No. 16-1150

In The
Supreme Court of the United States

ELSA HALL,
As Personal Representative of the
Estate of Ethlyn Louise Hall and as Successor Trustee of
the Ethlyn Louise Hall Family Trust,

Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, PC

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The deadline for filing an appeal is a "mandatory claims processing rule" that "must be enforced" "if properly invoked." *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658, 2017 WL 5160782 (Nov. 8, 2017) (slip op. at 3). Though the deadline is not jurisdictional, missing the deadline can result in the loss of an appeal. Therefore, the deadline "should above all be clear." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). The deadline is measured from the entry of final judgment. Fed. R. App. P. 4.

In *Gelboim v. Bank of Am. Corp.*,135 S.Ct. 897, 905 (2015), the Court held that in cases consolidated in multidistrict litigation ("MDL"), a final judgment in a single case triggers the "appeal-clock" for that case (rather than a final judgment entered in another case consolidated in the MDL proceeding). However, the Court limited its holding to MDL consolidations and declined to decide whether that same bright line rule should apply to cases consolidated in a single district under Fed. R. Civ. P. 42. *Gelboim*, 135 S.Ct. at 904 n.4. In the case below, the Third Circuit dismissed petitioner's appeal from a final judgment because it was consolidated under Fed. R. Civ. P. 42 with a case that was not final. Thus, the Question Presented raises the issue left undecided in *Gelboim*:

> Should the clarity *Gelboim* gave to multidistrict consolidated cases be extended to single district consolidated cases, so that the entry of a final judgment in only one case triggers the appeal-clock for that case?

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The Third Circuit Court of Appeals decision is found at 679 Fed. App'x 142.

JURISDICTION

The Third Circuit entered its decision on February 10, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Third Circuit's decision on a writ of certiorari. A timely petition for writ of certiorari was filed on March 17, 2017. This Court granted the petition on September 28, 2017.

STATUTORY PROVISION AT ISSUE

28 U.S.C. § 1291 provides, in relevant part:

> "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . and the District Court of the Virgin Islands . . . ."

STATEMENT OF THE CASE

In May 2011, Ethlyn Hall ("Mrs. Hall") sued her son, Samuel H. Hall, Jr. ("Samuel"), and his law firm, Hall and Griffith, PC, (collectively "respondents") for conversion, malpractice, fraud and related torts. Doc. No. 1.[1] The primary focus of the lawsuit was approxi-

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[1] Unless otherwise indicated, "Doc. No." refers to the document number assigned to a document by the District Court of the Virgin Islands Electronic Case Filing System in Case No. 3:11-cv-00054. References to documents filed in Case No. 3:13-cv-00095 are indicated by "(in 13-95)" following the document number.

mately one million dollars in rent that Samuel collected on behalf of his mother. Samuel claimed that he had his mother's permission to use a substantial portion of this money to build an expensive vacation rental property on St. John, U.S. Virgin Islands. JA-50, ¶37. Mrs. Hall asserted that Samuel had converted the money and demanded it back. JA-25, ¶¶44-52, 79-87.

Mrs. Hall sued in her individual capacity and in her capacity as the trustee of her *inter vivos* trust. Doc. No. 1. The case was filed in the District Court of the Virgin Islands as Case No. 3:11-cv-00054 ("11-54").

The progress of the case was delayed by procedural motions and during that delay, Mrs. Hall died. Pet. App'x A-4. Mrs. Hall's daughter, Elsa Hall ("Elsa"), in her representative capacities as the administrator of Mrs. Hall's estate and the successor trustee of Mrs. Hall's trust, was substituted as plaintiff by means of an amendment to the complaint filed in January 2013. JA-17. The respondents answered the amended complaint (JA-45) and asserted various defenses, including a claim that Mrs. Hall's testamentary documents were procured by Elsa through undue influence on Mrs. Hall. JA-60. Included with the answer was a counterclaim (JA-61) asserted solely by Samuel against Elsa in her representative capacities;[2]

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[2] The counterclaim was ostensibly against Elsa in both her representative and individual capacities. But, since Elsa was not a plaintiff in her individual capacity, there was no basis to file a counterclaim against her individually. *See, e.g., Alexander v. Todman*, 361 F.2d 744, 746 (3d Cir. 1966) (holding that a person suing in a representative capacity is "regarded as a person distinct from the same person in his individual capacity and is a

however, he alleged conduct that could only have occurred while Mrs. Hall was alive (*e.g.,* exercising undue influence over Mrs. Hall in the creation of her testamentary documents and alienating the relationship between Mrs. Hall and Samuel). As Elsa only assumed the representative capacity roles after Mrs. Hall died, she could not have committed these acts in a representative capacity.[3]

Presumably because he recognized the deficiencies in the counterclaim, Samuel eventually filed a separate complaint in the District Court of the Virgin Islands against Elsa individually. (Case No. 3:13-cv-00095) ("13-95"). That complaint, as amended (JA-108), made the same allegations against Elsa in her individual capacity that Samuel had previously made against her in her representative capacities in the counterclaim (JA-61) in 11-54.

Samuel moved, in 13-95 only, to consolidate that case with 11-54. Doc. No. 11 (in 13-95). The basis

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stranger to his rights or liabilities as an individual"). In a January 12, 2015 bench ruling, the district court recognized that the counterclaim against Elsa in her individual capacity was properly styled as a third party complaint; but, because leave to file a third party complaint was never obtained, the court dismissed the the claim against Elsa individually. JA-160, JA-162.

[3] On January 12, 2015, the morning of the first day of trial, Samuel conceded that the counterclaim against Elsa in her representative capacities was not viable because the actions alleged against her occurred before she began to act in a representative capacity. JA-161. The district court therefore dismissed the counterclaim. JA-162.

Samuel asserted for the consolidation was the similarity of the allegations in Samuel's counterclaim in 11-54 (which had not yet been dismissed) with the allegations in Samuel's complaint in 13-95. On February 14, 2014, the district court granted the motion; however, the order did not specify whether the consolidation was for discovery, for trial, or for all purposes. Pet. App'x A-14. Throughout the litigation, separate counsel represented Elsa in her two different capacities.

As the cases neared the scheduled January 2015 trial, the nature of the cases evolved. Samuel had filed a proceeding in the probate court in Florida (Mrs. Hall's final domicile) seeking revocation of Mrs. Hall's will and trust based upon his claim that Elsa had used undue influence to procure Mrs. Hall's testamentary documents. *See Hall v. Hall*, 190 So.3d 683, 684-85 (Fla. Dist. Ct. App. 2016) (describing proceedings in the probate court). On November 14, 2014, the probate court entered an order denying the petition to revoke the probate of the will and trust. Doc. No. 321-1.[4]

There were no shared issues between petitioner's claim against Samuel in 11-54 and Samuel's affirmative claims. The only reason there was an issue argu-

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[4] The order was affirmed on appeal with the appellate court holding that the record established "that the challenged documents were properly executed, that they were prepared at the request of the decedent, and that they were not actively procured by the appellee (a daughter) [Elsa] serving as personal representative under the will. The appellee established that she was not a substantial beneficiary under the trust." *Hall*, 190 So.3d at 685.

ably in common between the two cases was because Samuel made the same claim that Elsa exercised undue influence over his mother (1) as an affirmative defense in 11-54; (2) as an improperly asserted counterclaim in 11-54; and (3) in his complaint against Elsa in 13-95.[5] The collateral effect of the Florida probate court's order eliminated undue influence as an issue in the proceedings in the Virgin Islands and thus eliminated the only issue in common with Samuel's affirmative defense to petitioner's claim and his own claims against Elsa.

Forty days after the Florida probate court entered its order, Elsa in her representative capacities moved to sever the two Virgin Islands cases on the grounds that there were few overlapping facts and that the jurors would be confused and unable to distinguish between Elsa in her representative capacities (seeking to vindicate her mother's claims against Samuel for breach of fiduciary and related duties) and Elsa in her individual capacity (defending the claim by Samuel that she had caused the estrangement between Samuel and their mother). Doc. No. 177. The trial court never ruled on that motion and the cases were tried together.

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[5] Samuel raised undue influence as an affirmative defense (JA-60, ¶6) to petitioner's claim in 11-54 because, if he was successful in proving undue influence, Elsa would be removed as the personal representative/trustee and someone else would control the lawsuit against Samuel. He asserted undue influence in his counterclaim (11-54) and first amended complaint (13-95) to argue, *inter alia*, that he was entitled to a share of his mother's estate because he had been disinherited by Mrs. Hall as a result of undue influence. *See* JA-105, ¶251 (counterclaim) and JA-154, ¶261 (first amended complaint).

At the start of the trial, the district court concluded that major portions of Mrs. Hall's claims (including the conversion claim) did not survive her death and dismissed them *sua sponte*. Doc. No. 423 at 11. The jury returned a verdict against petitioner on the few remaining claims. JA-164. The jury also returned a verdict against Elsa in her individual capacity, awarding Samuel $500,000 in compensatory damages and $1.5 million in punitive damages. JA-172.

On February 4, 2015, the court entered separate final judgments in each case. In 11-54, the judgment specified that "the plaintiff recover nothing [and] the action be dismissed on the merits." Pet. App'x A-12.

On March 4, 2015, Elsa filed a motion for a new trial in the case against her individually. Doc. No. 289 (in 13-95). The following day, petitioner filed a timely notice of appeal in 11-54 to the United States Court of Appeals for the Third Circuit. Doc. No. 426.

Respondents moved to dismiss the appeal, asserting that the final judgment entered in 11-54 was not final because there was not yet a final judgment in 13-95 (due to the pendency of the Fed. R. Civ. P. 59 motion for new trial filed in that case). JA-13 (relevant docket entries). Initially, the Third Circuit placed the appeal on suspense, waiting to see what transpired with the motion for new trial in the companion case. *Id.*

A year later, on March 30, 2016, the district court granted the motion for new trial in 13-95 and vacated the verdict against Elsa individually. JA-315. The Third Circuit thereafter decided to move forward with the appeal in 11-54. JA-15 (relevant docket entries).

After full briefing, the court heard oral argument on December 12, 2016. *Id.* On February 10, 2017, the Third Circuit dismissed the appeal for lack of appellate jurisdiction. Pet. App'x A-1 and A-10.

The new trial against Elsa in her individual capacity commenced on April 5, 2017. Doc. No. 407 (in 13-95). At the conclusion of Samuel's case, Elsa moved for a mistrial and for judgment as a matter of law. Doc. No. 408 (in 13-95). The court took those motions under advisement and Elsa then rested without putting on a case. The jury returned a verdict against Elsa (Doc. No. 417 (in 13-95)); however, the district court still has the pre-verdict motions under advisement and therefore has not entered judgment on the jury verdict. If the trial court denies the pending motions and enters judgment against Elsa, she will renew the motion for judgment as a matter of law and file a motion for new trial in accordance with Fed. R. Civ. P. 59.

SUMMARY OF ARGUMENT

The appellate jurisdiction statute, 28 U.S.C. § 1291, unambiguously authorizes an appeal from a final judgment. A losing party has a right of appeal from a final judgment, even if its case is consolidated with another case that is not final. All but two of the courts of appeals have ignored the plain language of Section 1291, primarily because they perceive a need to avoid piecemeal appeals arising from the consolidated cases. While concern about piecemeal appeals is valid in *some* instances, there are other tools available to the courts of appeals to allow them to address that concern while still following the statutory mandate that a party has a right of appeal from a final judgment.

ARGUMENT

An order dismissing a case in its entirety is a final decision appealable as of right under 28 U.S.C. § 1291. Section 1291 is not discretionary—it instructs that the courts of appeals "shall have jurisdiction" over final decisions. Here, petitioner's case was dismissed in its entirety. Consequently, the court of appeals erred when it dismissed petitioner's appeal for lack of jurisdiction.

A. A court of appeals "shall" have jurisdiction over a final decision of a district court. 28 U.S.C. § 1291. Petitioner filed a timely appeal from an order dismissing her case. The Third Circuit erred when it concluded that it did not have jurisdiction.

Petitioner's lawsuit was terminated when the district court entered a "Judgment in a Civil Action" that "ordered that . . . the plaintiff recover nothing, the action be dismissed on the merits." Pet. App'x A-12. This judgment terminated petitioner's entire action.

A judgment that terminates an action is a final decision. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). This Court's long-standing precedent establishes that a final decision is "one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 134 S. Ct. 773, 779 (2014); *Bostwick v. Brinkerhoff*, 106 U.S. 3, 4 (1882) (stating that "[i]f the judgment is not one which disposes of the whole case on its merits, it is not

final").[6]

Petitioner sought to appeal the dismissal pursuant to 28 U.S.C. § 1291, which mandates that "[t]he courts of appeals . . . *shall* have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . and the District Court of the Virgin Islands . . . ." (Emphasis added.) Section 1291 is not discretionary: "'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.'" *England v. Louisiana Bd. of Med. Exam'rs*, 375 U.S. 411, 415 (1964) (quoting *Willcox v. Consol. Gas Co. of New York*, 212 U.S. 19, 40 (1909)). "Recourse to the Court of Appeals is a matter of right" under Section 1291. *Heckler v. Edwards*, 465 U.S. 870, 876 (1984).

Despite the entry of a final judgment terminating the litigation and the command in Section 1291 that the court of appeals "shall" have jurisdiction over a final decision of a district court,[7] the Third Circuit dismissed petitioner's appeal for lack of jurisdiction. It dismissed the appeal even as it acknowledged that "ordinarily such a judgment would, of course, be appealable." Pet. App'x A-6. The court then stated the circuit's precedent that compelled this result: "When two cases have been consolidated for all purposes, a

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[6] Congress gave this Court the authority to "define when a ruling of a district court is final for purposes of appeal under Section 1291." 28 U.S.C. § 2072(c).

[7] The word "shall" usually connotes a requirement. *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016).

final decision on one set of claims is generally not appealable while the second set remains pending." Pet. App'x A-7 (citing *Bergman v. City of Atl. City*, 860 F.2d 560, 563 (3d Cir. 1988)). Instead, the Third Circuit considers the appealability of consolidated cases on a case-by-case basis. *Id.* at 566. But one factor under this case-by-case analysis—if the cases are consolidated for trial or all purposes—is considered "dispositive" and precludes an appeal until the entire consolidated proceeding is final. *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991).

The Third Circuit's case-by-case approach to the appealability of consolidated cases finds no support in 28 U.S.C. § 1291. Section 1291 does not carve out an exception to the final judgment rule in consolidated cases or give a court discretion to decide whether to take jurisdiction over an appeal. And, because Section 1291 is unambiguous, there is no basis to interpret it in a manner that is contrary to its plain meaning.

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992). Thus, when interpreting a statute, this Court "always" starts with the statutory language. *Advocate Health Care Network v. Stapleton*, 137 S.Ct. 1652, 1658 (2017). If the statute is plain and unambiguous, the Court "must apply the statute according to its terms," *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); because, if the statute is plain and unambiguous, "this first canon is also the last: 'judicial

inquiry is complete.'" *Connecticut Nat. Bank*, 503 U.S. at 253 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Here, the "statute according to its terms" compelled the Third Circuit to take jurisdiction over petitioner's appeal.

The Third Circuit's case-by-case approach is also inconsistent with this Court's precedent. This Court has previously upheld appellate jurisdiction over an appeal from a final order in an individual case that was consolidated with another (non-final) case. *See United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-14 (1926) (holding that despite the grant of a new trial in one case, the judgments in cases consolidated with that case had "finality and completeness" such that they were reviewable in the court of appeals); *Withenbury v. United States*, 72 U.S. 819, 821 (1866) (accepting jurisdiction over appeals of parties whose claims "left nothing to be litigated" although other parties' claims were not yet final).[8]

The plain language of Section 1291 provides a bright line rule for when the "appeal-clock"[9] begins ticking: the date of entry of the final judgment against the party seeking to appeal. This Court should reinstate petitioner's appeal.

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[8] While these cases predate the codification of the final judgment rule in 28 U.S.C. § 1291, the final judgment rule has existed since the creation of the federal judiciary. *See generally Arizona v. Manypenny*, 451 U.S. 232, 245 n.19 (1981) (tracing the origins of final judgment rule to 1789).

[9] *Gelboim*, 135 S.Ct. at 905.

B. Allowing appeals from final judgments in consolidated cases does not force the courts of appeals to decide piecemeal appeals.

The Third Circuit's rule for appeals in consolidated cases is rooted in a concern that there will be piecemeal appeals from the various cases in a consolidated proceeding. See Pet. App'x A-9 ("we will not second guess [the district court's decision to consolidate] by allowing piecemeal appeals"); *see also Bergman*, 860 F.2d at 567 ("most importantly, the practice ignores the rule against piecemeal appeals . . ."). This same concern is often expressed by the other circuits that deny an immediate appeal from a final judgment in a consolidated case. *See, e.g. Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) ("[o]ur adoption of any other rule would lead to the same piecemeal review Rule 54(b) seeks to prevent"), *cert. denied*, 487 U.S. 1223 (1988); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988) ("we do not believe that [the appellant's] personal interest in his action outweighs the public interest in promoting judicial economy by avoiding piecemeal appeals").

In appeals from *some* consolidated cases, the concern about piecemeal appeals is valid. For example, in *Watson v. Adams*, 642 Fed. App'x 240 (4th Cir. 2016), the plaintiff filed a wrongful death action against various defendants and then filed a separate survival action against the same defendants. Both cases arose from the same core of operative facts. The two cases could have been filed as one case. Indeed, after they were filed, they were consolidated by consent of the

parties. Subsequently, the district court granted summary judgment dismissing the wrongful death case but not the survival action. When Watson appealed, the Fourth Circuit dismissed the appeal for lack of jurisdiction, holding that Watson had to await final judgment in the survival action before he could appeal.

Few would disagree that under the above facts, Watson's appeal should await the final disposition of the survival action.[10] But, acknowledging that a problem exists does not require using a sledgehammer to kill a fly. Rather than dismissing an appeal for lack of jurisdiction, there are solutions available that respect the final judgment rule and yet allow the courts of appeals to deal with appeals from consolidated cases in an efficient manner.

One solution is for the courts of appeals to *manage*, rather than *dismiss*, appeals from cases that are consolidated at the district court level. Confronted with an appeal from a final order in one of several consolidated cases, the appellate court may consider whether to stay the appeal, pending resolution of the other, non-final, cases that were consolidated with the case on appeal.[11] This solution is far superior to the current

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[10] The *Watson* case falls within the category of cases described in footnote seven of *Gelboim*: an action "that could have been brought under the umbrella of one complaint." 135 S.Ct. at 906 n.7.

[11] When the first case is appealed, there is only one appeal pending and thus no other case on appeal to consolidate with it. Procedurally, the court of appeals should consider whether the first appeal should be stayed, pending final disposition of the

situation, because it allows the courts of appeals, rather than the district courts, to determine whether appeals should be consolidated.[12] Thus, a decision to consolidate an appeal would be based upon the posture of the cases at the time of the appeal instead of their posture at the time they were consolidated in the district court (typically early in the proceedings, when the allegations in the two cases that supported the

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consolidated proceeding in the trial court. In practice, one would expect the appellee to file a motion to stay the appeal and explain why the issues that remain before the district court make it appropriate to delay the appellant's right of appeal.

Logically, the determination whether to stay the appeal should consider a variety of factors, such as: (1) whether the issues in the first appeal are distinct from the issues likely to arise if the consolidated cases are appealed; (2) whether the cases in the consolidated proceeding could have been (or should have been) filed as a single case (*e.g.*, the classic race to the courthouse case where the two parties to a contract file separate complaints alleging the other party breached the contract); (3) whether resolution of a particular legal issue on appeal might materially advance the remaining litigation in the district court; and (4) the prejudice to the appellant caused by delaying its appeal.

[12] The courts of appeals have broad authority to consolidate appeals, "constrained only by the requirement that 'the parties have filed separate timely notices of appeal.' Fed. R. App. P. 3(b)(2)." *United States v. Williamson*, 706 F.3d 405, 418 n.9 (4th Cir. 2013). *See also Stone v. INS*, 514 U.S. 386, 401 (1995) (stating in *dicta* that "it would seem" that a court of appeals had the power to consolidate two appeals); *Good v. Fuji Fire & Marine Ins. Co.*, 271 Fed. App'x 756, 757 (10th Cir. 2008) (consolidating appeals and citing *Stone* to support consolidation).

consolidation are untested).[13] Under the various procedures for appeals from consolidated cases followed in all but the First and Sixth Circuits (as described in the Petition for Writ of Certiorari, at 6-9), a district court's decision to consolidate creates an anomalous situation that prevents the courts of appeals from considering whether the case should remain consolidated on appeal. The solution proposed by petitioner is true to 28 U.S.C. § 1291 and avoids the incongruity that allows a district court to control the consolidation of a case on appeal. Instead, it permits the courts of appeals to manage their own appeals and avoid, when appropriate, piecemeal appeals.

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[13] The consolidation in this case demonstrates the problem perfectly. The second case (13-95) was consolidated with the first (11-54) because the allegations in the first amended complaint in 13-95 mirrored the allegations in the counterclaim filed in 11-54. By the time of trial, however, the counterclaim in 11-54 was dismissed and the cases had little substantively in common. The issues that petitioner raised on appeal in this case (such as whether Mrs. Hall's claims survived her death) have no bearing on Samuel's claim against his sister Elsa in 13-95. Nevertheless, because of the district court's consolidation order, the Third Circuit was precluded (by its own precedent) from considering whether there was any reason to keep the cases consolidated on appeal.

C. Fed. R. Civ. P. 54(b) permits a court to certify for interlocutory appeal a judgment as to one, "but fewer than all" claims. Here, the judgment dismissed all of petitioner's claims. The Third Circuit erred when it concluded that petitioner could have sought certification via a Rule 54(b) appeal.

The Third Circuit opined that petitioner "could have sought Rule 54(b) certification yet chose not to do so." Pet. App'x A-9 n.11. Similarly, in opposing the petition, respondents asserted that a party wishing to appeal in a consolidated proceeding in which other cases were not yet final should seek a discretionary appeal through Rule 54(b) rather than availing itself of an appeal as of right. The plain language of Rule 54(b), however, establishes that an appeal under that rule was not an option available to petitioner.

1. Rule 54(b) does not apply when a case is completely dismissed.

Rule 54(b) applies to "an action" and authorizes a court to enter a final judgment "as to one or more, but fewer than all, claims or parties." As this Court has recognized, when a case is dismissed in its entirety, Section 1291 rather than Rule 54(b) provides the jurisdiction for an appeal:

> If Mackey's complaint had contained only Count I, there is no doubt that a judgment striking out that count and thus dismissing, in its entirety, the claim there stated would be both a final and an appealable decision within the meaning of

> §1291. Similarly, if his complaint had contained Counts I, II, III and IV, there is no doubt that a judgment striking out all four would be a final and appealable decision under § 1291.

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431 (1956).

Rule 54(b) only applies when a judgment is entered in "an action" as to "fewer than all" claims. Here, the district court entered a final judgment dismissing the entire case. Pet. App'x A-12. Just as in *Gelboim*, "Rule 54(b) is of no avail to" petitioner because "there is nothing 'interlocutory' about the dismissal order." *Gelboim,* 135 S.Ct. at 906. The plain language of Rule 54(b) is inapplicable to a case that is completely dismissed.

2. Consolidated cases are not merged into a single action.

Rule 54(b) would only be available to a party in petitioner's shoes *if* cases consolidated for trial under Fed. R. Civ. P. 42 are merged and become a single action—such that a dismissal in one case is not final until final judgments are entered in the action. However, this Court has held that consolidation does not merge cases into a single case. A change in that holding would have a widespread impact upon practice in the federal courts.

a. Historically, this Court recognized that consolidated cases were not merged and were separately appealable.

Prior to the adoption of the Federal Rules of Civil Procedure, this Court rejected the proposition that consolidation of cases resulted in the merger of the actions. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." (footnote omitted)). *See also Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 293 (1892) ("[A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct . . . .").

Consistent with the holding in *Johnson* that consolidation does not cause the merger of cases, this Court has ruled, at least twice before the Federal Rules of Civil Procedure were adobted, that a party may appeal when a final judgment is entered against it even though the party's case is consolidated with another case that is not final. *See River Rouge Improvement*, 269 U.S. at 413-14 and *Withenbury*, 72 U.S. at 821. If the new federal rules were intended to overrule this Court's settled-precedent, one would expect the Advisory Committee that helped develop those rules to call attention to the change. The Advisory Committee did exactly that with other rules changes that departed

from the pre-Rules practice;[14] but, there is nary a hint in the Report of the Advisory Committee on Rules for Civil Procedure (1937) suggesting any intent to depart from the above precedents allowing an immediate appeal from a final judgment entered in a consolidated case.

b. Numerous and varied applications of the Federal Rules of Civil Procedure establish that Rule 42 does not result in the merger of actions.

The way in which the Federal Rules of Civil Procedure operate would change significantly if Rule 42 is read to merge cases that are consolidated. Questions about how Rule 42 affects other aspects of the rules arise frequently. The courts, including this Court, consistently recognize that Rule 42 does not alter the status of an "action" and merge two actions into one and thereby change the procedures applicable to the individual actions. Examples of this abound in the case law. For example:

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[14] Even when the adoption of the new federal rules resulted in a minor change in existing practice, the Advisory Committee highlighted the change. *See, e.g.*, Report of the Advisory Committee on Rules of Civil Procedure (1937), Rule 4, Note to Subdivision (f): "This rule enlarges to some extent the present rule . . . ." *See also id.,* Rule 18, Note to Subdivision (a) (describing modern trends and indicating that the rule "broad[ens] existing practice"). And, when the new rules were departing from practices previously authorized by federal statute, the Advisory Committee did not hesitate to acknowledge the change: "These statutes are superseded insofar as they differ from this and subsequent rules." *Id.*, Rule 26, Note to Subdivision (a).

- This Court requires that—despite consolidation of cases in the district court—"[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976); *accord Cole v. Schenley Industries, Inc.*, 563 F.2d 35, 38 (2d Cir. 1977).

- Improper service of a defendant in one case is not cured by consolidating that case with another case in which the same defendant was properly served. *Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.).

- A plaintiff may dismiss "an action" without a court order by securing a stipulation of dismissal "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). The plaintiff does not need to secure the signatures of parties who have appeared in the other actions subject to a consolidation order. *United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984).

- Consolidation does not merge cases and the cases retain their independent status such that the parties to one action can settle it independently of the other. *State Mutual Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979).

Because consolidated cases are not merged, when a final judgment is entered ending all claims in one case, 28 U.S.C. § 1291, rather than Rule 54(b), provides the sole basis for an appeal in that case.

D. Litigants need a uniform rule that clearly identifies when appellate jurisdiction attaches. The final judgment rule provides the best rule: It is clear; it is consistent with Section 1291 and *Gelboim*; and it still allows the circuits the flexibility to manage their dockets to avoid piecemeal appeals.

The importance of a uniform rule for the application of the final judgment rule is well-established:

> [W]hat is of importance here is . . . preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule . . . .

Budinich, 486 U.S. at 202 (1988) (establishing uniform rule that a pending motion for an award of attorney's fees does not prevent a judgment on the merits from being final for purposes of Section 1291). Although the Court has recently clarified that the deadline for filing a notice of appeal is a mandatory claims processing rule rather than a jurisdictional limitation, *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658, 2017 WL 5160782 (Nov. 8, 2017), the need for a uniform rule is no less pressing. "If properly invoked, mandatory claims processing rules must be enforced, but they may be waived or forfeited." *Id.*, slip op. at 3. One who misses a mandatory claims processing deadline can suffer the same fate as one who misses a jurisdictional deadline and therefore the need for a uniform rule is equally important.

A litigant should be able to apply "a clear test" to determine how to perfect an appeal. *Heckler v. Edwards*, 465 U.S. 870, 877 (1984). There should be certainty about the event that triggers the 30-day period for taking an appeal.

1. The current approach taken by the majority of the circuits creates too much uncertainty as to when to appeal.

As detailed in the Petition for Writ of Certiorari at 8-9, the Third Circuit and six other circuits use a case-by-case approach to the appealability of a final decision in a consolidated case. The very nature of a case-by-case test for appealability defines the test as uncertain —a party will not know if the case is appealable until after the court of appeals rules. The Second Circuit's test, which ostensibly does not use a case-by-case approach but allows appeals in "highly unusual circumstances," *Hageman v. City Investing Co.,* 851 F.2d 69, 71 (2d Cir. 1988), likewise puts the litigant in the unacceptable position of not knowing whether it can appeal until the Second Circuit announces whether the highly unusual circumstances exist.

Under the tests followed in these eight circuits, a litigant must either be able to predict with 20-20 foresight whether the case is appealable; or, it must take the safe route and file a protective appeal as petitioner did in this case. In the Second Circuit, that foresight requires being able to ascertain whether the circuit believes "the district court clearly intended final judgment to be entered," *Kamerman v. Steinberg*, 891 F.2d 424, 429–30 (2d Cir.1989), or that the case is "a certain type of claim." *Kelly v. City of N.Y.*, 391 Fed.

App'x 69, 70 (2d Cir. 2010). But, the Second Circuit has yet to define which cases are of that "certain type."

If the litigant does not file a protective appeal, it can anticipate a jurisdictional challenge when it files its appeal after all consolidated cases are final. Sometimes, the appellant will get lucky and survive such a challenge. *See, e.g., Biocore, Inc. v. Khosrowshahi*, 80 Fed. App'x 619, 623-24 (10th Cir. 2003) (denying challenge to appellate jurisdiction where appellant did not appeal until all consolidated cases were final).

Because the stakes—the risk of having an appeal dismissed as untimely—are so high, a wise advocate will always file a protective appeal when a judgment is entered in a single case that is consolidated with other cases that remain pending. A party cannot afford to await resolution of all consolidated cases before appealing; because, the circuit might then declare, "Sorry, this was one of the cases that should have been filed when the final judgment was entered in the specific proceeding."[15] *See, e.g., Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 794 n.7 (3d Cir. 1992) (describing eleven appeals and cross-appeals arising from consolidated cases because the parties were

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[15] *Hamer*'s ruling—that the deadline for filing an appeal is a claims processing rule—will potentially allow courts to invoke equity to allow an untimely appeal in such circumstances. Nevertheless, the establishment of a bright line rule will still (1) eliminate the need for filing a protective appeal and (2) avoid the need to resort to equity when a party who waits to appeal until all of the consolidated cases are final is informed that its appeal is too late because it should have filed its appeal when its own case became final.

"uncertain whether certain of the district court's actions were then final under 28 U.S.C. § 1291").

2. The rule followed in the Ninth, Tenth and Federal circuits is inefficient and contrary to the express language of Section 1291.

The Ninth, Tenth and Federal Circuits will not entertain any appeal from any consolidated case until all cases in the consolidated proceeding are final. *See Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad. Corp.,* 827 F.2d at 675; *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1381 (Fed. Cir. 1996). As noted in *Bergman*, this rule is "unwise" because it will not allow an appeal from a final judgment in one case even if the case was consolidated with another only for limited discovery purposes. *Bergman*, 860 F.2d at 566. Moreover, the rule prohibiting an appeal until all cases are final is contrary to the plain language of Section 1291.

3. The court should adopt the same rule that it adopted in *Gelboim*.

In *Gelboim*, as in *Budinich*, this Court vindicated the importance of uniformity and bright line rules that give parties clear notice of the event that triggers the "appeal-clock." That clarity is likewise needed in the context of appeals involving Fed. R. Civ. P. 42. The Court should adopt the same rule that it adopted in *Gelboim*: Entry of final judgment in a case renders it appealable notwithstanding that the case is consolidated with another case that is not final. Such a rule is consistent with Section 1291. Yet, it does not deprive the courts of appeals of the ability to stay appeals

when the appellate court concludes that justice will be served by deferring the appeal until the rest of the consolidated proceeding is complete.

Importantly, this flexibility will allow a court of appeals to consider the impact of delay upon the appellant. The circumstances of petitioner's situation demonstrate the unfairness of the Third Circuit's rule. Petitioner is unable to close out her mother's estate until the litigation is concluded. The judgment was entered in early February 2015. By the time this case is before the Court for oral argument, the delay to petitioner's statutory right of appeal will approach three years. And, since the other case, 13-95, still awaits entry of judgment, briefing on post-judgment motions and then a ruling on those post-judgment motions, as long as this case is tethered to 13-95, there is no end in sight to the ongoing prejudice to petitioner.

CONCLUSION

For the foregoing reasons, this Court should hold that the Third Circuit had jurisdiction over petitioner's appeal and therefore reverse the decision of the Third Circuit. It should remand with instructions to the Third Circuit to reach the merits of petitioner's appeal.

Respectfully submitted,

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