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

REPLY BRIEF FOR THE PETITIONER

ANDREW C. SIMPSON
Andrew C. Simpson, P.C.
2191 Church Street, Suite 5
Christiansted, St. Croix
U.S. Virgin Islands 00820
(340) 719-3900
asimpson@coralbrief.com

Counsel of Record for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

RULES

ADDENDUM TO STATEMENT OF THE CASE

After the Petition for Writ of Certiorari was filed a new trial of the case that was consolidated with this case was held on April 4, 2017. At the conclusion of Samuel Hall's case, Elsa Hall ("Elsa") in her individual capacity moved for a judgment as a matter of law under Fed. R. Civ. P. 50(a) and for a mistrial. The trial court took those motions under advisement, at which point Elsa rested without calling any witnesses. The jury returned a verdict against Elsa in her individual capacity. The trial court has neither ruled on those motions nor entered judgment on the jury verdict. If the motions are denied, Elsa will renew the motion for judgment as a matter of law in accordance with Fed. R. Civ. P. 50(b) after the judgment is entered.

REPLY BRIEF FOR THE PETITIONER

Petitioner was denied the *right* to appeal from a final judgment provided by 28 U.S.C. § 1291. The circuits are split in four different ways as to whether a party with a final judgment in a case has such a *right* if the case is consolidated with other cases that are not yet final. How does one oppose a petition for certiorari when the Question Presented reflects a four-way split in the circuits (that eleven of the twelve circuits have expressly recognized) and is of such importance that this Court has twice granted certiorari to answer it?

Respondents' strategy is to use the Fallacy of Distraction. They reframe the issue with a Question *Not* Presented and assert that because Petitioner *might* be able to persuade a district court to allow a *discretionary* appeal under Fed. R. Civ. P. 54(b), it

follows that the denial of the *right* to appeal is of no importance. Simply stating that proposition refutes it.

In arguing that the Question Presented is not important, Respondents' tellingly omit any mention of *Gelboim v. Bank of America Corp.*, 135 S.Ct. 897 (2015). In *Gelboim*, this Court deemed the same Question Presented (the real Question Presented, not the Respondent's reframed version) important enough to grant certiorari. Although the Court narrowed the question when it answered it (thereby leaving the question unresolved for cases—such as this one—that are consolidated under Fed R. Civ. P. 42[1]), the same concerns undergird the Question Presented in this case that the Court considered so important in *Gelboim*: To end the circuit split that creates a "quandary about the event that triggers the 30–day period for taking an appeal." 135 S.Ct. at 900.

Respondents' Brief in Opposition is also notable for its failure to acknowledge that *Gelboim* rejected (in the context of cases consolidated in a multi-district litigation proceeding) their argument; yet, Respondents offer no any reason why the outcome should be different here. In *Gelboim*, the respondent banks likewise argued "the sole avenue for appeal while the consolidation continues is Rule 54(b)." 135 S.Ct. at 904. This Court rebuffed that argument, largely because: (a) it is important that practitioners have a bright line establishing the date a notice of appeal must be filed; and (b) Fed. R. App. 4(a)(1)(A) specifies that a notice of appeal must be filed within thirty days "after entry of

---

[1] *See Gelboim*, 135 S.Ct. at 904, n.4.

the judgment or order *appealed from*" (rather than the judgment or order ultimately entered in the consolidated case that is not the basis for the appeal) (emphasis added). (The appealing party has no standing to appeal from the judgment in the other case and that judgment might not have any relevance to the party's appeal[2]).

A. Importance of the Question Presented

A sampling of cases highlights the quandary identified by this Court in *Gelboim*. Consider the dilemma presented by the Second Circuit's version of the circuit split, where an appeal of a final judgment in one case consolidated with another non-final case is not permitted except in "highly unusual" circumstances. A litigant must either be able to predict with 20-20 foresight whether a highly unusual circumstance exists or file a protective appeal. That foresight requires being able to ascertain whether the circuit believes "the district court clearly intended final judgment to be

---

[2] The difference in the consolidated cases in this appeal demonstrates that concept perfectly. Here, Elsa in her representative capacity presented three issues on appeal: whether certain claims survived her mother's death; whether the trial court erred when it held that a party cannot recover damages for the penalties and interest it legally must pay to the IRS due to another party's negligence unless the IRS has begun enforcement proceedings against the party; and whether it was error to refuse to sever the cases for trial. None of the issues in the case against Elsa in her individual capacity are related to survival of actions or taxes. And, Elsa in her individual capacity has now proceeded to a second trial and thus from her perspective in an individual capacity, any error from the failure to sever the first trial is moot while remaining a live controversy in this appeal.

entered," *Kamerman v. Steinberg*, 891 F.2d 424, 429–30 (2d Cir.1989), or that "'the case on appeal is the only one of the consolidated cases that presents' a certain type of claim." *Kelly v. City of N.Y.*, 391 F. App'x 69, 70 (2d Cir. 2010) (quoting *Kamerman*, 891 F.2d at 429-30).

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, and because of the uncertainty as to which of the courts of appeals' four different solutions is the solution that this Court will ultimately deem to be the correct solution, 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.

The uncertainty leads to needless "protective" appeals. For example, in *United States v. Sunset Ditch Co.*, 472 Fed. App'x 472 (9th Cir. 2012), the trial court entered judgment in several consolidated cases but had not ruled in other consolidated cases. The appellant filed a "protective appeal" while simultaneously moving to dismiss its own appeal for lack of appellate jurisdiction (based upon the fact that not all of the consolidated actions had been decided). If there were a

bright line rule establishing the time when the appeal clock begins to tick for final judgments in a consolidated case, then all of these inefficient and cost-increasing procedures (jurisdictional challenges and protective appeals) would be unnecessary. The Petition presents the Court with an opportunity to end the circuit split; establish a clear rule as to when the time to appeal begins to run in consolidated cases; and eliminate needless and costly practices caused by the current uncertainty as to when a notice of appeal must be filed.

B. Rule 54(b) is inapplicable.

Respondent's argue that this Court should sidestep the Question Presented on the theory that Petitioner should seek a discretionary appeal through Rule 54(b) rather than availing herself of an appeal as of right. The argument fails because it misinterprets Rule 54(b).

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, Rule 54(b) does not apply in those instances where a case is completely dismissed:

> 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, 436 (1956).

Here, the district court entered a final judgment dismissing all of the counts of Petitioner's action. The final judgment ordered that Petitioner "recover nothing" and that "the action be dismissed on the merits." A-12[3] Petitioner's case was dismissed entirely. Just as in *Gelboim*, "Rule 54(b) is of no avail to" Petitioner. 135 S.Ct. at 900. Thus, the plain language of Rule 54(b) is inapplicable in the situation where a case has been completely dismissed.

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

Respondents' only argument for asserting that Rule 54(b) is available to Petitioner is based upon an assumption (neither articulated nor argued by Respondents) that when cases are consolidated for trial under Fed. R. Civ. P. 42, they are merged and become a single action and therefore a dismissal in one such case is not final until final judgments are entered in all of the consolidated cases.[4]

---

[3] The Judgment is reprinted at A-12 in the Petition for Certiorari.

[4] Ironically, part of the four-way split between the circuits is created by a two-way split between the circuits as to whether or not a Rule 42(a) consolidation merges the cases into one unit for purposes of appeal. The First and Sixth Circuits emphatically hold that it does not. *See FDIC v. Caledonia Inv. Corp.*, 862 F.2d 378

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

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, and required separate verdicts and judgments . . . ."). Consistent with the rule that cases were not merged through consolidation, prior to the adoption of the Federal Rules of Civil Procedure, this Court permitted appeals from final orders in individual cases that had been consolidated with other (non-final) cases. *See, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-14 (1926); *Withenbury v. United States*, 72 U.S. 819, 821-22 (1866).

Given the above precedents that existed at the time the Federal Rules of Civil Procedure were

---

(1st Cir. 1988) (holding that consolidated cases retain their separate identity and that a final judgment entered in one case is immediately appealable under 28 U.S.C. § 1291) and *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994) (same).

promulgated, one would expect that if those rules were intended to overrule this Court's precedents (bearing in mind that it was the Court itself that promulgated the rules), the Advisory Committee that helped develop those rules would have called attention to the change. The Advisory Committee did exactly that with other rules changes that departed from the pre-Rules practice; but there is nary a hint in the Notes of the 1937 Advisory Committee suggesting any intent to depart from several precedents of this Court.[5]

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 dramatically if Rule 42 merges cases that are consolidated. Questions about how Rule 42 affects other aspects of the rules arise frequently—and the courts, including this Court, consistently recognize that Rule 42 does not alter the status of an "action" and merge two actions into one

---

[5] 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.* Notes of the 1937 Advisory Committee to Rule 4(f) ("This rule enlarges to some extent the present rule . . ."). *See also* Notes of the 1937 Advisory Committee to Rule 18(a) (describing modern trends and indicating that the rule broad[ens] existing practice). And, when the new rules were departing from practices 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." Notes of the 1937 Advisory Committee to Rule 26(a).

and thereby change the procedures applicable to the individual actions. Examples of this abound in the case law. For example:

- 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.*, C.A.2 (N.Y.) 1977, 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 in all 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) (quoting *Johnson*).

C. Rule 54(b) is neither an adequate nor acceptable substitute for an appeal of right.

Any advocate familiar with discretionary review and review as of right appreciates that the former is a poor substitute for the latter. With an appeal of right, the door to the courthouse is wide open and welcoming. With a discretionary appeal, the appellant must first pry the door open. Rule 54(b) creates a discretionary appeal and was intended to keep the door firmly shut except to "afford a remedy in the infrequent harsh case." *Panichella v. Pennsylvania R. Co.*, 252 F.2d 452, 454–55 (3d Cir. 1958)."It follows that 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel." *Id.* at 454–55. *See also Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005) (holding Rule 54(b) certification was unwarranted and an abuse of discretion).

Thus, even if Rule 54(b) was potentially available in this case, Petitioner would still be better off with an appeal as of right. Petitioner's Question Presented is directed to that appeal as of right and Respondents' effort to hijack the Question Presented should be rejected.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit, resolve the four-way split in the circuits, and reverse and remand for further proceedings.

Respectfully submitted,

ANDREW C. SIMPSON
Andrew C. Simpson P.C.
2191 Church St., Suite 5
Christiansted, St. Croix
U.S. Virgin Islands 00820
(340) 719-3900
asimpson@coralbrief.com