ORAL ARGUMENT SCHEDULED FOR APRIL 14, 2021

United States Court of Appeals for the District of Columbia Circuit

No. 19-7058

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 and No. 15-cv-01404-CKK (Honorable Colleen Kollar-Kotelly)

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellees state as follows:

A. Parties and *Amicus Curiae*

All parties and amici curiae appearing before this Court and the appealed case in the district court are listed in the Certificate as to Parties, Rulings, and Related Cases included in the Opening Brief for Appellants M. Frank Bednarz and Theodore H. Frank ("Appellants Brief").

B. Rulings Under Review

The rulings under review are described in their entirety in the Certificate as to Parties, Rulings, and Related Cases included in the Appellants Brief.

C. Related Cases

This case was not previously before the Court, and Appellees are unaware of any pending related cases.

RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, each Defendant-Appellee and each Plaintiff-Appellee makes the following disclosure on their own behalf:

Defendant-Appellee American Airlines, Inc. ("American Airlines") is a wholly-owned subsidiary of American Airlines Group Inc. (ticker symbol: AAL), a publicly held corporation.

Defendant-Appellee Southwest Airlines Co. ("Southwest Airlines") (ticker symbol: LUV) has no parent companies. PRIMECAP Management Company has filed a Form 13G with the Securities and Exchange Commission stating that it beneficially owns more than 10% of the shares of Southwest Airlines. It is believed that some or all of those shares are owned by the PRIMECAP Odyssey Stock Fund (ticker symbol: POSKX), the PRIMECAP Odyssey Growth Fund (ticker symbol: POGRX), and/or the PRIMECAP Odyssey Aggressive Growth Fund (ticker symbol: POAGX).

Plaintiff-Appellee Boston Amateur Basketball Club, III, Ltd. has no parent company and there is no publicly held corporation that owns 10% or more of any stock issued by it.

Plaintiff-Appellee Howard Sloan Koller Group has no parent company and there is no publicly held corporation that owns 10% or more of any stock issued by it.

Plaintiff-Appellees Breanna Jackson, Cherokii Verduzco, Elizabeth A. Cumming, Katherine Rose Warnock, Kumar Patel, Samantha White, Stephanie Jung, and Steven Yeninas are each individuals, not corporate entities, and are not subject to Rule 26.1.

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GLOSSARY

Abbreviation	Meaning
American	American Airlines, Inc.
Delta	Delta Air Lines, Inc.
JPML	U.S. Judicial Panel on Multidistrict Litigation
MDL	Multi-District Litigation
Southwest	Southwest Airlines Co.
United	United Airlines, Inc.

INTRODUCTION

This appeal arises out of Appellants' objections to the district court's approval of classwide settlements with American Airlines and Southwest Airlines in a multi-district litigation ("MDL") in which Plaintiffs allege that four domestic airlines—American, Southwest, Delta Air Lines, and United Airlines—violated federal antitrust laws. Two objectors to the settlements appealed, but (as even they have conceded) this Court lacks jurisdiction to consider their appeal. In a multi-defendant action, an order must resolve every claim against every defendant to be immediately appealable, unless the district court enters a partial final judgment under Federal Rule of Civil Procedure 54(b). But the district court's order approving the American and Southwest class settlements did not do so—it left claims remaining against two of the defendants, Delta and United. Because the district court's order was not a final decision under 28 U.S.C. § 1291—and because the court did not issue a Rule 54(b) judgment—this Court lacks jurisdiction. It's as simple as that.

Amicus's principal contrary argument rests on a misunderstanding of *Gelboim v. Bank of America Corp.*, 574 U.S. 405 (2015). Amicus argues that under *Gelboim*, appellate jurisdictional rules apply differently in MDLs, such that the district court's settlement-approval order is somehow "final" for appellate purposes even though it does not resolve all claims against all parties. But

Gelboim held the opposite: the MDL context does *not* alter the rules of finality and jurisdiction. *Gelboim* considered an action that *was* appealable under the normal jurisdictional rules, as the district court there had dismissed the entire complaint—all claims against all defendants—in one class action consolidated in an MDL. The question was whether the MDL context changes the result. The Supreme Court held that it did not—the same appellate jurisdictional rules apply in cases before MDL courts as cases outside them. Thus, when a complaint in an MDL is fully dismissed, § 1291 authorizes appeal, even if complaints in other distinct actions remain pending before the MDL court. But where, as here, a district court does *not* dispose of all claims against all defendants in a single action, the normal rules of finality dictate that there is no appealable final judgment.

That result is required as a matter of law, but it also furthers § 1291's policy against piecemeal litigation, as the facts of this case demonstrate. Rule 54(b) allows the district court to authorize immediate appeal of a partial class settlement when that makes sense. Perhaps that would have made sense here had Appellants challenged matters that are ripe, such as the settlements' amounts or terms. But Appellants' objection is only about how the settlement funds might ultimately be distributed and the court-approved notice thereof. In particular, the district court approved the settlements after considering Plaintiffs' proposal to use a *pro rata* method of distribution. But the court also held that distribution and approval of a

more detailed plan for *pro rata* distribution should be deferred until the claims against Delta and United are resolved and the ultimate size of the classwide recovery is known, at which point class members would receive further notice of the distribution plan and have the opportunity to object. The district court quite reasonably concluded that a Rule 54(b) judgment should not issue because the details of the distribution plan are not yet known but will be later, and they can be challenged at that time. Amicus's position would instead *require* this Court to consider this premature appeal, contrary to fundamental principles of finality.

For these and the other reasons described below, this Court should dismiss the appeal for lack of jurisdiction. If the Court does exercise jurisdiction, however, it should hold that the district court did not abuse its discretion in approving the settlements. The court carefully evaluated the proposed settlements to ensure that they were reasonable, adequate, and fair to class members, including Plaintiffs' proposed method of *pro rata* distribution—a method that is common and uncontroversial in antitrust litigation. That is all Federal Rule of Civil Procedure 23(e)(2) contemplates. It is standard practice in multi-defendant cases for courts to defer distribution and approval of a distribution plan until there are additional settlements or the total amount for distribution is known.

Appellants' principal concern is that, despite Plaintiffs' intention to distribute the settlement funds *pro rata* to the class, the lack of a detailed plan now

leaves open a remote possibility that the funds will be distributed via a *cy pres* award to charities, rather than class members. But Appellants' argument ignores the context here: these are partial settlements in a multi-defendant case, where litigation continues against other defendants and distribution has been deferred. Because recovery against other defendants is still possible and distribution is deferred, class counsel cannot know the full amount available to be distributed or develop a detailed, efficient distribution or claim-processing plan. The district court understood that and approved the settlements based on its thorough analysis of the Rule 23(e)(2) factors, including its findings that a *pro rata* distribution was adequate, appropriate, and likely; a *cy pres* distribution was unlikely and disfavored; and class counsel were motivated to seek the former and avoid the latter. The district court cannot have erred merely by postponing notice and approval of a detailed plan and thus leaving open a *possibility* of some *cy pres* award when the law is clear that even when *cy pres* distribution is certain, it can be fair, reasonable, and adequate.

Nor did the district court abuse its discretion by approving the class notice. The notice provided all the information required by Rule 23 and made class members aware of the possibility of a *cy pres* award (however remote) if distribution was economically infeasible. It also notified the class that distribution would likely be deferred until the amount to be distributed was known, and that the

court and class counsel would develop a more detailed distribution and claims-processing plan, which they would set forth in a second class notice. Class members thus had all the information necessary under Rule 23(c)(2)(B) to determine whether to object or opt out, and the district court was well within its discretion to approve the partial class settlements. If the Court holds that it has appellate jurisdiction, it should affirm.

JURISDICTIONAL STATEMENT

Under 28 U.S.C. §§ 1331 and 1337, the district court had subject matter jurisdiction over the federal antitrust actions consolidated in the MDL under 28 U.S.C. § 1407. JA.81-85. On May 9, 2019, the district court entered an order approving Plaintiffs' settlement agreements with American and Southwest. JA.511-69. The settlement-approval order dismissed with prejudice all claims against American and Southwest, but litigation continued against two non-settling defendants named in the consolidated class action complaint, Delta and United. *See* JA.515. The district court declined to enter a partial final judgment under Rule 54(b). *See* JA.607-21.

This Court lacks jurisdiction over Appellants' appeal of the settlement-approval order because it is neither a final judgment under 28 U.S.C. § 1291, *infra* Part I, nor an injunction under 28 U.S.C. § 1292(a)(1), *infra* Part II.

STATEMENT OF ISSUES

1. Whether this Court has appellate jurisdiction to review the district court's order approving American's and Southwest's settlements, where that order did not dispose of all claims against all parties in the case, and the district court did not direct entry of a final judgment under Federal Rule of Civil Procedure 54(b).

2. Whether the district court abused its discretion in approving the settlements under Federal Rule of Civil Procedure Rule 23(e), where Appellants did not object to the settlement amounts or terms and the district court found the proposal to use a *pro rata* distribution method adequate, but deferred distribution and approval of a detailed distribution plan until after the case concludes.

3. Whether the district court abused its discretion in approving a class notice without requiring a detailed description of a proposed plan of distribution, where that information will be provided in a subsequent notice.

STATUTES AND RULES

Relevant statutes and rules not reproduced by Appellants and amicus appear in the brief's addendum ("Add.").

STATEMENT OF THE CASE

A. Legal Background

Under 28 U.S.C. § 1407(a), the U.S. Judicial Panel on Multidistrict Litigation ("JPML") may transfer "civil actions involving one or more common questions of fact" pending in different federal district courts to a single district for

"coordinated or consolidated pretrial proceedings" if coordination or consolidation will serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the litigation.

Upon transfer, "the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction." Manual for Complex Litigation § 20.131 (4th ed. 2004). "A transferee judge exercises all the powers of a district judge in the transferee district," including the authority to decide all "dispositive motions such as motions to dismiss, motions for summary judgment, … and motions for judgment pursuant to a settlement." *In re Phenylpropanolamine Prods. Liab. Litig.*, 460 F.3d 1217, 1229-31 (9th Cir. 2006). The transferee judge also receives "broad discretion" to manage an often-sprawling docket and to guide the matter to a just and efficient resolution. *See id.* at 1231-32.

Plaintiffs in MDLs involving putative class actions generally file a consolidated amended class action complaint—sometimes called a "master complaint"—that "supersede[s] prior individual pleadings." *Gelboim*, 574 U.S. at 413 n.3 (citing *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590-92 (6th Cir. 2013)). "In such a case, the transferee court may treat [that complaint] as merging the discrete actions for the duration of the MDL pretrial proceedings." *Id.* This consolidated amended class action complaint then "serve[s] as *the* pleading" for the transferred actions. Diana E. Murphy, *Unified and*

Consolidated Complaints in Multidistrict Litig., 132 F.R.D. 597, 600 (1991); *see also* Wright & Miller, Fed. Prac. & Proc. Juris. § 3914.7 (2d ed. 2020).

Consolidated class action complaints thus differ substantially from mere administrative summaries of claims used in other types of MDLs. In mass tort MDLs, for example, parties with individual claims often file a single pleading that "is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs." *Gelboim*, 574 U.S. at 413 n.3 (quotations omitted). In this case, however, it is undisputed that the parties intended the consolidated complaint to have legal effect, and the district court specified that it "supersede[s] all [class action] complaints filed by individual plaintiffs." JA.90-95; *see also infra* at 9.

B. Factual And Procedural Background

1. *Plaintiffs File Class-Action Lawsuits Against American, Delta, Southwest, And United*

Beginning in 2015, numerous plaintiffs filed separate putative class actions in multiple districts—including the district court below—each alleging that four defendant airlines (American, Delta, Southwest, and United) violated Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3. JA.82; *see, e.g.*, *Andrade v. Am. Airlines Grp., Inc.*, No. 15-cv-3111 (N.D. Cal. July 6, 2015); *Blumenthal v. Am. Airlines, Inc.*, No. 15-cv-1056 (D.D.C. July 6, 2015); *see also* Amicus Br. 6. The airlines denied those allegations.

In October 2015, the JPML consolidated the then-pending antitrust actions against the four defendant airlines and transferred them to the district court for pretrial proceedings pursuant to 28 U.S.C. § 1407. JA.81-85. The JPML ultimately transferred a total of 105 related cases for consolidation in the MDL. JA.571.

After appointing Interim Class Counsel, JA.86-89, the district court ordered Plaintiffs to file a "Consolidated Amended Complaint," which would "supersede all complaints filed by individual plaintiffs in the cases that have been consolidated in the instant action," JA.90-95. Like the complaints it superseded, Plaintiffs' Consolidated Amended Class Action Complaint ("Consolidated Amended Complaint"), JA.96-175, *as corrected by* JA.177-256, brought claims on behalf of the same class of direct purchasers of airline tickets against the same four defendants: American, Delta, Southwest, and United. JA.184-85, 250-52 ¶¶ 23-26, 142-150. On October 28, 2016, the district court denied the airlines' motions to dismiss the Consolidated Amended Complaint, JA.176, and each airline thereafter filed its own single answer to that complaint, JA.257-61, JA.262-65, JA.266-69, JA.270-74.

2. *Plaintiffs Settle With Southwest And American*

After extensive litigation and well into fact discovery, Plaintiffs agreed to separate class settlements with two of the four defendant airlines—American and

Southwest. Southwest agreed to pay Plaintiffs $15 million; American agreed to $45 million. JA.527 ¶ 37; JA.557 ¶ 37; *see also* JA.572-75.

Both settlements also required the settling defendants to cooperate with Plaintiffs in the ongoing litigation against Delta and United, including by providing a "full account of facts" known to them about the action. *See* JA.529-37 ¶¶ 45-55; JA.559-62 ¶¶ 45-50. In exchange, Plaintiffs agreed to dismiss both Southwest and American from the action with prejudice. JA.522-23, 525-27 ¶¶ 25, 32-36; JA.552-53, 555-57 ¶¶ 25, 32-36.

"Such partial settlements" are common in multi-defendant litigation, as they may "aid the parties in obtaining evidence[] and facilitate later settlements on issues and with other parties." Manual for Complex Litigation § 13.21. Thus, the settling parties here anticipated that the total funds available for distribution to class members could increase significantly after litigation resolved against Delta and United. Class counsel therefore proposed deferring distribution of the settlement funds until the end of the case, both to maximize efficiencies and to allow for one streamlined claims and payment process once the total funds available for distribution are known. JA.587.

3. *The District Court Approves The Settlements*

The district court preliminarily approved the Southwest settlement in January 2018, JA.275-77, and did the same for the American settlement in June

2018, JA.278-80. Shortly thereafter, the district court approved a joint settlement notice program to inform class members of the settlements' terms and their right to object or opt out, determining it was "the best notice practicable under the circumstances of this case." JA.299. The notice informed class members, among other things, that distribution would be deferred, that the amount each class member would receive was unknown (as is always true with a *pro rata* distribution), and that a *cy pres* distribution was possible if distribution to the class was economically infeasible. JA.287-88.

Of approximately 100 million class members, only 25 filed objections. JA.611. Two of the objectors, Theodore Frank and M. Frank Bednarz, are Appellants here. JA.347-56. Frank and Bednarz did not challenge the fairness of the amounts or terms of the settlements. *See* JA.350-54; JA.598; JA.471-72 (Tr. 63:25-64:9). Their objections were instead limited to issues relating to distribution of the settlement funds, including, principally, that the settlements left open the possibility that class counsel might distribute the entirety of the settlement funds to charities, a possibility that class counsel firmly rejected at the fairness hearing. *Id.* After that hearing, the district court overruled all objections, granted final approval of the settlements, and dismissed Southwest and American from the suit. *See* JA.511-69; JA.570-603.

The district court recognized the fairness, reasonableness, and adequacy of the settlement amounts, which Frank acknowledged "he was not contesting," JA.598; JA.471-72 (Tr. 63:25-64:9), under Rule 23(e)(2), JA.577-87. The court then found that Plaintiffs had "demonstrated the adequacy" of their proposal to use a *pro rata* method for distributing the settlement payments under Rule 23(e)(2)(C)(ii). JA.588-89. Appellants agreed that a *pro rata* distribution was "probably fine." JA.472 (Tr. 64:17-20). Under a *pro rata* distribution in a direct-purchaser price-fixing case, the amount distributed to each class member depends on a number of factors, including the total recovery from all defendants, the total number of class members filing claims, and the relative value of each claimant's ticket purchases. *See* JA.587-88; *see also* JA.381-82. Where, as here, distribution is deferred pending other settlements or damages awards, that information cannot be known until the case terminates and the claims process is complete.

The district court found that "it would be inefficient to distribute and process claims until the entire case has been resolved," and it adopted class counsel's proposal to defer distribution of settlement funds "until the end of the entire case." JA.587, 589. It also specified that a "second notice" will be later provided to class members, describing the distribution and claims process, as well as their "right to object and/or file a claim." JA.588-89; *see also* JA.514. At that time, the district

court will evaluate any objections to class counsel's implementation of the *pro rata* distribution plan. JA.588-89.

The district court rejected Appellants' objections as premature. The court first rejected their objection to any possible *cy pres* distribution, explaining that until the court knew the total funds available for distribution, it could not ascertain "[w]hether the need for a *cy pres* distribution [would] arise, and if so, in what amount." JA.594. But the district court declined to treat any "uncertainty" about *cy pres* distribution "as a bar to the approval of the Settlements," given (i) class counsel made clear they intended to maximize *pro rata* distribution to class members and minimize *cy pres* distribution; and (ii) the court's "own disinclination toward *cy pres* distributions." JA.592-93. It also found Appellants' accusations that class counsel might use a *cy pres* distribution to redirect the settlement funds for their personal benefit to be unfounded. JA.592-93; JA.612-13.

The court likewise rejected Appellants' objection that the class notice did not adequately inform members about the distribution of funds. JA.598-99. The court reiterated that class members would receive full information regarding Plaintiffs' *pro rata* distribution plan during a second round of class notice, and class members could object to the distribution plan then. *Id.*[1]

[1] Appellants also objected to an award of attorney's fees and expenses. JA.350-54. At class counsel's request, the district court deferred ruling on Plaintiffs' fees and

In the meantime, the district court declined to delay final approval of American's and Southwest's settlements until the end of the case. The class members, it explained, would benefit from American's and Southwest's "significant cooperation" with the ongoing litigation against Delta and United—cooperation that the settling defendants could not be expected to provide while still shouldering the ongoing cost and burden of litigation. JA.597, 600-02. The court thus issued its final approval of the settlements and dismissed American and Southwest from the litigation with prejudice. JA.511-69. Its order did not direct entry of a partial final judgment under Rule 54(b).

4. *The District Court Declines To Enter Judgment Under Rule 54(b)*

Frank and Bednarz appealed the district court's order. After Appellees moved to dismiss for lack of appellate jurisdiction, Dkt. 1800711, Appellants acknowledged that this Court lacked jurisdiction and asked it to hold their appeal in abeyance while they sought a Rule 54(b) judgment from the district court, Dkts. 1802376, 1811930. The district court denied the request. JA.620-21. Rule 54(b), the court explained, required it to make an "express determination that there was

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cost petition, and thus held related objections in abeyance, JA.589-90. They are not the subject of this appeal. Appellants also incorrectly claim that counsel sought 40% of the settlement fund to "pay the attorneys." Appellants Br. 10. In fact, Plaintiffs' petition sought 25% for attorney fees and another 7% for costs, amounts consistent with awards in comparable cases. JA.320, 333-34.

no just reason for delay." JA.620 (quotations omitted). The court found that there was a just reason for delay: an immediate appeal of its settlement-approval order would result in a "fragmented appeal [on] issues" that were "obviously premature," including the possibility of a *cy pres* distribution and the final settlement distribution plan. JA.621.

Appellants nevertheless continued with their appeal to "protect their appellate rights," Appellants Br. 17, although they "agreed with Appellees" that "this Court lacks jurisdiction over this appeal," Dkt. 1832377, at 4-5. Separate motions panels referred the jurisdictional issue to the merits panel and appointed an amicus curiae to argue in support of the Court's jurisdiction. Dkts. 1826968, 1857971.

SUMMARY OF ARGUMENT

I. This Court lacks appellate jurisdiction under 28 U.S.C. § 1291 because the district court's order approving the class settlements was not a final, appealable judgment.

A. Section 1291 grants jurisdiction over appeals only of "final" judgments, i.e., orders that dispose of all claims against all parties. Rule 54(b) provides a limited exception to that rule of finality—it grants the district court discretion to enter judgment as to some but not all defendants (or some but not all claims). Thus

if a settlement-approval order does not resolve all claims against all defendants, an objector to that settlement cannot appeal absent a Rule 54(b) judgment.

Those established principles preclude this Court's exercise of appellate jurisdiction under § 1291. That is most obviously true because the district court's order did not dispose of two of the four airline defendants named in the Consolidated Amended Complaint, which superseded all prior complaints. But even if this Court considered the dozens of now-superseded complaints originally filed, each one named the same four defendant airlines, so the district court's order could not have finally adjudicated any of those complaints either.

B. Amicus's contrary argument is that the MDL context alters these firmly established finality rules. She relies entirely on the Supreme Court's decision in *Gelboim*, but *Gelboim* in fact stands for the opposite proposition: finality rules operate exactly the same for cases consolidated in an MDL as they do for cases outside that context. *Gelboim* allowed immediate appeal only because the dismissal of the complaint there would have been appealable under the ordinary rules of finality, as the order resolved all claims against all defendants in the complaint. The district court's order here did not, so the ordinary rules of finality preclude appeal.

II. Amicus alternatively argues that the settlement approvals are effectively "injunctions" appealable under § 1292(a)(1) because they obligate Southwest and

American to cooperate with Plaintiffs. Appellants have never invoked this Court's interlocutory appellate jurisdiction under § 1292(a)(1), so the Court should not consider amicus's argument. Regardless, the argument fails. The settlement-approval order lacks any of the hallmarks of an injunction because it does not direct the parties to do anything under penalty of contempt. It simply approves settlements under Rule 23(e) to which the parties voluntarily agreed and which are enforceable by arbitration.

III. If the Court determines that it has jurisdiction, it should affirm the district court's order approving the settlements. Appellants agree that the settlement amounts and proposal to distribute funds *pro rata* are reasonable. They object that the district court did not preclude the possibility (however remote) of a *cy pres* distribution and that the class did not receive detailed notice of a distribution and claims-processing plan. But Appellants come nowhere close to showing that the district court abused its discretion under Rule 23(e).

A.1. After a lengthy fairness hearing, the district court thoroughly considered the Rule 23(e) and other factors for determining whether a class settlement is fair, reasonable, and adequate, including the effectiveness of methods of distribution. Class counsel proposed a *pro rata* distribution method, but because further settlements or damages awards against Delta and United are possible, class counsel proposed deferring distribution until the end of the case to maximize

distribution efficiencies and the amount available to the class. The district court agreed that approach was proper only after considering class counsel's proposal—and Appellants' objections—at length, just as Rule 23(e)(2)(C)(ii) requires.

2. Appellants' arguments to the contrary are wrong.

The district court did not err by considering factors not specifically set forth in the 2018 amendments to Rule 23(e). The Advisory Committee Notes (and other authorities) make clear those amendments did nothing more than codify a few of the traditional factors courts consider in approving a settlement; they did not displace prior factors or practices.

Appellants also erroneously argue that Rule 23(e) requires a settlement-approval order to set forth a detailed plan for distribution and claims processing. But Rule 23(e) requires only that the settlement be fair, reasonable, and adequate. While that might require the district court to consider a detailed, final distribution plan in some cases—for example, where class members are differently situated and a distribution method might treat class members inequitably—the Rule does not require such finality when, as here, Plaintiffs intend a *pro rata* distribution, which uses the same formula for all class members. Indeed, courts routinely defer approval of detailed distribution plans until after final approval, particularly in partial settlements like this one where distribution is deferred.

Finally, Appellants argue that the district court erred in approving the settlements despite the possibility—however remote—of an all-*cy pres* distribution. But class counsel and the district court made clear that all-*cy pres* distribution was neither intended nor likely. In any event, there is no general rule against *cy pres* distributions, and there is every reason to believe the district court would prevent abuse of any *cy pres* distribution if one were necessary.

B. Appellants' Rule 23 and due process challenges to the class notice similarly fail. The notice indisputably included all the information Rule 23(c)(2)(B) requires. The notice also informed class members of the possibility of a *cy pres* distribution. Class members had all the information necessary to determine whether to opt out of or object to the settlement. Moreover, the district court made clear that once a detailed distribution plan is developed, a second class notice will issue, giving class members a second opportunity to object. Appellants fail to raise any plausible Rule 23 or due process problem with that common approach.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S SETTLEMENT APPROVAL UNDER 28 U.S.C. § 1291

This Court ordinarily lacks jurisdiction to review a district court's order unless it "dispos[es] of all claims against all parties." *Outlaw v. Airtech Air*

Conditioning & Heating, Inc., 412 F.3d 156, 159 (D.C. Cir. 2005). The rules are no different in an MDL proceeding: an order is final only if it "dispos[es] of one of the discrete cases" consolidated in the MDL "in its entirety." *Gelboim*, 574 U.S. at 413. Here, the district court's approval order did not dispose of any case "in its entirety," *id.*, so this Court lacks jurisdiction to review that order under 28 U.S.C. § 1291.[2]

A. The District Court's Order Approving The Settlements Was Not A Final Judgment

1. *An Order Is Not Final Under § 1291 Unless It Disposes of All Claims Against All Parties*

This Court's jurisdiction to review appeals of district court orders "comes primarily from 28 U.S.C. § 1291." *Attias v. CareFirst, Inc.*, 969 F.3d 412, 416 (D.C. Cir. 2020). Section 1291 grants "jurisdiction of appeals from all final decisions of the [U.S.] district courts." 28 U.S.C. § 1291. By its terms, the provision "extends only to *final* district court orders," i.e., "orders that dispose of an entire case both as to parties and issues." *Blackman v. District of Columbia*, 456 F.3d 167, 174-175 (D.C. Cir. 2006) (quotations omitted). By contrast, a decision that "resolves some, but not all, of the claims in a complaint is generally

[2] This Court considers questions about its own jurisdiction *de novo*. *United States v. Scantlebury*, 921 F.3d 241, 246 (D.C. Cir. 2019).

non-final and non-appealable." *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1026 (D.C. Cir. 2020).

Rule 54(b) "provides an escape hatch" to that otherwise rigid rule of finality. *Hill v. Henderson*, 195 F.3d 671, 672 (D.C. Cir. 1999). It specifies that "[w]hen an action presents more than one claim for relief … or when multiple parties are involved," the district court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties." Fed. R. Civ. P. 54(b). The decision to do so is discretionary, however, and the district court must first "expressly determine[] that there is no just reason for delay." *Id.*; *accord Blackman*, 456 F.3d at 174. Without that express determination, an order that disposes of fewer than all claims against all parties is not appealable under § 1291, "no matter [its] firmness [or] apparent finality." Wright & Miller, *supra*, § 3914.7.

Rule 54(b) applies with full force to orders approving class-action settlements "that dismiss[] … some defendants but not all." *Id.* "[I]f some defendants settle, others cannot immediately appeal to challenge approval of the settlement" unless the district court certifies its approval order for appeal under Rule 54(b). *Id.*; *see also*, *e.g.*, *Eichenholtz v. Brennan*, 52 F.3d 478, 479 (3d Cir. 1995) (hearing appeal of partial settlement only after "district court made [its order] final pursuant to Rule 54(b)").

The same is true for objectors appealing the approval of class settlements. If that approval order does not fully dispose of all claims against all parties, an objector can appeal under § 1291 only if "the district court … entered final judgment pursuant to [Rule] 54(b)." *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 246 (7th Cir. 1992).[3] But where a district court *denies* Rule 54(b) certification, a court of appeals will not entertain an objector's appeal of a partial settlement. *See, e.g.*, Add.81-83 (*Moore v. Petsmart Inc.*, No. 15-16750, ECF.7 & ECF.10 (9th Cir. Sept. 18, 2015)) (dismissing *sua sponte* objector appeal where the "order challenged … [did] not dispose[] of the action as to all claims and all parties").

2. *The District Court's Order Was Not A Final Decision Under § 1291*

Application of those jurisdictional rules is straightforward in this case, because the district court's order did not resolve "all claims against all parties." *Outlaw*, 412 F.3d at 159.

Most obviously, the district court's settlement-approval order did not fully dispose of all defendants named in the Consolidated Amended Complaint, which had "merg[ed] the discrete actions for the duration of the MDL pretrial

[3] *See also Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 38 (1st Cir. 2009); *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1364 (2d Cir. 1991).

proceedings." *Gelboim*, 574 U.S. at 413 n.3. That Complaint, as explained, "supersede[d] all [prior] complaints," JA.90, and named four defendants: American, Southwest, Delta, and United. *See supra* at 9. The district court's approval order thus left claims against "multiple parties"—Delta and United—pending in the action. *Blackman*, 456 F.3d at 174.

In such circumstances, the district court's judgment "is non-final (barring a Rule 54(b) judgment)." *Refrigerant Compressors*, 731 F.3d at 590; *accord Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 490 (7th Cir. 2020). That conclusion, the Sixth Circuit has explained, "respects the general rule that when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Refrigerant Compressors*, 731 F.3d at 589 (quotations omitted). A consolidated amended complaint, after all, "supersedes an earlier complaint for all purposes," and it would "make[] little sense to ascertain appellate jurisdiction" based on superseded, non-operative complaints. *Id.* at 589, 591; *see also Bell*, 982 F.3d at 490 (explaining that *Gelboim* "endors[ed] the Sixth Circuit's approach"). Because the district court's order did not resolve all claims against all defendants named in the Consolidated Amended Complaint, the order is non-final and thus not appealable.

But even if this Court were to look at past pleadings—i.e., the superseded complaints that were consolidated for pre-trial purposes—to determine its

jurisdiction,[4] the result would be the same. Every one of those individual actions was brought on behalf of the same class against all four airlines, i.e., American, Delta, Southwest, and United. *See supra* at 8. The district court's order therefore did not fully resolve any single individual action either, as it left multiple defendants remaining in each of the transferred cases. The rules for finality are "eas[y] to resolve" in such circumstances: "a ruling that fails to dispose of the whole complaint is not final." *Refrigerant Compressors*, 731 F.3d at 589 (emphasis omitted).

Because the district court's approval of the settlements did not dispose of "the whole complaint" in any case—much less the Consolidated Amended Complaint—this Court does not have jurisdiction under § 1291 absent a Rule 54(b) judgment. But the district court expressly declined to enter such a judgment. *See* JA.620-21. That is the end of the matter.

B. The MDL Context Does Not Alter The Normal Rules Of Finality

Amicus accepts that the district court's decision would not be appealable under the "ordinary rule[s]" of finality. Amicus Br. 15; *see also* Appellants Br. 20. She nevertheless argues that the normal rules do not apply because "MDL cases

[4] *Gelboim* clarifies, however, that this approach would be improper where, as here, a consolidated amended complaint has merged and superseded the prior individual actions (thus eliminating their separate identities). *See* 574 U.S. at 413 & n.3.

are different." Amicus Br. 15; *see also* Appellants Br. 23-24. In particular, amicus contends that the Supreme Court's decision in *Gelboim* means that "finality is analyzed differently in MDL litigation." Amicus Br. 16. But *Gelboim*'s central holding is that the rules of appellate jurisdiction apply in the MDL context exactly as they do outside that context.

1. Gelboim *Holds That Finality Rules Remain Unaltered In the MDL Context*

In *Gelboim*, the Supreme Court held that the right to appeal under § 1291 is not "affected when a case is consolidated … in multidistrict litigation." 574 U.S. at 407-08. The plaintiffs in *Gelboim* filed a class action raising a single claim, on behalf of a class of bondholders. *Id.* at 411. That class was then consolidated in an MDL with litigation brought on behalf of different classes (an over-the-counter class and an exchange class), which asserted additional claims and were litigated alongside one another. *Id.* at 411-12. The district court dismissed the *Gelboim* complaint "in its entirety," thereby "complet[ing] its adjudication of petitioners' complaint and terminat[ing] their action." *Id.* at 408, 414. There was no dispute that, but for the fact that the action was consolidated in an MDL proceeding, the district court's judgment dismissing the bondholder complaint would be a final, appealable order. But the defendants argued that because the case had been consolidated with different class actions whose complaints continued to be litigated, appellate jurisdiction was lacking.

Gelboim disagreed, making clear that the MDL context does not alter the ordinary rules of finality: If a "[c]ase[] consolidated for MDL pretrial proceedings … retain[s] [its] separate identit[y]," an order that "dispos[es] of one of the discrete cases in its entirety should qualify under § 1291 as an appealable final decision." *Id.* at 413; *accord* Wright & Miller, *supra*, § 3914.7.[5] "But Rule 54(b) continues to apply … if an order in a consolidated proceeding does not dispose of all claims [or] all parties to any single action in the consolidation." Wright & Miller, *supra*, § 3914.7. Indeed, *Gelboim* itself anticipated that Rule 54(b) would still govern "multi-claim complaints," permitting district courts "to authorize immediate appeal" of "orders finally adjudicating fewer than all claims presented in a civil action complaint," but only if the district court expressly finds that "there is no just reason for delay." *Gelboim*, 574 U.S. at 409, 416 (quotations omitted).[6]

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[5] In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court extended *Gelboim*'s holding to cases consolidated under Federal Rule of Civil Procedure 42(a). The Court held that a judgment that "resolve[s] *all* of the claims" in a case is immediately appealable, even if that case was consolidated with other actions. *Id.* at 1124, 1131 (emphasis added).

[6] The cases amicus cites (Br. 32) are not to the contrary, as each involved orders that "terminate[d] [the] action." *Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1225-31 (11th Cir. 2020) (quotations omitted); *see also In re Processed Egg Prods. Antitrust Litig.*, 881 F.3d 262, 267 (3d Cir. 2018).

2. *Amicus's Alternative Two-Part Test Has No Basis In* Gelboim *And Would Not Support Jurisdiction Under § 1291*

Amicus reads *Gelboim* differently. Amicus suggests that the case created a new test for finality that allows appeal from any order in an MDL "when two conditions are met": (i) immediate appeal is "necessary to avoid the prospect of a litigant being permanently denied appeal"; and (ii) the appeal has a "separate identit[y] from the other cases in the underlying MDL." Amicus Br. 19-20. But that test has no basis in *Gelboim* and would not vest this Court with jurisdiction even if it did.

a. First, amicus claims that jurisdiction is proper because Frank and Bednarz might otherwise have "no chance to appeal." Amicus Br. 20; *see also* Appellants Br. 19-20. Not so.

As an initial matter, *Gelboim* nowhere suggested that courts could ignore the statutory requirements of § 1291 in an MDL. In *Gelboim*, the Court simply explained the consequences of *disregarding* the rule of finality in an MDL: it would be unclear what "event or order [c]ould start the [bondholder class plaintiffs'] 30-day clock" to appeal because there was nothing left to adjudicate in *that* action. 574 U.S. at 414-15. Because the district court had dismissed the entire complaint with prejudice, no court could take any further "final" action to trigger the plaintiffs' right to appeal. *Id.* at 415. Nor would it make sense for the appeal clock to run when final disposition was entered in *other*, distinct class actions in

which the plaintiffs were neither parties nor members. *Id.* Thus, the order was appealable, just as the normal § 1291 rules dictated. *See id.* In this case, no action has been finally decided, so the normal § 1291 rules preclude appeal.

In any event, there is no risk that Appellants will lose their appellate rights absent immediate appeal. Unlike the plaintiffs in *Gelboim*, Frank and Bednarz seek to appeal an order that left claims remaining against two defendants. Once the claims against those defendants are resolved, there will be no impediment to an appeal of the final approval order.

That final judgment will likely arise in the district court below, allowing a single appeal to this Court. That may well occur while the MDL remains pending; after all, "most multidistrict litigation" is resolved during the pretrial proceedings "in the transferee court." *Gelboim*, 574 U.S. at 415 n.6 (quotation omitted). But even if a class is certified and the litigation proceeds to trial, the district court would almost certainly conduct the class trial because at least one of the named plaintiffs in the Consolidated Amended Complaint (as well as several other plaintiffs in this MDL) filed their individual actions in the D.C. district court in the first instance.[7] *See* JA.184; *Yeninas v. American Airlines, Inc. et al.*, No. 15-cv-

[7] Additionally, all of the named plaintiffs in the Consolidated Amended Complaint superseded their original complaints and pleaded proper venue here. JA.181 ¶ 9; *see* Manual for Complex Litigation § 20.132 n.668 and accompanying text (transferee court may try case if amended complaint is filed asserting venue).

1980 (D.D.C. Nov. 9, 2015); *see also* David F. Herr, *Multidistrict Litigation Manual* § 9:24 (2020) ("transferee can conduct trials of cases . . . filed in the transferee court"). In that instance, the district court would enter a final judgment that would bind any class member (including named plaintiffs in other actions) who did not opt out of the class and would be appealable to this Court. *See* Herr, *supra*, § 9:26.

Even if class certification is denied and the district court remands individual cases for trial on individual claims, there will still be a final judgment to trigger appeal. For one thing, the court could (and likely would) first certify judgment under Rule 54(b) "before the cases are returned to their courts of origin." *Hill*, 195 F.3d at 677-78. The district court here has so far declined to enter a Rule 54(b) judgment, but only to avoid piecemeal appeals of the settlement-approval order on issues that will not be ripe until the total amount available to distribute is known. *See supra* at 15. If there will be no further classwide relief in this action, the objections will be ripe and there will be no reason to delay Rule 54(b) judgment as to Southwest and American. Indeed, if remand actually "mean[t] complete exemption from appellate review," the district court would more than likely find that "there [is] no just reason for [continued] delay" and enter Rule 54(b) judgment before transfer. *Hill*, 195 F.3d at 675-77.

But even without a Rule 54(b) judgment, Appellants would not lose their right to review simply because the district court transferred one or more of the individual cases back to their originating courts. Unlike in *Gelboim*, the district court would remand a non-final action, meaning "appellate jurisdiction [would] arise on the issuance of a final judgment." *Hill*, 195 F.3d at 678. In that instance, the district court's interlocutory settlement approval would "merge[]" with the final judgment, triggering the time to appeal. *Kalama v. Matson Navigation Co.*, 875 F.3d 297, 305 (6th Cir. 2017); *see also* 17 Moore's Federal Practice - Civil § 112.07[4].

b. Nor does the district court's order have a "separate identit[y] from the MDL," as amicus suggests. Amicus Br. 20. *Gelboim* makes clear that § 1291 applies to dismissal of *cases* in an MDL (like the bondholder class action complaint) that have not been merged with other actions (like the exchange and over-the-counter class action complaints) in a consolidated amended class action complaint. *See* 574 U.S. at 413 & n.3. It expressly precludes amicus's argument that finality under § 1291 exists when a court resolves discrete issues or addresses discrete parties.

In *Gelboim*, the Court stressed that the *action* before it was "separate" from the other class actions consolidated in the MDL, noting that the parties had not filed a single consolidated complaint that would "merg[e] the discrete [class]

actions." *Id.* at 413 n.3. Because the case before it retained its "independent status" despite consolidation, the Court separately evaluated whether that discrete case was final under § 1291. *Id.* at 408. In other words, *Gelboim* "held that one of multiple cases consolidated for multidistrict litigation … is immediately appealable upon an order disposing of that *case*, regardless of whether any others remain pending." *Hall*, 138 S. Ct. at 1122 (emphasis added). Thus, *Gelboim*'s reference to "separate identities" referred to the separate identities of cases that have not been superseded by a consolidated amended complaint, 574 U.S. at 413 & n.3, not to interlocutory rulings in those cases that involve "discrete" parties to a case (American and Southwest) or discrete issues (settlement objections). For the reasons explained, no case with a "separate identit[y]" has been entirely resolved here. *See supra* at 23-25.

Amicus posits that the case would be final if the "Court were evaluating only Bednarz and Frank's role as objectors to the American and Southwest settlements, without considering the Delta and United litigation." Amicus Br. 27. But there is no separate "Delta and United litigation." This is a conspiracy case, and the Consolidated Amended Complaint—as well as all of the superseded complaints in the individual actions consolidated in the MDL—assert claims against all four defendants: American, Delta, Southwest, and United. *See supra* at 8-9. As Appellants acknowledge, no "individual case [here] is final," Appellants Br. 22,

and as *Gelboim* itself makes clear, no partial judgment is appealable absent certification under Rule 54(b). *See Gelboim*, 574 U.S. at 416; *see supra* at 26-27.

Amicus also suggests that because Appellants are objectors, "their *case* [has] a separate identit[y] from the named plaintiffs' case in the MDL." Amicus Br. 33 (emphasis added). But Appellants did not bring their own "case." They objected to the partial settlements *in a case* as members of the settlement classes, and their right to appeal stems from the fact that they are "member[s] of the class bound by the [district court's] judgment" approving the settlement. *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002). Frank and Bednarz are therefore parties to the same underlying case as the named class representatives. *Id.* at 10 ("[N]onnamed class members are parties to the proceedings in the sense of being bound by the settlement.").

To be sure, Frank and Bednarz may have distinct *interests* from the other parties in the litigation. But the same could be said of any objector to a class-action settlement, as "objecting class members" always supply "adversary presentation" against approval of the settlement. *See* Amicus Br. 33 (quotations omitted). Yet, as previously explained, courts have uniformly insisted on certification under Rule 54(b) before entertaining objector appeals to partial settlements. *See supra* at 22. There is no basis for fashioning a different rule simply because these objections happen to arise in an MDL.

3. *Amicus's Policy Arguments Do Not Support Jurisdiction Here*

That leaves amicus and Appellants to raise policy arguments. In particular, amicus notes that the settlements require both Southwest and American to cooperate with the ongoing litigation against Delta and United and worries that it may be "unfair" to American and Southwest to "undo[] the settlements" down the road. Amicus Br. 25. Appellants echo those purported concerns. Appellants Br. 23.

Putting aside that Southwest and American are the parties bearing those risks, Rule 54(b) accounts for the concerns. If delay were unjust, the district court could have made an "express determination" to that effect. Fed. R. Civ. P. 54(b). But the district court's reasons for not entering a Rule 54(b) judgment at this stage are sound. On the one hand, Frank and Bednarz's objections do not threaten the underlying settlements, as they challenge only the implementation and distribution of the settlements by class counsel, not the adequacy of the "money paid by American and Southwest" or American's and Southwest's "pledge to cooperate in ongoing litigation." Amicus Br. 30; *see also supra* at 10. Any appeal thus "cannot 'alter … or moot'" the "key aspects of the settlement agreements." Amicus Br. 30 (quoting *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988)). Indeed, the settlements themselves recognize the settling defendants have no role in the proposed or approved plan of distribution. *See, e.g.,* JA.528 ¶ 40.

On the other hand, the district court rightly recognized the burdens associated with piecemeal appeals. The district court declined to enter a Rule 54(b) judgment because the issues Appellants raised were "obviously premature," JA.621; the court still planned to consider whether to approve the Plaintiffs' proposed allocation of the final settlement award and to give class members the opportunity to object during a second round of notice, JA.614-15. Appellants' primary objection—the possibility of a *cy pres* award—would become moot if (as the district court expects) no such award is necessary.[8] *See Hill*, 195 F.3d at 672 (disfavoring judgment under Rule 54(b) in that circumstance). The district court was right to avoid the needless expenditure of this Court's and the parties' resources on a premature appeal.

II. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S SETTLEMENT APPROVAL UNDER 28 U.S.C. § 1292(a)(1)

Amicus—but not Appellants—alternatively argues that if the district court's settlement-approval order "is not final" for purposes of 28 U.S.C. § 1291, "it is appealable as an interlocutory order under 28 U.S.C. § 1292(a)(1)." Amicus Br. 34. Section 1292(a)(1) grants the courts of appeals jurisdiction over appeals

[8] Even if some *cy pres* distribution were necessary, *see infra* at 50-51, knowing why that were so would be important in analyzing whether the *cy pres* award is warranted.

from "[i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Section 1292(a)(1) is construed "narrowly in order to avoid the 'debilitating' problems engendered by piecemeal appeals." *See United States v. Philip Morris USA Inc.*, 840 F.3d 844, 849 (D.C. Cir. 2016) (quoting *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261 (D.C. Cir. 2012)). It provides no basis for jurisdiction over this appeal.

As a threshold matter, the Court should not entertain amicus's § 1292(a)(1) argument because Appellants never requested the Court to exercise jurisdiction under that provision. *Cf. Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) (refusing to consider "new issues" raised by court-appointed amicus). As appellants, Frank and Bednarz bear "the burden of establishing" this Court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They have elected, however, not to invoke § 1292(a)(1). *See Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 57 n.15 (D.C. Cir. 1977); Wright & Miller, *supra*, § 3921. This Court should accordingly decline to exercise jurisdiction under § 1292(a)(1) when Appellants themselves have not invoked that provision.

Declining to entertain amicus's § 1292(a)(1) argument is particularly warranted for this appeal. The amicus's argument is premised on aspects of the settlement agreements that Frank and Bednarz do not challenge (and that only

benefit the class members)—i.e., the requirements that Southwest and American "cooperate with plaintiffs in the ongoing litigation against Delta and United." Amicus Br. 18. Section 1292(a)(1) has no application in such circumstances. Even where "an injunction has issued," that fact "does not justify an interlocutory appeal that does not challenge the injunction but seeks to reach other matters not yet reduced to final judgment." Wright & Miller, *supra*, § 3924.

This Court lacks jurisdiction under § 1292(a)(1) in any event. The settlement-approval order bears none of the hallmarks of "an 'injunction' within the meaning of § 1292(a)(1)." *United States v. Am. Inst. of Real Estate Appraisers of Nat'l Ass'n of Realtors*, 590 F.2d 242, 244 (7th Cir. 1978) (dismissing for lack of jurisdiction intervenor's appeal of settlement-approval order). An injunction is an order "directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by a complaint." *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir. 1986) (quotations omitted). The district court's settlement-approval order did not direct any party to do anything. It simply approved under Rule 23(e) the class's settlement of its claims against Southwest and American based on the district court's finding that the "[s]ettlements are, in all respects, fair, reasonable, and adequate." JA.514.

Indeed, amicus does not even contend that the district court's settlement-approval order "clearly grant[ed] or den[ied] a specific request for injunctive relief." *Salazar*, 671 F.3d at 1261 (citations omitted). Instead, amicus argues that the district court's order had "the practical effect" of granting or refusing an injunction, Amicus Br. 34 (quoting *Carson v. Am. Brands*, 450 U.S. 79, 83 (1981)), because the settlements imposed certain obligations on Southwest and American "to cooperate with plaintiffs in the litigation," *id.* at 35. That argument is meritless. It is common for parties to agree to non-monetary obligations as a condition for releasing claims, but that does not transform every district court order approving a partial settlement with such obligations into an immediately appealable injunction. Instead, those requirements are merely contractual obligations between the parties, not an injunction within the meaning of § 1292(a)(1).

That is certainly true of the cooperation obligations in this case. Those obligations are set forth not in the district court's approval order—as they would be if mandated by injunction, *see* Fed. R. Civ. P. 65(d)(1)(C)—but instead in the parties' settlement agreements, *see* JA.529-37 ¶¶ 45-55; JA.559-62 ¶¶ 45-50. Moreover, disputes concerning Southwest's and American's cooperation obligations will not be resolved by the district court, but instead by an arbitrator. *See* JA.537 ¶ 55; JA.563-64 ¶ 54. Amicus is simply wrong when she states that the

remedy for violating the cooperation obligations is "contempt," Amicus Br. 35, a fact fatal to her argument, *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24; *see also United States v. Fokker Servs. B.V.*, 818 F.3d 733, 749 (D.C. Cir. 2016) (order not appealable under § 1292(a)(1) where not enforced through "*judicial* sanctions").[9]

The cooperation obligations also lack the practical effect of an injunction because they do not provide "some or all of the substantive relief sought by [the plaintiffs'] complaint." *I.A.M. Nat'l Pension Fund*, 789 F.2d at 24. The Consolidated Amended Complaint sought damages and an injunction against the alleged antitrust conspiracy. *See* JA.254-55. But no such injunctive relief was incorporated into the Southwest and American settlement agreements. JA.447 (Tr. 39:4-22). And the complaint contains no request that individual defendants be enjoined to assist with Plaintiffs' efforts to establish liability against other defendants.

But even were it otherwise, "a litigant must show more than that the order has the practical effect of [issuing] an injunction." *Carson*, 450 U.S. at 84. This Court has authorized appeals from a "practical effect" order under § 1292(a)(1) only if that order (1) "affect[s] predominantly all of the merits" of the case, or (2)

[9] By contrast, the parties in *Carson*, on which amicus relies, Amicus Br. 34, requested that the district court enter a consent decree expressly providing for "injunctive relief." *Carson*, 450 U.S. at 80, 83-84 & n.9.

"might have a serious, perhaps irreparable, consequence" and "can be effectually challenged only by immediate appeal." *Salazar*, 671 F.3d at 1261-62 (citations omitted). Amicus does not argue for jurisdiction on the latter ground, instead maintaining that the order "affect[s] predominantly all of the merits of Bednarz and Frank's case." Amicus Br. 36 (citations omitted).

That is incorrect, for two reasons. First, the claims against Delta and United remain outstanding. Just as with the § 1291 argument, amicus erroneously suggests that the settlement approval "conclusively determined the entirety of Bednarz and Frank's case." Amicus Br. 37. But as explained, Appellants have no independent "case." They have objected to the plaintiffs' settlement with only two of the four defendants in an ongoing class action. For the same reason that the settlement-approval order does not qualify as a "final decision[]" under § 1291, *see supra* Part I, it does not "affect[] predominantly all of the merits" of this case for purposes of § 1292(a)(1). *Salazar*, 671 F.3d at 1261-65 (holding that no § 1292(a)(1) jurisdiction existed over order that "resolved only one of two merits issues"); *see also Ctr. for Nat'l Sec. Studies v. CIA*, 711 F.2d 409, 413 (D.C. Cir. 1983) (holding that it lacked jurisdiction under § 1292(a)(1) over summary-judgment ruling that did not resolve all claims in case).

Second, the settlement approval did not affect predominantly all of the merits of Appellants' objections. The district court will provide class members

with another opportunity to object to class counsel's distribution plan after the claims against Delta and United have been resolved, thereby providing Appellants with a further chance to assert in the district court the challenges they raise here. *See* JA.514, JA.588-89, JA.591-92, JA.599, JA.617. There is no basis for this Court to exercise jurisdiction now.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE SETTLEMENTS FAIR, REASONABLE, AND ADEQUATE

If this Court concludes it has appellate jurisdiction, it should affirm.

The decision to approve a settlement under Rule 23(e) is "committed to the sound discretion of the district court." *Pigford v. Glickman*, 206 F.3d 1212, 1216-17 (D.C. Cir. 2000). The objector "bears the burden on appeal of making a clear showing that an abuse of discretion has occurred." *Id.* at 1217 (quotations omitted). Appellants concede that the settlement amounts are fair, reasonable, and adequate. *See* JA.471-72, 475 (Tr. 63:25-64:7, 67:10-11). Their challenge is limited. They contend that the district court was required, but failed, to consider and approve a detailed distribution plan that forecloses the possibility of *cy pres* and that class notice was inadequate for failing to provide details of a distribution plan. They have not met their heavy burden to demonstrate that the district court abused its discretion when it granted final approval to the settlements.

A. The District Court Properly Exercised Its Discretion In Considering Factors Relevant To Final Approval, Including The Effectiveness Of Methods Of Distribution

As amended in 2018, Rule 23(e) calls for courts to consider certain factors when evaluating whether a class settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Appellants' principal argument is that the district court violated Rule 23(e)(2)(C)(ii), *see, e.g.*, Appellants Br. 26, which provides that, in "considering whether . . . the relief provided for the class is adequate," a court should "tak[e] into account . . . the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," among other factors. Fed. R. Civ. P. 23(e)(2)(C)(ii). Appellants are wrong both factually and legally.

1. *The District Court Carefully Evaluated The Proposal To Distribute Funds* Pro Rata

Class counsel proposed that funds be distributed *pro rata*—a methodology courts have long found fair, reasonable, and adequate—and described the *pro rata* formula to the court. JA.380-81. Even Appellants' counsel has conceded that a *pro rata* distribution "is probably fine" here. JA.472 (Tr. 64:18-19). In a *pro rata* distribution, the total settlement fund (less fees and costs awarded) is distributed to all claimants submitting valid qualifying claims, with the size of each claimant's award depending on the size of the final settlement fund, the amount of the claimant's purchases, and the aggregate value of purchases made by all claimants.

JA.380-81. Class counsel proposed deferring the claims process and distribution until resolution of the entire litigation—when there may be additional funds to distribute—to maximize returns to the class and improve administrative efficiencies. The class then will be provided with a second notice of a detailed plan for distribution and claims processing and will have an opportunity to object to the plan before the court approves it. JA.379-80; JA.287-88; JA.588-89, 599.

Far from "neglect[ing]" Rule 23(e)(2)(C)(ii) or treating it as "meaningless surplusage," Appellants Br. 26, 29, the district court expressly and extensively considered the proposed method of processing claims and distributing relief. *See* JA.587-89, 592-94, 598-600; *see also* JA.616-17. At the fairness hearing, the district court considered objectors' concerns and pressed the settling parties on the *pro rata* distribution method, the possibility of *cy pres*, and proof of claims, including whether American's and Southwest's records could be used to minimize proof-of-claims requirements for class members. *See, e.g.*, JA.434-44 (Tr. 26:9-36:15) (discussing "plan of allocation"); JA.444-45, 480-81, 483-86 (Tr. 36:16-37:13, 72:18-73:1, 75:5-78:6) (addressing claims process and proof-of-claims requirements); JA.445-47 (Tr. 37:14-39:3) (addressing possibility of *cy pres*); JA.447-50 (Tr. 39:23-42:12, 43:17-45:20, 50:25-59:12) (addressing whether to postpone final settlement approval); JA.469-81, 487-88 (Tr. 61:1-73:12, 79:10-80:3) (hearing objectors).

The court devoted particular scrutiny to Appellants' principal concern: the potential for a *cy pres* distribution. Emphasizing "Class Counsel's intention to maximize the distribution to Class Members and th[e] Court's own disinclination toward *cy pres*," the court found that "it is unlikely that there will be a *cy pres* distribution." JA.594; *see also* JA.474 (Tr. 66:21-25) (Court: "I'm not in favor of *cy pres*"). It acknowledged that because distribution will be deferred, the information necessary to determine the need for any *cy pres* cannot be known until claims are processed. JA.593-94. The court also addressed the two most likely causes of *cy pres*: there might be too few claims to exhaust the fund or "so many claims" that "the cost of disbursing the money" would exceed the amounts available for distribution to individual claimants. JA.445 (Tr. 37:14-23). The court explained why neither possibility presented a substantial risk in the context of this case. There was likely to be "aggressive[] submi[ssion] [of] claims" by "corporate users of ... flight reservations," leading to significant *pro rata* awards. JA.594 (quoting JA.482 (Tr. 74:4-16)). Meanwhile, "historical claims rates" indicated that it was "unlikely" that the number of claims would be so large as to render *pro rata* distributions economically infeasible, especially given class counsel's commitment to working with the claims administrator on "cost-effective ways of facilitating the distribution." JA.592, 594; *see also* JA.383-84.

Ultimately, the court concluded that class counsel had "demonstrated the adequacy" of their proposal for a single "pro rata" distribution after "the entire case ha[d] been resolved" and for "a second notice to Class Members, followed by a right to object" to the more detailed distribution plan. JA.588-89.

2. *Appellants' Contrary Arguments Are Wrong*

The district court thus thoroughly "t[ook] into account" the "proposed method of distributing relief" and "processing class-member claims," just as Rule 23(e)(2)(C)(ii) contemplates. Appellants Br. 2, 28, 31. Appellants' contrary arguments are erroneous.

a. Appellants levy two main challenges to the district court's approach to Rule 23(e)(2)(C)(ii). Each fails.

First, Appellants contend that the district court erred in relying on cases decided before the 2018 amendment to Rule 23(e)(2). *See* Appellants Br. 32. But the Advisory Committee Notes refute that contention: the Committee acknowledged that "[c]ourts have generated lists of factors" that shed light on whether "a proposed class-action settlement is … fair, reasonable, and adequate," and made clear that the amendment was not meant "to displace any factor" that courts had traditionally considered. Fed. R. Civ. P. 23, advisory committee's note to 2018 amendment. The 2018 amendments thus did not effect a sea change in the settlement-approval process or analysis, but rather merely codified certain

traditional factors courts had considered. Precisely for that reason, it is well understood that the amendment is "unlikely to generate a significant change in the settlement process or outcome." 4 William B. Rubenstein, *Newberg on Class Actions* § 13:48 (5th ed. 2020) ("Newberg").

Accordingly, the district court did not err by considering the number of objections to the proposed settlement as one factor among many bearing on the settlement's fairness and adequacy. *See* Appellants Br. 34-35. This Court approved that precise practice pre-amendment, *see Cobell v. Salazar*, 679 F.3d 909, 923 (D.C. Cir. 2012), and because the 2018 amendment did not displace traditional approval factors, the district court's approach remains appropriate post-amendment as well, *see, e.g.*, *Stephens v. Farmers Rest. Grp.*, 2019 WL 2550674, at *5 n.3, *6, *8 (D.D.C. June 20, 2019) (considering absence of objections as one factor among many).

Second, Appellants contend that Rule 23(e)(2)(C)(ii) *requires* the district court to review a formal or detailed plan of distribution and claims processing before approving a settlement. While such a detailed plan may sometimes be required,[10] district courts retain substantial discretion to evaluate the level of detail

[10] That may be true where a settlement fully resolves a case or raises other concerns that might require extra scrutiny. *See, e.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 944, 946, 948, 963 (9th Cir. 2003) (case-ending settlement with vast, unexplained differential between claimant awards, among other concerns);

needed and can "require less information from the parties if there are no indications that the settlement is unfair, unreasonable, or inadequate." *See* Bolch Judicial Institute, *Guidelines and Best Practices; Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions* 4 (Aug. 2018), https://bit.ly/38duMyo. That is indisputably true here. The district court's extensive analysis of class counsel's proposed distribution method—subject to later refinement, class notice, and possible objections, *see supra* at 12-13—easily satisfies Rule 23. The ultimate question is whether any methodology proposed will deliver adequate relief to the class, *see* Fed. R. Civ. P. 23, advisory committee's note to 2018 amendment, not whether every detail of a plan for distribution and claims processing has been resolved.

Haggart v. Woodley, 809 F.3d 1336, 1349 (Fed. Cir. 2016) (case-ending settlement where class counsel refused to reveal formula or comparative data upon class member's request); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169-70, 175-76 (3d Cir. 2013) (case-ending settlement where court was not informed that the class would receive less than one-tenth of the settlement fund, even though that information was available at final approval)*; In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2013 WL 3224585, at *5 (C.D. Cal. June 17, 2013) (case-ending settlement for economic loss class); *see also Chi v. Univ. of S. Cal.*, 2019 WL 3064457, at *4 (C.D. Cal. Apr. 18, 2019) (parties proposed tiers of claimants with different awards for each that would be determined at the discretion of a proposed special master (rather than a *pro rata* system)); *Geiss v. Weinstein Co. Holdings LLC*, 474 F. Supp. 3d 628, 636 (S.D.N.Y. 2020) (same).

Indeed, district courts routinely consider general plans for distribution at final approval but defer both notice and approval of more detailed distribution plans until later in the case. *See* 2 McLaughlin on Class Actions § 6:23 (17th ed. 2020) (noting courts "frequently approve" plans of allocation "separately" and approve "partial settlements without a plan of allocation"); Manual for Complex Litigation § 21.312 (describing how claim forms are "often" "distributed after the approval"); *accord In re Lithium Batteries Antitrust Litig.*, 2020 WL 7264559, at *25 (N.D. Cal. Dec. 10, 2020) (collecting authorities).[11] And courts have long had the authority to modify distribution plans, even after notice of them has been provided.[12]

Contrary to Appellants' argument (Br. 31), other courts managing multi-defendant or multi-district litigation after the 2018 amendments have similarly deferred distribution plans. In *In re TelexFree Securities Litigation* ("*TelexFree*"),

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[11] *See also In re Auto. Parts Antitrust Litig.*, 2016 WL 8200511, at *10 (E.D. Mich. Aug. 9, 2016) (holding, in finally approving partial settlement, that objections regarding "distribution" and "cy pres" were "premature"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 167347, at *5 (N.D. Ill. Apr. 4, 1996) (noting deferral of allocation plan and distribution is routine in partial settlements).

[12] *See, e.g.*, *Union Asset Mgmt. Holding, A.G. v. Dell, Inc.*, 669 F.3d 632, 640-41 (5th Cir. 2012) (district court can alter allocation plan after notice had issued); *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 648-49 & n.23 (E.D. Pa. 2015) (modifying the allocation plan without further notice); *In re WorldCom, Inc. Sec. Litig.*, 2005 WL 3577135, at *1-2 (S.D.N.Y. Dec. 30, 2005) (similar).

for example, the court granted final approval of a partial settlement, while postponing approval of a distribution plan. 2020 WL 4340966, at *2 (D. Mass. July 28, 2020). *Compare Telexfree*, No. 4:14-md-2566, ECF.1101 at 9 *with* JA.287-88 (explaining deferred distribution and allocation here). So too in *In re Automotive Parts Antitrust Litigation*, No. 13-md-2701 (E.D. Mich.),[13] and *In re Broiler Chicken Antitrust Litigation*, No. 16-cv-8637 (N.D. Ill.).[14] Appellants, meanwhile, identify no contrary authority suggesting that the 2018 amendment disturbed this longstanding case-management practice.

b. Appellants also express concern over a potential *cy pres* distribution. They concede that this Court's precedent "allow[s]" *cy pres* distribution of "residual funds" remaining "after class members have been compensated directly." Appellants Br. 39 (citing *Keepseagle v. Perdue*, 856 F.3d 1039 (D.C. Cir. 2017)). Appellants nevertheless contend that the district court erred because the settlements allowed the "possibility" of an all-*cy pres* distribution. *See id.* at 40-41. That is a red herring.

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[13] *See* ECF.172 at 14-15 (describing planned *pro rata* distribution using claims administrator); ECF.172-1 at 4 (class notice); Add.4-7 (order approving settlement and maintaining jurisdiction over any motion for distribution).

[14] ECF.3757 at 5 (noting distribution plan to be filed later); Add.11-13 ¶¶ 12, 17 (settlement-approval order).

As an initial matter, this argument only highlights the problem with adjudicating Appellants' objections now, *see supra* Part I: there is no reason to consider whether a settlement with a *potential* for an all-*cy pres* distribution is lawful when there will be ample opportunity to challenge an all-*cy pres* distribution if and when it materializes. Indeed, class counsel has also unequivocally stated that they do not intend an all-*cy pres* distribution but rather a *pro rata* distribution. The merit of all-*cy pres* distributions is therefore likely to prove irrelevant, especially where the district court described its "own disinclination toward *cy pres*," credited class counsel's representations regarding their intentions to distribute *pro rata* and avoid *cy pres*, and found that an all-*cy pres* distribution "is unlikely." JA.594.

In any event, Appellants' challenge is meritless. Appellants contend that the district court was required to demand settlement terms that affirmatively preclude an all-*cy pres* distribution and expressly mandate a *pro rata* distribution. Appellants Br. 33-34, 38-42. But no case supports that proposition. Appellants' cited cases involved settlements *expressly calling for* an all-*cy pres* distribution in their terms; none hold that an all-*cy pres* distribution is always inappropriate.[15]

[15] *See, e.g., Frank v. Gaos*, 139 S. Ct. 1041, 1043 (2019) (per curiam) (agreement provided for $5 million in *cy pres* awards as only monetary relief); *Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080-81 (9th Cir. 2017) (*cy pres* award to a charity was not "tethered" to the class's interests); *Molski v. Gleich*, 318 F.3d 937,

Indeed, it is difficult to see how allowing the mere possibility of a *cy pres* distribution could be an abuse of discretion when courts regularly approve partial- or all-*cy pres* distributions. *See, e.g.*, *Keepseagle*, 856 F.3d at 1050 ("There is no precedent in this circuit to support the assertion that parties cannot negotiate a settlement providing for *cy-près* distribution."); *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326-28 (3d Cir. 2019) (holding that "[i]n some cases a *cy pres*-only settlement may be proper," and rejecting Appellant Frank's contrary argument).

And Appellants provide no grounds to distrust the district court's ability to prevent abuse of any *cy pres* distribution (if one is necessary) or to question class counsel's representation that they intend to avoid one. Appellants' *ad hominem* attack that class counsel likely "harbored the intent all along to create a *cy pres* slush fund" because this matter is a "nuisance suit" (Appellants Br. 41; JA.354)—i.e., a case brought without intent to litigate the merits but rather to force a quick settlement, *Stone Basket Innovations, LLC v. Cook Med. LLC*, 892 F.3d 1175, 1183 (Fed. Cir. 2018)—is as conclusory as it is preposterous: settlements totaling $60 million (an amount to which Appellants do not object as inadequate) were reached

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941 (9th Cir. 2003) (agreement provided for *cy pres* awards with only monetary relief going to named representative); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 475 (E.D.N.Y. 2016) (same); *Fraley v. Facebook, Inc.*, 2012 WL 5838198, at *1 (N.D. Cal. Aug. 17, 2012) (similar).

after two-and-a-half years of hotly disputed litigation and discovery in a case that has now been pending for nearly five years. Tellingly, the only "evidence" Appellants offer to support their attack is their gross mischaracterization of the district court's approval of a partial $5.1 million *cy pres* award in a different case. Appellants Br. 11, 42.[16] But there, the court granted *cy pres* distribution only after every claimant "received at least trebled damages," counsel expended extensive "efforts to locate additional class members" and reopened the claims period (twice) to encourage more claims, and the court engaged in rigorous analysis regarding the appropriateness of the *cy pres* award and its recipient. JA.592-93; *see also Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 219-220 (D.D.C. 2007); *Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 2007 WL 2007447, at *3 (D.D.C. July 10, 2007). In the unlikely event a *cy pres* award is sought here, there is no reason to believe that class counsel will be any less diligent in distributing the funds or that the district court would be any less rigorous. And again, if Appellants identify any real-world problems with the ultimate distribution in this case, they will be free to object. Appellants have failed to demonstrate that

[16] Appellants not only fail to identify the case they reference, but support their fallacious claim of "counsels' track record of [*cy pres*] abuse" by citing their own objection, which in turn cites another of Appellants' briefs, which, in turn, cites only a single press release. Appellants Br. 10, 11, 42; JA.348 (alleging without support that *cy pres* award was used to fund future litigation).

the district court abused its broad discretion under Rule 23(e) in approving the settlements.[17]

B. Class Notice Complied With Rule 23 And Satisfied Due Process

The class notice disclosed all material terms and complied with all requirements of due process and Rule 23. *See* JA.294-306; JA.598-600. Appellants argue that the notice was required to provide a detailed description of the plan of allocation and claims processing. But that is directly contrary to the language of Rule 23, which specifies what should be included in the class notice. *See* Fed. R. Civ. P. 23(c)(2)(B).

District courts retain substantial discretion to approve class notice based on the unique facts of that case. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004). To satisfy Rule 23 and due process, notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 114 (2d Cir.

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[17] Appellants' passing suggestion (Br. 37) that *cy pres* distributions violate the First Amendment is meritless: Appellants have not shown that any such distributions under the parties' settlement agreements would qualify as "state action" subject to the First Amendment, and regardless, "class members had the opportunity to exclude themselves from the settlement"—and thus avoid any possibility of purportedly compelled speech—after the class notice informed them of the possibility of *cy pres*. *In re Google LLC St. View Elec. Commc'ns Litig.*, 2020 WL 1288377, at *14 n.10 (N.D. Cal. Mar. 18, 2020).

2005) (citations omitted); 4 Newberg, *supra*, § 11:53 (notice is "adequate if it may be understood by the average class member").

That principle is reflected in Rule 23(c)(2)(B), which outlines precisely what a notice must include:

> *i.* the nature of the action;
>
> *ii.* the definition of the class certified;
>
> *iii.* the class claims, issues, or defenses;
>
> *iv.* that a class member may enter an appearance through an attorney if the member so desires;
>
> *v.* that the court will exclude from the class any member who requests exclusion;
>
> *vi.* the time and manner for requesting exclusion; and
>
> *vii.* the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

Appellants do not dispute that the class notice here included all of the foregoing information. Rule 23 thus forecloses Appellants' argument. If a detailed plan of distribution were *required* to be in the notice, the Rule's drafters would have said as much. Moreover, while not required by the Rule, the notice also informed class members that a *cy pres* award was a possibility, even if a remote one, thereby giving class members all the information needed to monitor the process and object. JA.287-88. Neither Rule 23(c)(2)(B) nor the Due Process Clause requires anything more. *See In re Baby Prod. Antitrust Litig.*, 708 F.3d at

180 (notice adequate where it addressed the "possibility of a *cy pres* award"). Certainly, they do not require notice of a detailed plan of allocation (or details about potential *cy pres* awards), as courts have long held. *See, e.g., Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1152-53 (8th Cir. 1999) (notice sufficient even though "it did not say how [the aggregate settlement] amount would be distributed among the individual members of the class"); *In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 170 (2d Cir. 1987) ("There is . . . no absolute requirement that [a distribution] plan be formulated prior to notification of the class.") (citations omitted).

Appellants, meanwhile, appear to misrepresent the authorities they cite. They cite, for example, the Manual for Complex Litigation, arguing that it states that a detailed plan of distribution is *required* in the class notice. Appellants Br. 35. But Appellants omit the following sentences that directly contradict that position:

> "*If* the details of a claims procedure have been determined, and there is little indication of any serious challenge to or problems with the settlement, claims forms might be included with the settlement notice. Often, however, the outcome of objections to or concerns over the settlement terms and the details of allocation and distribution are not established until after the settlement is approved. In that situation, claims forms are distributed after the approval."

Manual for Complex Litigation § 21.312 (emphasis added). The cases on which Appellants rely also undermine that argument. In *In re Toyota Corp. Unintended*

Acceleration Mktg., Sales Practices and Products Liability Litigation, the court *approved* the notice plan and discussed final approval at a fairness hearing, even though the allocation plan had not been finalized. 2013 WL 12327929, at *9, *11-13 (C.D. Cal. July 24, 2013). *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012), did not even address the sufficiency of the class notice, much less hold that an allocation plan must be included in it. Similarly, *In re Federal National Mortgage Association Securities, Derivative & ERISA Litig*., 4 F. Supp. 3d 94, 101 (D.D.C. 2013), merely mentioned that the class notice there included an allocation plan; it did not hold that all class notices must do so. And it merely repeated the unremarkable proposition that allocation plans, like settlements, are subject to the same standard of fairness, reasonableness, and adequacy. *Id.* at 107.

Appellants' argument is all the more implausible because the district court confirmed that it would require a *second* class notice once the details of the distribution method are made concrete, with another opportunity for class members to object. *See supra* at 13. Contrary to Appellants' contention, due process does not require a second opportunity to opt out when, as here, the class was notified that *cy pres* distribution was possible and will receive notice of, and the chance to object to, the ultimate distribution plan and claims process.[18] *See Denney v.*

[18] Appellants' claim that class members must have the opportunity to opt out *after* it is determined that some *cy pres* is necessary also fails for practical reasons.

Deutsche Bank AG, 443 F.3d 253, 271 (2d Cir. 2006); *cf. Walmart*, 396 F.3d at 96 (finding no error in denying second opt-out, even though notice did not explain that non-parties were among releasees, where class was on notice of the possibility that claims against non-parties may be released).

The class notice here thus satisfies the requirements of Rule 23 and due process, as the district court properly concluded.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal for lack of jurisdiction. Alternatively, it should affirm the order below.

Dated: March 9, 2021

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Whether any *cy pres* distribution is needed—and if so, in what amount—will not be known until after the claims process is complete, something that can only be done after the opt out period is over and the number and size of claims are known. JA.438-40 (Tr. 30:18-32:6).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of this Court's Order of August 24, 2020, because it contains 12,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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