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)

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

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Appellees cite no precedent foreclosing appellate jurisdiction for the challenge by appellants Frank and Bednarz (often referred to collectively as "Frank") to the district court's final approval order in this multidistrict litigation, nor does appellees' response overcome the strong practical and policy reasons in support of jurisdiction advanced by Frank and Amicus. Appellees largely rely on *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015), and their interpretation of the case as holding that appellate jurisdictional rules never apply differently in MDLs. This argument does not withstand scrutiny. Unlike this appeal, *Gelboim* involved an appeal by parties who brought an individual case that was fully separable and who did not risk losing the right to ever appeal approval of a settlement on which they had no input and which they claimed violated their statutory and constitutional rights.

Appellees fail to reckon with the fact that class action objectors such as Frank and Bednarz are in a far different position. Unlike parties in an ordinary multi-party action, they have no ongoing involvement with the litigation and certainly not with dozens of individual cases that may be transferred back to the originating courts at the conclusion of pretrial proceedings. This Court could apply a "practical" construction of 28 U.S.C. § 1291 that protects objectors' rights by finding that the district court's final approval order is a final decision under the statute. Appellees' speculation about how Frank might still be able to appeal the final approval order at a later date if this Court holds it lacks jurisdiction at this juncture fails. There is no reason to believe the district court would change its mind and enter a Rule 54(b) judgment when individual cases are transferred back to their originating courts, and there is no guarantee that

those courts will enter final judgments into which the district court's final approval order will merge. And even if there later was a merged final judgment for Frank to appeal, the multiple individual judgments would only exacerbate the "piecemeal" appeal issue appellees rely on and raise thorny questions about when the appeal deadlines commence. *See* Section I.

On the merits, appellees fail to rebut Frank's argument that Rule 23(e)(2) permits courts to approve class settlements only after considering the method of distributing relief to the class, and the district court's analysis was legally deficient where the parties left open the possibility that all class relief would be distributed as *cy pres* without articulating the conditions that would warrant *cy pres*. Such allocational information is necessary for a court to determine whether a settlement is fair under Rule 23(e). If parties can defer disclosure of how class members will be compensated or even how they will determine how class members will be compensated, then the requirements of Rule 23(e)(2)(C)(ii) are meaningless. *See* Bolch Judicial Institute, *Guidelines and Best Practices; Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions* 5-6 (Aug. 2018). Appellees did not meet their burden under Rule 23(e), so the settlement should not have been approved. *See* Section II.

Finally, appellees fail to respond to Frank's argument that the settlement also fails under Rule 23(e)(1)(B) because notice to the class left out the critical details of the extent and type of benefits the settlement will confer on class members. They focus instead on the less specific notice requirements under Rule 23(c)(2)(B) and on cases that predate the additional notice requirements added to Rule 23(e). In many of the cases appellees cite, the class notice did in fact inform class members of the settlement

benefits. In short, they fail to rebut Frank's argument that the class has a right to notice of and to object to both *cy pres* distribution and the recipients, particularly given that *cy pres* without an opt-out right constitutes compelled speech in violation of the First Amendment and violates multiple subsections of Rule 23. Without proper class notice, the district court's approval of the settlement was legal error. *See* Section III.

Argument

I. The Court may have jurisdiction to decide the appeal, and if it determines otherwise, appellees do not object to the Court expressly stating that the "final approval order" is not a "final decision" ripe for appeal.

A. Appellees fail to rebut Frank's arguments in support of extending *Gelboim* to protect his appeal rights in this MDL settlement.

Appellees' assertion that *Gelboim* did not "hold that appellate jurisdictional rules apply differently in MDLs" (RB1) is beside the point when *Gelboim* presented a straightforward application of 28 U.S.C. § 1291 and did not address the situation presented in this appeal. This is neither an ordinary case nor a duplicate of *Gelboim*. It instead presents a unique situation where the district court's order "end[ed] the litigation on the merits" for two defendants and the class objectors "and [left] nothing for the court to do but execute the judgment" where all the parties and the district court expressly recognized the importance of finality and nonfinality risks foreclosing all appeal rights for the objectors. *See Caitlin v. United States*, 324 U.S. 229, 233 (1945); *see*

also Dkt. 374 (JA__); OB12-14.[1] The order has the markers of a final decision. This Court could resolve the dilemma MDL objectors face where less than all defendants settle and the district court approves the settlement by extending *Gelboim* and applying a practical construction of 28 U.S.C. § 1291 and Rule 54(b) to allow Frank to proceed with this appeal.

In *Gelboim*, the Supreme Court held that when one of the underlying cases that was consolidated into an MDL proceeding is final, then the dispositive order in that case is appealable under § 1291. In this appeal, in contrast, all of the *claims* against American and Southwest have been fully resolved by settlement. The MDL proceeding nevertheless remains pending, however, because unlike in *Gelboim*, the individual cases here—over which absent class members such as Frank and Bednarz have no control—alleged claims against two additional defendants. Frank and Bednarz objected to the American and Southwest settlements because the settlements and the notice to class members thereof violate Rule 23 and class members' constitutional rights. If this Court holds that the final approval order issued by the district court is not an appealable final order under § 1291, then their right to ever appeal the settlements that release their claims is in limbo.

Appellees stretch *Gelboim*'s "central holding" beyond recognition by claiming that rules of appellate jurisdiction apply exactly the same in the MDL context as in other contexts (RB25), but not even *Gelboim*'s dicta resolves the different scenario in this

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[1] "OB" refers to Frank and Bednarz's opening brief. "RB" refer to appellees' response brief. "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).

appeal. *Gelboim* does, however, recognize Rule 54(b)'s "aim[] to augment, not diminish appeal opportunity" as the liberalized joinder and consolidation of cases "increase[] the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties." 574 U.S. at 410 (internal quotations omitted). That *Gelboim* "anticipated that Rule 54(b) would still govern 'multi-claim complaints'" (RB26) does nothing more than recognize the text of the Rule itself. But that doesn't solve the objectors' dilemma or the application of § 1291 to final approval orders that completely end a defendant's involvement in an MDL that continues with respect to other defendants. This Court could take a pragmatic approach, "finding that finality can be achieved without reliance on Rule 54(b)" here, where absent class members' objection to the American and Southwest settlements is "sufficiently independent to support appeal upon final disposition without regard to Rule 54(b)." *See* Wright & Miller, Fed. Prac. & Proc. Juris. § 3914.7 (2d ed. 2020).

Unlike the single separable case in *Gelboim*, the individual cases here allege claims against four defendants, and now claims are fully resolved with respect to only two of those defendants in the consolidated MDL. There is no dispute that there are no merits issues left to be decided with respect to the American and Southwest defendants. In this situation, it would be appropriate for the Court to consider the purpose of the Rules Committee in drafting Rule 54(b) and a "practical rather than technical construction" of § 1291 to protect objecting class members in MDL proceedings by allowing them to appeal settlement approval rather than waiting for a future settlement that may or may not be reached in the MDL. *See Gelboim*, 574 U.S. at 409 (internal quotation omitted).

On this point, appellees say very little. They don't dispute the purpose of Rule 54(b) is to expand rather than restrict appeal rights. They even admit that it may "have made sense" to allow Frank to appeal on certain issues such as the settlement amounts and terms that they view as "ripe." RB2. This admission, however, underscores Frank's point: The particular topic of Frank's appeal is irrelevant when the lack of a final judgment means that he might lose his right to appeal entirely a settlement that potentially violates Rule 23 and denies class members all direct relief. The appeal would only be "piecemeal" (RB2) if the remaining two defendants settle in the MDL and Frank or another objecting class member has an opportunity to appeal that settlement. If the cases are transferred to other districts for trial, rather than settled in the MDL proceeding, Frank potentially won't have *any* appeal, much less piecemeal appeals. Moreover, even if there is a later appeal of a settlement with the remaining two defendants, a ruling by this Court on the issues presented by Frank's appeal would more beneficial than harmful. It would provide precedent for the settling parties' proposed notice to the class and decisions regarding *cy pres* relief and ensure class member' litigation rights are fully respected.

Appellees respond to the potential denial of objectors' appellate rights with pure speculation about ways in which Frank will be able to pursue an appeal in the future. But *Gelboim* recognizes the risk that "there may be no occasion for the entry of any judgment" when pretrial consolidation concludes and/or individual cases are returned to their originating courts. 574 U.S. at 415. As non-party absent class members, Frank and Bednarz would not have a role in any ongoing litigation in the MDL. Thus, it wouldn't "make sense for the appeal clock to run when final disposition was entered in

other, distinct class actions" sent back to the originating courts to adjudicate claims against the two remaining defendants. *Cf.* RB28.

Appellees surmise that a final judgment "will likely arise" in the same district court that approved the Southwest and American settlements. RB28. They speculate that the district court (i) would retain the cases for trial if the class is certified because at least one named plaintiff filed an individual action in that district court; or (ii) "likely would" first certify judgment under Rule 54(b) before returning individual cases to their court of origin. RB28-29. The district court has given no signal that it will do either. The individual cases originally were filed in over a dozen different districts. *See* Transfer Order, Dkt. 1, No. 1:15-mc-01404 (Oct. 13, 2015) (noting twenty-three actions pending in seven districts and sixty-nine related actions pending in fifteen districts at time of transfer). Frank's appeal rights should not ride on speculation about how a court will manage an unpredictable, large-scale antitrust MDL, and the parties cite no support for such an approach.

The parties also claim that, at some point in the future, the action in remanded cases will become final in the originating district courts such that appellate jurisdiction would then arise from the "merged" final judgment. RB30. But the parties don't address the uncertainty objectors would face in determining when the appeals clock begins to run under Rule 4(a)(1)(A). Objectors might be required to appeal as soon as judgment is entered in the first individual case—which does not solve the parties' asserted concern with "piecemeal appeals" as there may be judgments and then appeals in later-resolved individual cases. Or perhaps objectors would be required to appeal in every individual case. Or perhaps objectors could appeal only after all the individual cases are

resolved in the originating districts. Neither the parties, nor the rules, nor precedent provides reassurance that objecting class members' rights will be protected. Fundamentally, the parties fail to explain how the MDL's final approval order for the American and Southwest settlements would merge with judgments in the individual actions to avoid the "piecemeal" issue that drives much of their response. Appellees' argument also ignores the notice problems with the settlement that Frank raises on appeal and the fact that there would be multiple judgments in the multiple cases remanded to originating districts that Frank might be required to track for years and then appeal from under the parties' view of the law. Such an approach magnifies rather than mitigates the appellees' concern with piecemeal appeals.

Further, appellees are simply wrong that Frank's objection and appeal do not "threaten the underlying settlements." RB33-34. The legal defects in the settlement that Frank challenges on appeal go to the heart of the Rule 23 settlement approval. As described in detail in Sections II and III below, the district court was required to consier the potential allocation of the settlement funds to a third-party *cy pres* recipient unconnected to the litigation, which would violate multiple dimensions of Rule 23, and the lack of proper notice undermines class members' Rule 23 and constitutional rights, such that the settlement itself cannot be approved. Although the parties assert that the class will receive additional notice about the distribution, they don't dispute that nothing binds them to provide a process for class members to object to the fairness of an all-*cy pres* settlement at that later date.

Appellees cite no precedent holding that MDL class objectors may not appeal where a settlement resolves all claims against some of the defendants in a consolidated

MDL. Although they rely on *Agretti v. ANR Freight Systems, Inc.*, to support their view that an objector cannot appeal until a final judgment is entered (RB22), the case involved co-defendant employers' effort to challenge a settlement between the plaintiff employees and a co-defendant union. 982 F.2d 242 (7th Cir. 1922). The co-defendant employers remained parties to the ongoing case such that they could fully protect their own rights in the litigation. In any event, the court held in *Agretti* that the employers did not have standing to challenge the settlement; it was the district court's order denying the employers' motion to add cross-claims to their answer—a classic interlocutory order—for which the court found that no final judgment had been entered and therefore no appeal was allowed. Class members in an MDL, in contrast, have virtually no ability to direct the litigation and protect their rights in the ongoing proceeding. And, a final approval order typically is a final order ending the litigation. *See* OB12-14 (discussing the parties' and court's view of the finality of the final approval order). Likewise, *Moore v. Petsmart Inc.* (RB22) involved a class member's appeal of a class action settlement which did not adjudicate her own claims; the class member's appeal was based on her argument that the settlement prejudiced her individual suit that remained pending. *Moore*, No. 15-16750, Dkt. 9 (9th Cir. Oct. 13, 2015). The same is true for *National Association of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, where the First Circuit dismissed the appeal with respect to the non-class member appellants' argument that the settlement adversely impacted them. 582 F.3d 30, 38 (1st Cir. 2009). The court otherwise denied the motion to dismiss, found class members were proper appellants, and affirmed the settlement with respect to those parties included with the settlement's class definition. *Id. See also In re Ivan F. Boesky Sec. Litig.*,

948 F.2d 1358, 1364 (2d Cir. 1991) (objector appeal of final approval order reduced to judgment).

If the Court nevertheless adheres to a bright-line rule requiring a specific 54(b) finding for § 1291 jurisdiction, the parties do not oppose Frank's request that this Court make an express finding that the district court's "final approval order" is not a final judgment. *See* OB25-26. Nor do they oppose Frank's request that this Court find that his appeal is a "protective" appeal and stay and abey the appeal, as the Supreme Court has allowed in other contexts. *See, e.g.*, *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005) (citing *Rhines v. Weber*, 544 U.S. 269 (2005)). The parties have thus forfeited any opposition to this commonsense approach.

B. Appellees are wrong to ask the Court to disregard any of Amicus's arguments that jurisdiction is proper.

Finally, the parties' argument that the Court should disregard Amicus's § 1292 argument—or any of their arguments—because Frank did not raise it is meritless. "It is axiomatic that subject matter jurisdiction may not be waived, and that courts may raise the issue *sua sponte*." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) (internal quotation omitted). The cases the parties cite do not support their argument otherwise. *See* RB35-36 (citing *Kokkonen v. Guardian*, 511 U.S. 375, 377 (1994) and *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 57 n.15 (D.C. Cir. 1977)). The Court appointed Amicus for the purpose of presenting arguments in support of the Court's jurisdiction. *See* Order, Doc. 1857971 (D.C. Cir. Aug. 24, 2020). The appellees' request, if granted, would make Amicus's appointment gratuitously wasteful because the Court would find itself forbidden from considering any jurisdictional arguments not presented

by Frank. Fortunately, the law holds otherwise, and the parties' request should be rejected. *See Laverpool v. Taylor Bean & Whitaker REO LLC*, 229 F. Supp. 3d 5, 15 (D.C. Cir. 2017) ("Because this doctrine is one of jurisdiction, even though the Mortgage defendants have not raised it themselves, this Court must raise the issue … *sua sponte*." (cleaned up)).

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).

Appellees note that settlement approval decisions are "committed to the sound discretion of the district court." RB41 (quoting *Pigford v. Glickman*, 206 F.3d 1212, 1216-17 (D.C. Cir. 2020)). But Rule 23(e)(2) permits courts to approve class settlements only "after considering," *inter alia*, "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." "[T]o make a reasoned decision" that can survive abuse of discretion review, the district court needed the proper predicate facts; it "needed more than guesstimates" about the plan of distribution. *Am. Council for the Blind v. Mnuchin*, 878 F.3d 360, 370 (D.C. Cir. 2017). At the very least, under the 2018 Amendments to Rule 23 it was error to presume that any to-be-determined distribution plan would satisfy the requirements of fairness and reasonableness. *Jane Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019).

Although the adversarial process between class plaintiffs and defendants ordinarily generates an "adequate" fund, it does nothing to ensure "the manner in which that amount is *allocated*" will be fair and reasonable. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717 (6th Cir. 2013) (emphasis in original). Rule 23(e)(2) conditions settlement

approval on finding not only that the settlement is "adequate" but also that it is "fair and reasonable." A fair allocation depends upon class counsel's faithful discharge of their fiduciary obligations, and in turn, on courts "carefully scrutiniz[ing] whether those fiduciary obligations have been met." *Pampers*, 724 F.3d at 718.

Appellees protest that the district court did "expressly and extensively consider[] the proposed method of processing claims and distributing relief." RB43. This elides a crucial and undisputed point: class counsel's representations as to their general intentions "constitute no part of the settlement agreements" (OB34) and are "no binding guarantee." (OB33; *accord* OB42). Nor was there any extensive consideration. Instead, the district court concluded that it would be "inefficient to distribute and process claims until the entire case has been resolved" and that there was no requirement that the amounts of distribution be known at this time. Dkt. 374 at 19-20 (JA__).

Both of these rationales are non sequiturs. Frank never suggested that it would be unlawful to defer the distribution for reasons of administrative efficiency or that class counsel are required to engage in unknowable speculation about the *per claimant* recovery. He only asked that the plaintiffs actual bind themselves to the *pro rata* distribution they purportedly intend, and to specific criteria under which they could later determine such class distributions are infeasible. As to this issue, the district court merely observed class counsel's promise to "work with the Claims Administrator to determine at what level distribution is not economically feasible; *i.e.* the 'break-even point.'" Dkt. 374 at 23 (JA__).

Neither the settling parties, nor the district court provided *any* reason why that break-even point should not have been determined—and noticed upon the class—before settlement approval. Nor have they provided a reason for why the parties failed to decide much of the other machinery of the claims process that could affect class member rights. *See* OB32 (listing examples such as the length of the claims period). Because it was "feasible" to do so, these material aspect of the plan of allocation "should [have been] disclosed at the preliminary approval stage." 2 McLaughlin on Class Actions § 6:23 (17th ed. 2020) (cited by RB47).

In appellees' view, the 2018 Amendments were no "sea change in the settlement-approval process." RB45. They are correct insofar as the allocation of settlement funds has always been a material factor in the assessment of settlement fairness. OB29-30. But they are mistaken insofar as the 2018 revamping of Rule 23(e)(2) does demand that district courts review class settlements in a less deferential manner. *Roes*, 944 F.3d at 1049 n.12 (9th Cir. 2019); 4 William B. Rubenstein, *Newberg on Class Actions* §13:50 (2020) (questioning pre-2018 Amendments cases that applied a presumption of fairness to settlement review). "For the first time, … the rules and accompanying guidance to judges stress that they should pay close attention to how class action settlements are distributed." Jessica Erickson, *Automating Securities Class Action Settlements*, 72 Vand. L. Rev. 1817, 1851 (2019). If settling parties may simply dispense with proposing a plan of allocation until a later date, then Rule 23(e)(2)(C)(ii) has no meaning.

Quoting the Bolch Judicial Institute's Guidelines on implementing the 2018 Amendments to Rule 23, appellees assert that courts "can require less information…if there are no indications that the settlement is unfair." RB47. But to determine whether

there are such indications in the first place, courts must know how the settlement is "allocated" (including whether "a significant portion of the money made available" will go to *cy pres*) and whether the claims process is "complicated" or "direct and simple." Bolch Judicial Institute, *Guidelines and Best Practices; Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions* 5-6 (Aug. 2018), *available at* https://bit.ly/38duMyo. The Bolch Guidelines also make clear that to comply with the Amendments the parties should provide information on the effectiveness of the proposed method of distributing relief. *Id.* at 10. Specifically:

> If the benefits are distributed in a 'claims-made' settlement, the parties should explain the contemplated claims process and the proposed notice and claims methods to ensure the best practicable recovery by the class. At the notice stage, the parties should provide information showing that any proposed claims-processing method will facilitate the filing of legitimate claims and deter unjustified claims. At the same time, the court should ensure that the claims process is not unduly demanding, burdensome, and oppressive.

Id.

Rule 23, and more specifically subsection (e)(2)(C)(ii), apply to all class settlements; there is no exception for settlements that do not mark the end of the litigation. *Contra* RB46 n.10. For example, appellees make no effort to distinguish *In re Katrina Canal Breaches Litig.*, which vacated a partial interim settlement when the record offered no assurance that the class would receive a monetary benefit. 628 F.3d 185, 189 n.1, 195-96 (5th Cir. 2010).

Relying on a district court decision, *In re Lithium Batteries Antitrust Litigation*, 2020 WL 7264559, 2020 U.S. Dist. LEXIS 233607 (N.D. Cal. Dec. 10, 2020), and authorities it cites, appellees maintain that it is permissible to defer consideration of a plan of allocation until after final approval. RB47-48. But *Lithium* did not involve a final settlement approval without a plan of allocation; the court there made "alterations to the distribution plan" and approved that "revised distribution plan" after final approval. 2020 U.S. Dist. LEXIS 233607 at *36, *107. To be sure, that procedure is legally suspect for other reasons, but it is not the issue Bednarz raises here. Similarly irrelevant, *Union Asset* held that an alteration of the plan of allocation after preliminary approval **but before final approval** was not an abuse of discretion. *Union Asset Mgmt Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 640-41 (5th Cir. 2012).

Although the plan of allocation was approved (and presumably generated) after final settlement approval in *Class Plaintiffs v. Seattle*, that issue merely lurked in the record; the objectors did not raise, and the Ninth Circuit did not address it. 955 F.3d 1268 (9th Cir. 1992). *Agent Orange* did reject a categorical rule that settlement approval presupposes a plan of allocation, but that decision was *sui generis*. That particularly sprawling mass tort litigation (involving all members of the American, New Zealand and Australian armed forces (and their relatives) harmed by exposure to Agent Orange over an eleven-year period in Vietnam) made "formulation of the plan" "a difficult, time-consuming process." *In re Agent Orange Prods. Liab. Litig.*, 818 F.3d 145, 170 (2d Cir. 1987). Moreover, the legal underpinning of *Agent Orange*'s holding—that "the prime function of the district court in holding a hearing on fairness of the settlement is to

determine that the amount paid is commensurate with the value of the case"—is incompatible with today's Rule 23(e). *Id.*

It is incorrect that prior to the 2018 Amendments this Court "approved" the practice of giving weight to the lack of objections. *Contra* RB46. While *Cobell v. Salazar* holds that considering the paucity of objections is not an independent ground for reversal, it also recognizes the "caution that should be exercised in inferring support from a small number of objectors to a sophisticated settlement." 679 F.3d 909, 923 (D.C. Cir. 2012) (internal quotation omitted). Frank does not allege that it is an independent ground for reversal here; rather he alleges that it cannot serve as the justification for ratifying a settlement without a firm plan of distribution. OB35.

Citing three district court orders that retained jurisdiction after final approval to later consider plans of distribution (RB48-49), appellees claim that 2018 Amendments present no obstacle. But these orders, ostensibly entered exactly as proposed by the settling parties, contain no reasoning at all. "The adoption of proposed orders is commonplace" but "these 'orders' are of little aid" "in the context of a class-action settlement" where "a searching judicial inquiry is required." *Hart v. BHH, LLC*, 334 F.R.D. 74, 78 (S.D.N.Y. 2020). "That is not how the law should develop." *Id.*

Bednarz does not ask this court to offer an advisory opinion on the legality of all-*cy pres* settlements. *Contra* RB49.[2] Rather, his illustration demonstrates only that the

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[2] It is notable, however, that appellees' only support for "regularly approv[ing]…all-*cy pres* distributions" (RB50) is a Third Circuit decision *vacating* an all-*cy pres* settlement approval. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316 (3d Cir. 2019). *Google Cookie*'s dicta that "in accords with the purpose of the

class is not "indifferent" on the question of allocation and "class counsel should not be either." *In re Baby Prods. Antitrust Litigation*, 708 F.3d 163, 178 (3d Cir. 2013). An allocation plan is a material component of the settlement and "[i]f the parties have not on their own initiative supplied the information needed to make the necessary findings, the court should affirmatively seek out such information." *Id.* at 174 (quotation omitted).

The settling parties had the burden to prove their settlement satisfies Rule 23(e). *E.g. Pampers*, 724 F.3d at 719 *Roes*, 944 F.3d at 1049; *Katrina*, 628 F.3d at 196; *Manual for Complex Litigation* § 21.631. Without proposing a binding plan of allocation, they could not bear their burden, and consequently, the district court's settlement approval was error.

III. Notice that does not disclose the "essential terms" of settlement disbursement does not satisfy Rule 23 and at minimum would require a future opportunity to opt out.

Appellees assert Frank's argument contradicts Rule 23(c)(2)(B), but they ignore his actual argument based on Rule 23(e)(1)(B). RB53. While Rule 23(c)(2)(B) lists certain requirements for notice of certification, Frank's argument centers on the deficiencies under Rule 23(e)(1)(B).

In particular, the parties' failure to inform class members of terms essential to deciding whether to participate in the settlement failed Rule 23(e)(1)(B). This rule

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Rule 23(b)(2) structure" "a cy pres-only (b)(2) settlement" need not belong "to individual class members as monetary compensation" has no application to a (b)(3) class action such as that here. *Id.* at 328.

requires such details including "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." OB13, quoting *Manual for Complex Litigation* § 21.312 (4th ed.).

Appellees fail to cite Rule (e)(1)(B) at all. While courts commonly "send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B)" (Advisory Committee Notes to 2018 Amendment Federal Rule of Civil Procedure 23), the requirements are distinct. For settlements ostensibly intended to provide direct relief to class members like this one, the class notice should detail "the extent and type of benefits that the settlement will confer on the members of the class," and "details of the contemplated claims process and the anticipated rate of claims by class members" may be necessary for settling parties to disclose. *Id.*

Plaintiffs' cases concern only notice adequacy under Rule 23(c)(2)(B)—and they predate the additional notice requirements added to Rule 23(e). *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004) ("As Rule 23(e)'s notice requirements are less specific than that of Rule 23(c)'s…the Court will focus on Rule 23(c)'s requirements.").

Moreover—strikingly—notice in the cases appellees cite *did* inform class members of "the settlement benefits available to the various classes." *Id.* at 446; *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 103 (2d Cir. 2005) (affirming "plan of allocation to distribute funds to class member"); *Baby Prods.*, 708 F.3d at 170 (notice advised class members of their ability to file claims); *Petrovic v. AMOCO Oil Co.*, 200

F.3d 1140, 1153 (8th Cir. 1999) (notice allowed class to "easily acquire more detailed information, including data on potential individual awards").[3]

Nowhere do appellees even claim to have informed class members of their potential benefits under the settlement.

Appellees argue that the *Manual for Complex Litigation* § 21.312 suggests that details of allocation "[o]ften" follow final approval, but this misreads the *Manual*. "Often, however, … the *details* of allocation and distribution are not established until after the settlement is approved." *Id.* Here, plaintiffs have not even established broad strokes. Frank does not contend that appellees need to explain the exact forms of proof the claims administer will accept, but whether the class will be paid at all is not a mere "detail." Appellees' lone citation for this proposition in the *Manual* confirms this:

> For example, in *In re Holocaust Victim Assets Litigation* ("*Swiss Banks*"), the pre-fairness hearing on worldwide notice did not include a detailed plan of allocation; instead, the notice program was actively used to solicit allocation proposals and preferences from the class members themselves. These were submitted to a court-appointed special master, who in turn considered the suggestions and prepared a detailed plan of allocation, after final settlement approval, that the court ultimately approved and implemented. *See In re Holocaust Victim Assets Litig.*, No. CV 96-4849, [105 F.Supp.2d 139] (E.D.N.Y. Nov. 22, 2000).

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[3] *Agent Orange* concerned pre-settlement notice, with no settlement terms to advise the class of whatsoever. 818 F.2d at 169. As discussed above, this case predates and is incompatible with Rule 23(e).

The *Holocaust Victim* settlement is an unusual case—a sprawling and valuable action like *Agent Orange*, and appellees have not shown that notice "often" keeps class members in the dark about whether they will be paid at all. Class recovery versus giving away the settlement fund to third party beneficiaries is no trifling "detail" and Rule 23(e) requires settling parties to at least say how or under what circumstances they can obtain a benefit under the settlement.

While the district court in *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, approved notice with an incomplete allocation, it did still inform class members of their rights to make claims and the broad fund pools available. No. 8:10ML 02151 JVS (FMOx), 2013 U.S. Dist. LEXIS 123298, at *238 (C.D. Cal. July 24, 2013). Appellees cannot dispute that the case supports Frank's argument that such a settlement cannot be approved. "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." *Id.* at *242.

Appellees also assert that notice need not identify class members of any *cy pres* recipients, citing *Baby Products* where a *cy pres* award would at most dispose of unclaimed class funds. RB54. This case is not like that—appellees do not say how or *whether* the settlement fund will be disbursed *at all*. Here, the notice "language does not clearly inform class members of the real possibility, acknowledged by all parties, that there may be a cy pres distribution ***in lieu of any direct distribution of funds to the class members***." *Katrina*, 628 F.3d at 198 (emphasis added).

As for appellees' argument (RB52 n.17) contesting the First Amendment implications of a compelled *cy pres* award, it has been established eighty years that approval of class settlements implicates the constitutional rights of absent class members. *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940). Plaintiffs cite *In re Google LLC St. View Elec. Commc'ns Litig.*, 2020 WL 1288377, at *14 n.10 (N.D. Cal. Mar. 18, 2020), but this case contradicts foundational First Amendment law, which correctly views binding judicial orders as state actions. *See*, *e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964). Approvals of class-action settlements are thus state actions subject to constitutional limitations. *E.g., Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846-48 (1999). Appellees do not dispute that a *cy pres* award may subsidize speech, nor do they argue that any award would be narrowly tailored to avoid First Amendment problems, nor can they argue that the lack of a future opt-out opportunity exacerbates the problem. OB14. Appellees' black box notice independently flunks the First Amendment. "[E]xcept perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

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.

February 16, 2021

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 5,980 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.

February 16, 2021

/s/ Anna St. John
Anna St. John

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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