation omitted).

The purpose of Rule 54(b) was adopted "to avoid the possibility of injustice" of "delay[ing] judgment on a distinctly separate claim pending adjudication of the entire case." Report of Advisory Committee on Proposed Amendments to Rules of Civil Procedure 70 (1946). The Rule is intended "to augment, not diminish, appeal opportunity." *Gelboim*, 135 S. Ct. at 903. The Rule will not serve these purposes if the Court allows the parties and district court here to frustrate objector Frank's appeal rights.

As in *Gelboim*, the court's final approval of the settlements at issue completed American and Southwest's involvement in the case; they "are no longer participants in the consolidated proceedings." 135 S. Ct. at 905. The plaintiffs continue to have claims pending against two remaining defendants such that they are in a different position than *Gelboim* plaintiffs Gelboim and Zacher, who were permitted to appeal immediately after the court disposed of all of the issues in their individual case without regard to Rule 54(b). 135 S. Ct. at 905-06. Frank faces a similar "quandary about the proper timing of their appeals" but because of the structure of the consolidated complaint, does not have an individual case that is final. *Id.* at 905. Even if there were an individual case that was separable from the consolidated MDL for purposes of appeal under *Gelboim* or *Hall v. Hall*, 138 S. Ct. 1118 (2018), Frank is a class member in multiple consolidated individual cases alleging claims against multiple defendants. The settlement agreements resolve all of the claims against only two of the four defendants. Pursuing an appeal of only certain individual cases would be logistically unworkable and exacerbate rather than resolve the problem created by the piecemeal settlement. Therefore, neither case forecloses the Court's jurisdiction over Frank's appeal and the holdings suggest instead

that Frank's unique quandary as an objector in an MDL should be resolved to allow him to appeal where all of the claims against certain defendants are fully resolved.

The parties all anticipated that the final approval order would be a final judgment from which appeal could be taken. The settlement agreements require plaintiffs to seek entry of final judgment under Rule 54(b), and, indeed, plaintiffs included language in their proposed order stating that the Court found "pursuant to Rules 54(a) and (b) of the Federal Rules of Civil Procedure, that Final Judgments of Dismissal with prejudice as to the Settling Defendants ("Judgments") should be entered forthwith and further [found] that there is no just reason for delay in the entry of the Judgments, as Final Judgments, in accordance with the Settlement Agreements." Dkt. 351. This term in the settlement agreements protects defendants against the risk that the settlements will be rejected by the district court or this Court by making their obligations binding only on the "Effective Date," defined as to the "affirmance of such final judgment in its entirety … to which an appeal of such final judgment may be taken." Dkts. 373-1, Ex. A ¶ 26 (JA__); Dkt. 373-1, Ex. B ¶ 26 (JA__). Reciprocally, the releases that defendants obtained from the class are not operative until the Effective Date. Although plaintiffs did not file a motion asking the district court to make Rule 54(b) findings and enter final judgment, they implicitly made that request by including the appropriate language in the proposed order filed with their motion for final approval of the settlements. Dkt. 351.

The district court's opinion held that finality was important, and its order repeatedly refers to finality. Dkt. 374 (JA__). Nevertheless, the court's order does not include a paragraph making findings under Federal Rule of Civil Procedure 54(b).

Dkt. 373 (JA__). The district court's refusal to enter a 54(b) judgment exposes the defendants to risk they claimed they were not willing to accept in their negotiated settlement. There is a risk that years from now, plaintiffs will reach a settlement with the two remaining defendants, and all four settlements are rejected. Then, American and Southwest will face renewed litigation when memories have faded and work product is outdated, and, more critically, they have lost settlement leverage because they already provided cooperation to the plaintiffs for their claims against Delta and United but did not receive the benefit of their bargain.

The risk is not just to defendants but also to Frank. Plaintiffs now see the strategic advantage of having Frank's appeal dismissed with the possibility that he is denied a later opportunity to challenge the settlement after the claims against the two remaining defendants are resolved. Were this a typical non-MDL case, Frank would face no risk because his premature notice of appeal could ripen with the final claims resolved against the last remaining defendant. *Capitol Sprinkler Inspection, Inc. v. Guest Servs.*, 630 F.3d 217, 222 (D.C. Cir. 2011); *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161-63 (D.C. Cir. 2005) (Roberts, J.). But in an MDL, if plaintiffs can delay objector appeal rights, "there may be no occasion for the entry of any judgment" such that objectors are never able to obtain appellate review. *Gelboim*, 135 S. Ct. at 905. "Orders may issue returning cases to their originating courts, but an order of that genre would not qualify as the dispositive ruling" that Frank could challenge on appeal. *Id.* Nor would it qualify as the "entry of judgment" that would ripen Frank's earlier appeal under Fed. R. App. P. 4(a)(2). To protect objector appeal rights and interpret § 1291 and Rule 54(b) in line with their purposes, the Court could hold that

objectors such as Frank may pursue immediate appellate review of final approval orders of settlements that resolve all of the claims against at least one but less than all defendants in a multi-party multidistrict class action litigation. Otherwise, MDL parties now have a potential roadmap for effectively evading appellate review for objecting class members.

Below, the parties argued, and the district court apparently accepted, that an appeal would be "premature" and "piecemeal." Dkt. 425 at 14 (JA__). But one remedy in such a situation is to permit the filing of a "protective" appeal and staying and abeying the appeal; the Supreme Court endorsed such a procedure in *habeas* proceedings to avoid similar predicaments about jurisdictional bars to timeliness. *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005) (citing *Rhines v. Weber*, 544 U.S. 269 (2005)).

That said, a bright-line rule requiring a specific 54(b) finding has the advantage of certainty. If so, then there would not be jurisdiction here, notwithstanding the gamesmanship of appellees to evade appellate review.

B. If the Court does not have jurisdiction, it should expressly state that the district court's "final approval order" is not a final judgment such that Frank retains his rights to move for reconsideration and appeal.

Because appellate jurisdiction, in particular the timeliness of an appeal, is a non-waivable issue, appellees will not be bound by their position that the lack of a Rule 54(b) judgment means Frank's appeal is premature if Frank voluntarily dismisses his appeal and then files a new appeal of the final approval order after the district court enters a Rule 58 judgment. Nothing would prevent the appellees from switching their position, and arguing that Frank has appealed the final approval order too late and there is no

appellate jurisdiction over the second appeal. Frank therefore cannot abandon his appeal without potentially waiving his appeal rights.

Appellees will be able to engage in such gamesmanship tactics if this Court enters judgment dismissing for lack of jurisdiction without expressly stating in an order that the district court's "final approval order" is not a "final decision" for purposes of 28 U.S.C. § 1291, and that challengers to settlement approval have no obligation to appeal until a formal final judgment is issued. Making this pronouncement would safeguard Frank's right to appeal (presuming that there is an eventual final judgment for him to appeal in the MDL). It also could save appellate-court resources because Frank could first to move for reconsideration of final approval of the American and Southwest settlements in the district court once any future settlements are reached or judgments entered. Such reconsideration by the district court would allow the court to address the legal defects in the settlements in light of the settlement of the full MDL, particularly if the class receives zero direct recovery or experiences other harm, and potentially avoid an appeal entirely.

II. The district court erred as a matter of law by approving settlements without considering the effectiveness of the method of distributing relief to the class as required by Rule 23(e).

The district court erred by approving the settlements without the parties proposing any method for distributing the settlement fund and processing claims in violation of Rule 23(e)(2)(C)(ii). Courts are required to consider this factor in determining settlement fairness because of, among other reasons, the risk inherent in the nature of representational litigation that class counsel will prioritize their own

interests over those of the class at the settlement stage of the case. That risk is pronounced here because the settlement allows for the entire fund to be sent to third-party *cy pres* recipients rather than directly paid to class members. Other courts have applied Rule 23(e)(2)(C)(ii) diligently since it went into effect in 2018, and the district court's neglect of the provision here should be rejected. Under the court's ruling, class members are effectively deprived of their right to opt-out because they lack material information on which to make that decision by the opt-out deadline and they are vulnerable to losing their entire recovery to unspecified third-party organizations.

A. A district court must consider a plan of distribution and claims processing to properly evaluate settlement fairness.

Rule 23(e)(2)(C)(ii) requires a court to consider "the effectiveness of any proposed method of distributing relief to the class," as part of its decision to approve a settlement. "The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible." *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-cv-2335, 2020 U.S. Dist. LEXIS 16195, at *19 (S.D. Cal. Jan. 31, 2020) (quoting Final approval criteria—Rule 23(e)(2)(C)(ii): Distribution method, 4 Newberg on Class Actions § 13:53 (5th ed.)). "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Advisory Committee Notes to 2018 Amendment to Rule 23 Subdivision (e)(2)(C).

As the Rule implicitly recognizes, the fairness inquiry must include focus on the distribution of relief because that is among the aspects of a settlement that "directly lend themselves to pursuit of self-interest by class counsel and certain members of the

class." *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003). The need for court approval of a proposed settlement—and the requirement that courts analyze particular aspects of the settlement—arises from the self-interested incentives inherent in the representational nature of class actions. The "district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *See In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013). "Defendants, once the settlement amount has been agreed to, have little interest in how it is distributed and … no incentive to oppose the fee." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000). Class counsel, meanwhile, have an obvious interest in maximizing the fee award and little interest in ensuring the funds reach the absent class members without rules requiring such a focus. *Id.* at 52-53. Even where class counsel do not overreach on their fee request, court oversight of the allocation plan is indispensable because there is no natural incentive for class counsel to propose a fair distribution between the various members of the class. And, absent "vocal objectors," district courts analyze settlements in a "non-adversarial posture" for which they are often "ill-equipped" to assess the reasonableness of the parties' positions. *See Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 122 n.7 (D.D.C. July 24, 2015).

For decades now, Rule 23(e) has conditioned settlement approval not only on finding that the gross settlement is "adequate" but also that the settlement is "fair" and "reasonable." "Fairness calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class." *Manual for Complex Litigation* (Fourth) §21.62 (2004) "Reasonableness depends on an analysis of the class allegations and claims and the

responsiveness of the settlement to those claims." *Id.* Trying to evaluate "fairness" and "reasonableness" without a plan of allocation is like trying to evaluate the quality of a merlot using only your sense of sight, without taste or smell.

So, unsurprisingly, even before the 2018 amendments, the effectiveness of the distribution of funds was a material element that district courts were required to take into account in evaluating settlement fairness. *See, e.g.*, *Staton*, 327 F.3d at 960; *Haggart v. Woodley*, 809 F.3d 1336, 1351 (Fed. Cir. 2016) (reversing settlement approval where counsel failed to inform class members of the methodology used to determine fund distribution); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) (reversing settlement approval where the district court approved a settlement without knowledge that less than $3 million of a $21 million common fund had been claimed and thus the *cy pres* component would be disproportionately large); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Practices & Prods. Liab. Litig.*, 2013 WL 3224585, 2013 U.S. Dist. LEXIS 123298, at *242 (C.D. Cal. July 24, 2013) ("Because the Allocation Plan is such an integral part of effectuating the proposed settlement, the Court cannot conclude that the parties have met their Rule 23(e)(3) burden to identify the terms of the settlement."). Courts have to assure themselves that "'the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants.'" *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (quoting 4 Newberg on Class Actions § 11:46 at 133). And the allocation matters to whether there is an "adequate advantage" because direct benefit matters; "[c]lass members are not indifferent to whether funds are distributed to them or to *cy pres* recipients." *Baby Products*, 708 F.3d at 178; *see also Katrina*, 628 F.3d at 196 (reversing settlement approval

where the district court approved the settlement "without any assurance that attorneys' costs and administrative costs will not cannibalize the entire $21 million settlement").

Rule 23(e)(2)(C)(ii) was added to increase the degree of judicial oversight for the protection of absent class members and cement the high standard only some courts were living up to. Yet the district court's order essentially nullifies that consideration and improperly treats the Rules Committee's careful addition as meaningless surplusage. *See Agnew v. Gov't of the Dist. Of Columbia*, 920 F.3d 49, 57 (D.C. Cir. 2019) (discussing surplusage canon). The district court's analysis essentially determined only that the overall settlement amount was "enough" for the class as a whole without consideration for the fairness to class *members*.

Other courts' scrupulous application of this prong of Rule 23(e)(2)(C) underscores the importance of meaningfully considering the plan of distribution to ensure proper judicial oversight. For example, in *Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, the court "expressed some skepticism" and "directed [the parties] to provide additional information" where the plan of distribution contained far more details than the settlements provide here. 333 F.R.D. 314, 321-22 (S.D.N.Y. 2019) (explaining distribution would be by check mailed to each class member for a *pro rata* share amount, with only amounts remaining from returned and uncashed checks after a specified time period paid as *cy pres* to a specified recipient). Similarly, in *Chi v. University of Southern California*, the court held that the parties had not articulated how the proposed settlement provided a fair method of adjudication where the same person who determined class members' compensation awards would also resolve appeals of those determinations and the class was not informed of the specific procedures governing the

reconsideration process. No. 2:18-cv-04258, 2019 U.S. Dist. LEXIS 103436, at *16-*19 (C.D. Cal. Apr. 18, 2019); *see also Geiss v. Weinstein Co. Holdings LLC*, 17 cv 9554, 2020 U.S. Dist. LEXIS 131170, at *20-21 (July 24, 2020) (rejecting settlement where availability and scope of recovery were improperly delegated with insufficient guidelines); *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-md-2670, 2020 U.S. Dist. LEXIS 28586, at *53 (S.D. Cal. Jan. 17, 2020) (denying settlement approval where settlement and underlying motion failed to describe a claim administration plan); *cf. Bills v. TLC Homes*, No. 19-cv-148, 2020 U.S. Dist. LEXIS 186956, at *7-*8 (E.D. Wis. Oct. 8, 2020) (discussing details of check mailing and expiration and allocation calculations). Appellants located not a single case applying Rule 23(e)(2)(C)(ii) and approving a settlement that contained as little information about the settlement distribution as the settlements at issue here. Affirming the district court's decision would make this Circuit out of step with the consensus application of the Rule.

B. The district court erred by approving the settlements without considering a proposed distribution plan.

The settlements approved by the district court have *no* proposed method of distributing relief to the class and provide no information about the claims process. Plaintiffs' motion for settlement approval stated only that they would distribute the settlement proceeds to the class at a later date. *See* Dkt. 299-1 at 15 n.7. Class counsel reiterated that distribution of the fund is being "deferred until the end of the entire case" at the fairness hearing. Dkt. 374 at 18 (JA__) (summarizing class counsel's statement at fairness hearing).

The district court could not have assessed whether the distribution method was effective at providing relief to the class with nonexistent terms to review. While the parties have committed to distribution *pro rata* if there is distribution at all, there is no indication how funds will be sent to class members, how long class members will have to make a claim, how funds will be sent to them (*e.g.*, by check or electronic transfer), the method for processing claims, whether and how class members can challenge any rejection of their claim, and under what conditions the settlement fund—including the entire settlement fund—will be diverted to *cy pres* rather than distributed to class members. All of those factors are potentially relevant to Rule 23(e)(2)(C)(ii). *See generally Ross v. Lockheed Martin Corp.*, 267 F. Supp. 3d 174, 203 (D.D.C. 2017) ("a putative class member needs to be able to make an informed determination regarding whether or not to opt out of a class settlement"). Yet the district court considered none of them.

Relatedly, the district court could not have assessed whether the claims process prior to distribution is "unduly demanding" as Rule 23(e) requires because the court knew nothing about the claims or distribution process. At a minimum, class counsel could have presented a proposed claims form to the court. Class counsel failed to provide even that, instead expressly acknowledging that they didn't know what information class members would be required to provide. Dkt. 354 at 76:12-13 (JA__). Both class members and the court are left in the dark as to whether they will have to provide burdensome requirements such as notarization, years-old receipts, lengthy unnecessary responses, or other information or actions that deter class members from filing a claim. Because the court could not assess whether the claims process is burdensome, it erred by approving the settlements.

Although the district court initially recognized that Rule 23 requires it to consider the method of distribution to the class (Dkt. 354 at 39:24-40-:9 (JA__-__)), the court then erred by relying on pre-2018 cases that necessarily did not apply the 2018 amendment that specifically requires courts to consider the effectiveness of the method of distribution before approving a settlement. Dkt. 374 at 19-20 (JA__-__) (exclusively citing cases from the 1980s and 1990s). The district court further erred by latching onto the inapposite legal proposition that final approval is not precluded where the settlement and class notice do not specify the amount each class member will recover. Frank did not, and does not, argue that a specific range of recovery must be disclosed to the class prior to settlement approval. Indeed, the settling parties cannot be reasonably asked to provide information that they will only have after the claims process occurs. But Rule 23(e)(2)(C) does require the settling parties to present a proposed method of distribution disclosing how class members' recovery from the settlement fund will be determined. Here, there is no binding guarantee, or even a proposed methodology, whether the settlement will provide cash to the class or be a $0 *cy pres* settlement. Without such information a court cannot determine if the settlement is fair or if class counsel did or will prioritize its own interests at the expense of those of the class.

The appellees may argue that class counsel verbally provided an intent to avoid *cy pres*. Dkt. 374 at 19 (JA__). But such remarks cannot remedy the problem with the settlement and notice themselves. First, class members will not have the right to opt out if the proposed distribution is unfair, including if the entire fund is distributed as *cy pres* or if the *cy pres* recipients are unacceptable to them. The deadline for class members

to opt out so as to preserve their claims against American and Southwest was January 4, 2019 (Dkt. 257-2 at 6 (JA__); Dkt. 267)[2]—before they had any information about distribution of the settlement fund.

Second, class counsel are not bound to adhere to such statements, they constitute no part of the settlement agreements, and, in any event, none of that additional information was provided to the class. *See* Section III. The district court entered no court order and the parties entered no agreement or amendment imposing limitations on when the fund may be distributed to *cy pres* recipients. *See also* Dkt. 373-1, Ex. A ¶40 (JA__); Dkt. 373-1, Ex. B ¶ 40 (JA__). Indeed, nothing prevents counsel from presenting a plan of distribution later in the case that proposes all *cy pres*, and nothing prevents the district court from accepting it. No matter how well-intentioned the district court's disinclination toward *cy pres* may be, its position provides insufficient assurance to the class. In the intervening years between now and when settlements are reached or judgments entered with respect to the remaining defendants, the case could be reassigned to a different court, or the court may simply change its mind.

The district court erred further by allowing efficiency concerns and the relatively small number of objections to override a proper evaluation of settlement fairness. Dkt. 374 at 20 (JA__) ("it would be inefficient to distribute and process claims until the entire case has been resolved"). Even if the distribution itself were delayed for efficiency reasons, there is no justification for the court's failure to evaluate the way in which the

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[2] The notice is also available on the settlement website at https://domesticairclass.com/Portals/0/Document%20Files/6060_Domestic%20Airlines_LF%20Notice_v1.pdf.

fund will be distributed. Nor is there any justification for relying on the lack of objections as evidence of class members' acquiescence, much less support for a settlement—a view the Seventh Circuit considers "naïve." *Redman v. RadioShack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014); *accord Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2015) (low objection rate "proves little"). That is particularly true here, where the method of email notification was prone to being filtered as spam in class members' email systems. *See* Dkt. 329 at 2 (JA__).

III. The district court erred by approving a settlement where the class notice failed to disclose material terms of the settlement and class counsel is permitted to divert the entire settlement fund to *cy pres*.

The potential for harm from the district court's approval of the settlements without analyzing the effectiveness of the proposed method of distributing the funds is pronounced in this case due to loopholes in the settlement that allow the entire fund (after attorneys' fees and costs are paid) to go to third-party *cy pres* recipients. Despite the parties' express recognition of this fact, neither the class notice nor the settlement explains how class counsel will determine when they will forego distribution to the class in favor of *cy pres*, nor do they explain who the *cy pres* recipients will be or how the recipients will be chosen. These deficiencies compound the notice's failure to provide the class with information about the plan of distribution and allocation of the settlement fund, in violation of Rule 23 and class members' due process rights. The district court erred by approving the settlements in the face of these legal flaws.

A. The settlement notice violates Rule 23 and class members' due process rights by failing to disclose material terms before the objection and opt-out deadlines.

Federal Rule of Civil Procedure 23(e)(1)(B) requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." The Rule 23 notice requirements are grounded in class members' constitutional due process rights that protect them from being deprived of property, here their claims against the defendants, without notice and an opportunity to object or otherwise be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). The notice should include, *inter alia*, "the essential terms of the proposed settlement," "any special benefits provided to the class representatives," "the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations," and "the basis for valuation of nonmonetary benefits," and further should "provide information that will enable class members to calculate or at least estimate their individual recoveries, including estimates of the size of the class and any subclasses." *Manual for Complex Litigation* § 21.312 (4th ed.).

The class notice here is deficient because it fails to provide notice to the class of certain of these material terms of the settlement, including the plan of distribution and allocation. This plan is a material detail of the settlement that must be disclosed to class members. *See, e.g.*, *In re Fed. Nat'l Mortg. Ass'n Sec., Derivative & ERISA Litig.*, 4 F. Supp. 3d 94, 108-09 (D.D.C. 2013). Because the plan is "an integral part of effectuating the proposed settlement[s]," the failure to include it in the notice means the parties have not "met their Rule 23(e)(3) burden to identify the terms of the settlement." *Toyota Motor*

Corp. Unintended Acceleration Mktg., 2013 U.S. Dist. LEXIS 123298, at *242. Even if the district court was correct to credit class counsel's assertions at the fairness hearing that they intended to distribute the settlement fund to the class *pro rata* (and it wasn't), there is no dispute that this information was never communicated to the class. And even if class counsel make good on their asserted intention to allow class members to object once future settlements with the remaining defendants are reached (assuming they settle at all), the impact of class members' objections is severely diminished because the district court already approved the American and Southwest settlements. And the opt-out deadline will have long passed by the time any such future settlements are reached. Class members thus were missing a material detail that prevented them from making an informed decision of whether to object or opt out. *See Black's Law Dictionary* 1124 (10th ed. 2014) (A piece of information is "material" when it is "significant," *i.e.*, when "knowledge of the item would affect a person's decision-making").

The class notice is also deficient as a matter of law because it doesn't disclose another material term—when the settlement fund will be distributed to third parties, the identity of the charities being considered as such *cy pres* recipients, how they will be selected, and what conflicts might exist between the class representatives, class counsel, and the possible recipients. Nor does the settlement establish a procedure for selecting recipients or opportunity for class members to object to the recipients. "The *cy pres* problem presented in this case is of the parties' own making, and encouraging multiple costly appeals by punting down the line [the court's] review of the settlement agreement is no solution." *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012).

Even worse, when charitable recipients are not designated until the opt-out deadline has passed—as it has here—class members have no way to distance themselves from the subsidy and thus it constitutes compelled speech in violation of the First Amendment. A *cy pres* distribution will result in compelled speech because the settlement fund proceeds were "generated by the value of class member claims, [and thus] belong solely to the class members." *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011). Just as making a charitable contribution is First Amendment-protected expressive and associational activity, *see Buckley v. Valeo*, 424 U.S. 1 (1976), individuals concomitantly have a right to refrain from making such a donation—a right to not be compelled to engage in expressive and associational activity, *see Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018).

The district court erred as a matter of law by relying on class counsel's expressed "intention" to avoid *cy pres* altogether (Dkt. 374 at 25 (JA__)) and to later provide notice and an opportunity for the class to object after settlements with the remaining two defendants are reached (Dkt. 374 at 30 (JA__)). Even if made in the utmost good faith, these assertions are nothing more than speculative plans. Rule 23, and our system of law, require more than speculative "just trust us" assertions as grounds for legal rulings that take away absent class members' rights. *Dennis*, 697 F.3d at 869; *see also* Section II.B.

B. The settlement cannot be approved and the settlement class cannot be certified because the settlement allows class counsel to divert the entire fund to third parties selected by class counsel.

The legal construct of *cy pres* has its origins in trust law as a vehicle to realize the intent of a settlor whose trust cannot be implemented according to its literal terms.

Keepseagle v. Perdue, 856 F.3d 1039, 1059 (D.C. Cir. 2017) (Brown, J., dissenting); *see also Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011). A classic example of *cy pres* is found in a 19th-century case where a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867). Imported to the class action context, it has become an increasingly popular way to distribute settlement funds to non-class third parties—a practice that raises "fundamental concerns." *Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari). These fundamental concerns exist in spades in the settlements, raising issues of adequacy of representation under Rules 23(a)(4) and (g), superiority of the class action device under Rule 23(b)(3), and settlement fairness under Rule 23(e).

A *cy pres*-only arrangement fails several requirements of Rule 23. "First, the fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented" under Rule 23(a)(4) and Rule 23(g). *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting where majority vacated settlement approval and remanded for determination of standing). By allowing an all-*cy pres* distribution, the settlement at issue is far worse than settlements that may allow *cy pres* after class members have been compensated directly. *Cf. Keepseagle*, 856 F.3d 1039 (approving settlement where residual funds designated to *cy pres* after two rounds of distribution to class members but finding legal challenge to *cy pres* provision waived). *Cy pres* is "not a form of relief to the absent class members and should not be treated as such." *Id.* (Thomas, J., dissenting). "*Cy pres*

distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class." *Baby Prods.*, 708 F.3d at 173; *Keepseagle*, 856 F.3d at 1060 (Brown, J., dissenting). If class counsel gets paid the same either way, they have no incentive to do the extra work to move money to their anonymous clients, rather than to their favorite charities and *alma maters*.

Second, because *cy pres* does not provide any relief to absent class members, the lack of any benefit for the class from directing all of the funds to *cy pres* would render the settlement unfair under Rule 23(e) and provide no basis for awarding attorneys' fees under Rule 23(h). *See Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting). "There is no indirect benefit to the class from the defendant's giving money to someone else." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004); *accord Pearson*, 772 F.3d at 784. The settlement funds "belong solely to the class members." *Klier*, 658 F.3d at 474. Although the court has deferred ruling on attorneys' fees, the specter of disproportionality is omnipresent in an all-*cy pres* settlement. If the settlement funds are all diverted to third parties, the settlement provides no direct or actual benefit to the class in consideration for releasing their claims.

In addition to being unfair, an all-*cy pres* settlement thus raises questions of "whether a class action is 'superior to other available methods for fairly and efficiently adjudicating the controversy' when it serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief." *Gaos*, 139 S. Ct. at 1047-48 (Thomas, J., dissenting). The class device cannot be a superior means of resolving litigation if the settlement benefit does not distinguish between class

members and non-class members. A faithful agent—or adequate class representative—would costly opt out every class member from the settlement rather than waive their rights. Class members are unable to act to protect their own rights here because they have been provided no information about when *cy pres* will be utilized or how their funds will be allocated. Courts have repeatedly rejected settlements that provide for or allow *cy pres* as the only class relief, and it was error to approve the two at issue here without binding legal protections against that possibility. *See, e.g.*, *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071 (9th Cir. 2017) (rejecting all-*cy pres* settlement); *Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003) (same); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 485-86 (E.D.N.Y. 2016) (same); *Fraley v. Facebook, Inc.*, 2012 WL 5838198, 2012 U.S. Dist. LEXIS 116526, at *4-*7 (N.D. Cal. Aug. 17, 2012) (same).

The district court's belief that a *cy pres* distribution is unlikely provides no legal grounds for approving the settlement. *See* Dkt. 374 at 25 (JA__). The risk of a *cy pres* distribution is in fact pronounced in this case because of class counsel's history with *cy pres* and the apparent nuisance settlements they have reached. If the case is so meritless that defendants will engage in only nuisance settlements equal to less than 1% of the damages they alleged—as Southwest and American did—or avoid liability altogether, then there are class certification problems under Rule 23(a)(4) and Rule 23(g). *See Gaos*, 139 S. Ct. at 1047 (Thomas, J., dissenting). "Cy pres distributions present a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations." *Dennis*, 697 F.3d at 867; *see also In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 327 (3d Cir. 2019) (vacating settlement approval where class counsel sat on the board of one *cy pres*

recipient and defendant already donated to another, noting the "misalignment of interests" where a settlement's only monetary distributions are to class representatives, counsel, and *cy pres*); *Nachshin*, 663 F.3d at 1039 (criticizing *cy pres* where "the selection process may answer to the whims and self interests of the parties [or] their counsel").

A nuisance suit makes it more likely that class counsel has harbored the intent all along to create a *cy pres* slush fund and obtain fees for counsel's use with nothing for the class. With the low-settlement-dollar / large class size ratio, class counsel is more likely to argue that distribution is economically infeasible such that *cy pres* is appropriate, just as other class counsel have tried to argue in multiple other settlements with these traits—only to find that direct distribution to the class is feasible when challenged. *E.g. Fraley v. Facebook, Inc.*, 966 F. Supp. 2d 939 (N.D. Cal. 2013). If class counsel is engaging in these tactics, it is an abuse of the class action system that should preclude class certification and settlement approval. *E.g.*, *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 557 (7th Cir. 2017).

This risk is not imaginary. Lead class counsel previously was willing to agree to an egregious settlement in which $5.1 million of settlement money was diverted away from the class to fund the development of future litigation while also funding a sizable donation to class counsel's alma mater. *See* Roberts, *supra.* As noted above, neither class counsel's assertions on the record nor the district court's comments regarding its disinclination toward *cy pres* or belief that it is unlikely to happen are binding and cannot protect class members from future *cy pres* proposals. The court may change its mind, or the case may be transferred, while class counsel may decide to propose *cy pres* even where distribution to class claimants is economically feasible. Because Rule 23(e)

fairness requires more protection for class members, settlement approval must be vacated.

Conclusion

For the reasons set forth above, Appellants Frank and Bednarz respectfully ask this Court, if it has jurisdiction, to vacate settlement approval or, if it does not have jurisdiction, to state that the district court's "final approval order" is not a "final decision" for purposes of 28 U.S.C. § 1291 such that challengers to the settlement approval have no obligation to appeal until a formal final judgment is issued.

October 26, 2020

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 11,702 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this initial brief has been prepared in a proportionally spaced typeface, 14-point Garamond, using Microsoft Word 2013.

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October 26, 2020

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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