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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-1174, Gelboim v. Bank of
5 America.

6 Mr. Goldstein.

7 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8 ON BEHALF OF THE PETITIONERS

9 MR. GOLDSTEIN: Mr. Chief Justice, may it
10 please the Court:

11 My clients filed this lawsuit against
12 Mr. Waxman's clients. The district court dismissed that
13 lawsuit and said that it was terminated.

14 Now, from the earliest days of this Court's
15 -- excuse me, this nation's jurisdictional statutes,
16 that would be an appealable order under the aptly named
17 Final Judgment Rule, and that must be so unless
18 something changed with Congress's enactment of Section
19 1407(a) of the multidistrict litigation statute. And we
20 ask you to hold that nothing changed, and it was
21 appealable for three reasons.

22 The first is the judgment was entered in
23 this action. It was dismissed. We had our own
24 complaint, our own docket, our own lawyers, our own
25 plaintiffs, and our own defendants.

1 The second is that there is no judgment in
2 the MDL itself, so there is nothing from which we could
3 appeal at the end of the MDL litigation, so it must be
4 that we appeal from this.

5 And the third is that Rule 54(b) of the
6 Rules of Civil Procedure does not apply because that
7 applies to the dismissal of part of an action, some of
8 the claims or some of the parties, not the whole action.
9 And here, the whole action was dismissed.

10 JUSTICE SOTOMAYOR: Could you tell me,
11 first, what difference there is, if any, pursuant to
12 your reasons, that would not apply to a consolidated
13 case for all purposes, number one? And, number two,
14 isn't a case consolidated with others, for purposes of
15 pretrial proceedings, a pending action that involves
16 multiple parties?

17 MR. GOLDSTEIN: As to the first, there are
18 different forms of consolidation. Both sides agree with
19 that. They make this point, the Respondents do, on
20 page 33 of their brief. There are forms of
21 consolidation that produce a single action. That can
22 happen under Rule 20 with joinder. It can happen under
23 Rule 42(a)(1) if the parties consent with consolidation.
24 The cases can become so intertwined that there is
25 effectively one case, one complaint, and one action.

1 JUSTICE SOTOMAYOR: That's, frankly, not the
2 majority of the cases. In --

3 MR. GOLDSTEIN: That doesn't happen most of
4 the time. That's correct.

5 JUSTICE SOTOMAYOR: In -- in most of the
6 MDLs --

7 MR. GOLDSTEIN: Yes.

8 JUSTICE SOTOMAYOR: -- most of the cases
9 retain their individual character, even though they're
10 consolidated for all purposes. There may be a case
11 that's taken as a test case among the many, et cetera.

12 Your rule basically is saying consolidation
13 now will permit piecemeal appeals in almost every
14 circumstance, except for a very limited number.

15 MR. GOLDSTEIN: One preliminary point and
16 then the question about what our rule produces.

17 In MDL litigation, as this district court
18 recognized, you actually don't have consolidation for
19 all purposes. Section 1407(a) specifies is that there
20 can be consolidation for pretrial purposes only. The
21 pretrial purposes in this case are over. The complaint
22 was dismissed.

23 Now, as to the policy arguments of the
24 Respondents, that there is a grave concern that our rule
25 would produce interlocutory appeals that go up to the

1 court of appeals, lots of different times, there is a
2 straightforward answer to that point, and that is that
3 district courts, just as they have the discretion to
4 enter a partial final judgment under Rule 54(b), have
5 the same discretion to avoid entering a final judgment
6 in individual actions under Rule 58(b).

7 And this is very common in MDL litigation,
8 just as you indicate, Justice Sotomayor. Very
9 frequently district courts will enter consolidated
10 complaints and will not enter orders in the individual
11 actions that would be appealable.

12 The distinct feature of this case, the
13 critical distinct feature here is that this district
14 court decided to dismiss in its entirety our individual
15 actions. She didn't have to do that, but she did it
16 consciously --

17 CHIEF JUSTICE ROBERTS: Well, does the
18 150-day provision kick in? I mean, you said don't worry
19 about this. District courts can just put it on the back
20 burner for three years, however long. Doesn't the
21 150-day provision kick in if, in fact, the district
22 court has dismissed all of the claims?

23 MR. GOLDSTEIN: Two things, Mr. Chief
24 Justice. First, we think it does not. So here we're
25 talking about Rule 58(b) and Rule 58(c). And I

1 apologize, those --

2 JUSTICE GINSBURG: Doesn't Rule 58 say
3 unless otherwise provided?

4 MR. GOLDSTEIN: Yes. But you --

5 JUSTICE GINSBURG: So they -- automatic
6 entry of judgment doesn't happen if the district judge
7 specifically otherwise provides.

8 MR. GOLDSTEIN: That is correct. But there,
9 the Chief Justice is pointing out that it's not entirely
10 clear what 58(c) means and how long the district court's
11 discretion lasts under Rule 58(b). I will give you an
12 example, and if the Court wanted the -- the library or
13 the clerks to look up the 1935 MDL in the --

14 CHIEF JUSTICE ROBERTS: Oh, we could do it
15 ourselves.

16 (Laughter.)

17 MR. GOLDSTEIN: The MDL litigation -- as you
18 well could -- the MDL litigation in the Chocolate
19 litigation, there the district court used the tool that
20 we're discussing right now. It said, I'm going to
21 resolve some of the claims, but I'm not going to enter
22 an appealable judgment.

23 We do think that's the better reading.

24 JUSTICE BREYER: How do you do that?
25 Because not -- not all of us can look it up themselves.

1 (Laughter.)

2 MR. GOLDSTEIN: There is a --

3 JUSTICE BREYER: The --

4 MR. GOLDSTEIN: Right.

5 JUSTICE BREYER: The rule does say that the
6 clerk, once the -- once the judge denies all relief, he
7 says to you or somebody, I deny all relief in your case,
8 then the clerk is supposed to just enter the judgment.

9 MR. GOLDSTEIN: With one --

10 JUSTICE BREYER: So how -- how is the judge
11 supposed to not do that?

12 MR. GOLDSTEIN: Just noting that I do want
13 to return to the other tools the district court has.
14 And I apologize, the parties have not reproduced the
15 rules, so I'm going to describe it for you, and that
16 is --

17 JUSTICE BREYER: Why not just answer what I
18 just asked you.

19 MR. GOLDSTEIN: Okay. That is, that Rule
20 58(b) (1) provides --

21 JUSTICE BREYER: Yeah.

22 MR. GOLDSTEIN: -- that the district
23 court -- and this is the provision Justice Ginsburg is
24 talking about -- the district court may direct the clerk
25 not to enter a judgment. The Rule 58 --

1 JUSTICE BREYER: Oh, I get it. I see. So
2 he says don't do it.

3 But we have seven -- I mean, I am moved by
4 this. We have a group of federal district judges --

5 MR. GOLDSTEIN: Yes.

6 JUSTICE BREYER: -- who actually don't have
7 to look these up because every day they work with them.

8 MR. GOLDSTEIN: Well, they are actually --
9 they are not --

10 JUSTICE BREYER: And tell us your rule -- if
11 we agree with you, we are going to produce a mess. And
12 then they have about seven different ways in which it
13 will produce a mess in various cases. And so,
14 obviously, I do pay attention when the district judges
15 do say that.

16 And so I'm not a district judge, but I don't
17 want to produce a mess for them. The MDL is trying to
18 do the opposite. So what's the answer to what they say?

19 MR. GOLDSTEIN: Okay. What they say,
20 Mr. Justice Breyer, is actually not that our -- our
21 result will produce a mess. It is -- they quite clearly
22 say, we're not asking you to -- we're not saying what
23 the correct interpretation of the statute or rules are.
24 They have a grave concern that you identify, which is we
25 don't want automatic interlocutory appeals from MDLs.

1 Our answer is that our rule does not produce
2 automatic interlocutory appeals because district judges
3 are perfectly free, through a number of tools, only one
4 of which we've been discussing, not to enter.

5 JUSTICE BREYER: Has -- has that happened to
6 a lot of district judge? Your rule is the district
7 judge, despite Rule 58(b), et cetera, says, I deny all
8 relief in your case, Mr. Smith, everyone out, good-bye.

9 Then you say to the clerk, Clerk, don't
10 enter the piece of paper called the judgment because I
11 don't want them to take an appeal.

12 And then they ask for mandamus on the ground
13 that must be an abusive discretion. What happens? Or
14 has it happened a lot?

15 MR. GOLDSTEIN: There is an MDL in which
16 this happened.

17 JUSTICE BREYER: What?

18 MR. GOLDSTEIN: It is the Chocolate MDL.

19 JUSTICE BREYER: All right.

20 MR. GOLDSTEIN: Well, the reason it doesn't
21 happen very often, Justice Breyer, is this problem
22 doesn't happen very often. So preliminarily, the only
23 time --

24 JUSTICE BREYER: Okay. So I see. Your rule
25 will, in fact, win your case for your client.

1 MR. GOLDSTEIN: No.

2 JUSTICE BREYER: And then in the future, no
3 one else is --

4 MR. GOLDSTEIN: Justice Breyer, that is not
5 correct. Frequently district judges will want these
6 questions to go up on appeal because they will get
7 guidance.

8 JUSTICE BREYER: 54.

9 MR. GOLDSTEIN: Now, they can do it under 54
10 or they can enter a final judgment in the case. So
11 there is the 1935 MDL using Rule 58(b), but there are
12 many other tools the district judges have.

13 JUSTICE GINSBURG: Mr. Goldstein, as -- as
14 your view of the case is 54(b) would not be
15 appropriate --

16 MR. GOLDSTEIN: Yes.

17 JUSTICE GINSBURG: -- when the -- when the
18 judge says, I dismiss this claim entirely. This
19 complaint is out. It's a final judgment. It's not
20 appropriate for Rule 54 because Rule 54(b) is when one
21 claim is done, but other claims are still pending.

22 MR. GOLDSTEIN: That's correct. Justice
23 Breyer's suggestion of Rule 54(b) would not work if the
24 district judge has dismissed the entire action.

25 It does say by its terms that it applies

1 only to the dismissal of some of the parties or some of
2 the claims in the action. The action throughout the
3 rule of civil proceed -- Rules of Civil Procedure refers
4 only to one thing, that is, the individual piece of
5 litigation. We have our own complaint, our own docket,
6 our own plaintiffs, defendants, and lawyers.

7 JUSTICE KENNEDY: But -- but your -- your
8 answer is that, oh, well, the district judge can find
9 plenty of ways, disingenuously perhaps, to say this
10 isn't going to be entered yet, we're just going to wait.
11 And so Chief Justice says you have the 150-day problem.
12 It -- it seems to me that if you're asking for these
13 sort of furtive measures, we might as well face up to
14 the problem right away and just adopt Mr. Waxman's
15 position.

16 MR. GOLDSTEIN: Well, Justice Kennedy, we
17 don't think it's --

18 JUSTICE KENNEDY: It seems to me you're
19 asking the judge to be almost disingenuous.

20 MR. GOLDSTEIN: Well, we disagree for the
21 following reason, and that is, if the point of
22 Mr. Waxman's side is that district judges need
23 discretion to decide when to enter judgments, whether
24 they're 54(b), partial final judgments, or final
25 judgments under Rule 58, the discretion should be the

1 same.

2 And the tools that I'm talking about are not
3 used disingenuously by your district judges. They are
4 used consistently, and that is --

5 JUSTICE KAGAN: Are you then saying that
6 there's no practical difference between your position
7 and Mr. Waxman's position? In other words, you're
8 saying Rule 54 is not the right vehicle.

9 MR. GOLDSTEIN: Yes.

10 JUSTICE KAGAN: And that's an important
11 point.

12 MR. GOLDSTEIN: Yes.

13 JUSTICE KAGAN: It's important to get the
14 rules right, whether it's Rule 54 or something else.
15 But are you saying that there is no practical difference
16 between the two?

17 MR. GOLDSTEIN: I'm saying there's little
18 practical difference. There is some, and that is that
19 their side requires the district court and the court of
20 appeals to have litigation on whether Rule 54(b)
21 certification is appropriate, and whether the district
22 court abused its discretion in entering a Rule 54(b)
23 judgment. But there isn't much beyond that.

24 JUSTICE GINSBURG: There's one huge
25 difference. The district judge can say no to 54(b) if

1 it's a final judgment. In this -- in this very case,
2 that's exactly what the judge said. In the first round,
3 he said, you have an appeal of right, and -- she said to
4 the plaintiff who was dismissed.

5 And then when the Second Circuit said no,
6 she refused to give a 54(b).

7 MR. GOLDSTEIN: The reason it's not a huge
8 difference, Justice Ginsburg, is that the district court
9 doesn't have to enter a final judgment.

10 I'll give you a very specific example. The
11 district court in this case entered a ruling in three
12 different cases, the OTC plaintiff's case, the exchange
13 plaintiff's case, and the -- our clients, the bondholder
14 case. And if the district court had instead entered her
15 opinion in the OTC or exchange complaints in the
16 complaint that had just an antitrust claim, for example,
17 that did not have just an antitrust claim, then there
18 would not be an appealable final judgment.

19 The district court quite consciously
20 resolved all the antitrust issues, knowing that they
21 would go up on appeal. She just changed her mind only
22 after the Second Circuit, in a rule that the Respondents
23 do not defend, decided that it did not want to hear the
24 appeal as a matter of its discretion.

25 It is quite important, I think, that --

1 JUSTICE GINSBURG: I don't think this court
2 of appeals said as a matter of its discretion, and that
3 was one thing that puzzled me about your presentation.
4 The court of appeals said we have no jurisdiction.
5 That's quite different from saying we have discretion.

6 MR. GOLDSTEIN: Ah. But, Justice Ginsburg,
7 their rule is a case-by-case determination if they do
8 have jurisdiction. And they said, in our -- they did it
9 sua sponte. The defendants did not move actually to
10 dismiss our appeal. The court of appeals, applying this
11 case-by-case rule that's very hard to predict, which is
12 why the Respondents don't defend it, said, we think --
13 they didn't explain much about what they -- the reason
14 that they dismissed it.

15 JUSTICE GINSBURG: They said we had no
16 jurisdiction.

17 MR. GOLDSTEIN: Right, they did. But their
18 rule is that sometimes you can have an -- an appeal like
19 this, and they will deem it to be an appealable final
20 judgment.

21 JUSTICE GINSBURG: They said they -- they --
22 there was a -- there's a phrase that the Second Circuit
23 uses, and it -- something to the effect of an
24 extraordinary case, an exceptional case.

25 MR. GOLDSTEIN: Yes, that's correct. Right.

1 JUSTICE GINSBURG: But their main rule is
2 there's no jurisdiction.

3 MR. GOLDSTEIN: Right. And the great
4 majority of circuits apply the opposite rule. They
5 recognize that there's no reason to depart from the
6 ordinary, long-settled understanding of what a final
7 judgment is. It is called the final judgment rule. We
8 happen --

9 JUSTICE SOTOMAYOR: Can we go back to
10 Justice Kennedy's question about the disingenuous nature
11 of this?

12 MR. GOLDSTEIN: Yeah.

13 JUSTICE SOTOMAYOR: So we write an opinion
14 and say, no, it's a final judgment. It could be
15 appealed.

16 MR. GOLDSTEIN: Yes.

17 JUSTICE SOTOMAYOR: But district courts, you
18 have other tools not to enter the judgment?

19 MR. GOLDSTEIN: Yes.

20 JUSTICE SOTOMAYOR: You can delay it?

21 MR. GOLDSTEIN: I --

22 JUSTICE SOTOMAYOR: That -- that does sound
23 like all we're saying that this is a very formalistic
24 ruling. But haven't we said -- quoting myself in
25 Mohawk -- that the inquiry should always be a practical

1 one --

2 MR. GOLDSTEIN: It is --

3 JUSTICE SOTOMAYOR: -- and that efficiency
4 is part of the calculus?

5 MR. GOLDSTEIN: The Court has said that
6 there is a practical inquiry in one important respect,
7 and that is the Court has broadened the notion of what
8 could be an appealable final judgment. But it has never
9 denied the fact that when you decide the case, you
10 resolve it, you terminate it as the district court does
11 here. That is a final judgment for the purposes of --

12 JUSTICE SOTOMAYOR: That is, if you look at
13 it as narrowly as you do.

14 MR. GOLDSTEIN: Your Honor, let me just --
15 in the MDL, these cases were brought together because
16 there was a common factual allegation. And that is that
17 Mr. Waxman's clients manipulated LIBOR. But we have a
18 different complaint in a different docket with different
19 plaintiffs and defendants, and the district court
20 decided to dismiss our case. I admit and I --

21 JUSTICE GINSBURG: But you asked -- you
22 asked to be part of the MDL case, didn't you?

23 MR. GOLDSTEIN: Yes, that's correct. In
24 the -- well, we filed in the Southern District of New
25 York. We asked to be part of the MDL litigation. The

1 district court initially said that we would be
2 consolidated for all purposes and then recognized she
3 could not do, that it would be consolidated only for
4 pretrial purposes. The pretrial purposes are now over.
5 We were dismissed and therefore --

6 JUSTICE GINSBURG: Mr. -- Mr. Goldstein,
7 following up the -- what has been called disingenuous.
8 If no judgment -- if there is no final judgment, the
9 judge says, this is how I'm going to rule, but I'm going
10 to defer making the ruling.

11 MR. GOLDSTEIN: Yes.

12 JUSTICE GINSBURG: That party still is in
13 the case --

14 MR. GOLDSTEIN: Yes.

15 JUSTICE GINSBURG: -- and can participate in
16 discovery. Your strong point, I thought, was, here,
17 they said I'm out of the case. Can't participate in it
18 anymore because I have no standing according to the
19 district judge --

20 MR. GOLDSTEIN: Right.

21 JUSTICE GINSBURG: -- and yet I have to wait
22 six years or however -- however long the MDL proceedings
23 go on. So it says you're out, but you can't appeal.

24 MR. GOLDSTEIN: Yes. Now there -- what
25 district judges do in this circumstance, Your Honor, is

1 that they stay the case that they believe will not go
2 forward. This is something that Judge Rakoff does with
3 some regularity in complex litigation. What he will say
4 is my inclination is I'm going to ultimately say that
5 the antitrust claims cannot go forward and what I'm
6 going to do, therefore, is stay the antitrust claims
7 and, therefore, you do not participate in discovery, for
8 example.

9 But we do think it is important to recognize
10 that there is a real reason for the appeals to go
11 forward and that is, that it avoids duplicative
12 discovery when we have to come back after appeal and
13 there is the very real prospect of multiple appeals in
14 multiple different courts after the MDL --

15 JUSTICE SOTOMAYOR: I don't understand that.
16 That's arguing that they shouldn't exercise their 58(c).
17 That's what Judge Rakoff is essentially doing. He's
18 saying, and you're saying, we shouldn't let them.

19 MR. GOLDSTEIN: I'm sorry, Your Honor, no --

20 JUSTICE SOTOMAYOR: If he can say it for as
21 long as he thinks is appropriate --

22 MR. GOLDSTEIN: Yes.

23 JUSTICE SOTOMAYOR: -- what's the
24 difference?

25 MR. GOLDSTEIN: What's the practical

1 difference between the parties?

2 JUSTICE SOTOMAYOR: In terms of the effect
3 on you. You're not going to participate in discovery
4 under his system.

5 MR. GOLDSTEIN: That's -- that is correct.
6 And so my point to the Court is the following: And,
7 that is, to the extent that members of the Court are
8 concerned, that the district courts are concerned, the
9 district judges that you cite, Justice Breyer, that we
10 shouldn't have these interlocutory appeals, then the
11 district courts have the tools to deal with that --

12 JUSTICE BREYER: Yeah, but what they tell
13 us, these judges, who are experienced, I stress, on
14 pages 12 and 13, "District courts have evaluated the
15 Third Circuit factors," that is 54(b) factors, "in
16 deciding whether to certify one among several
17 consolidated cases for appeal." Footnote, and then in
18 the footnote they have several cases which I take it,
19 since they tell us that, are cases where they were
20 consolidated cases, they used 54(b) to say that one of
21 the cases could go ahead on appeal.

22 Now, I took that as saying that judges are
23 using 54(b) to accomplish the end that we seem
24 apparently everyone wants, giving them the flexibility,
25 and not the system that you propose.

1 MR. GOLDSTEIN: That is not correct, Justice
2 Breyer. And here's --

3 JUSTICE BREYER: So are they wrong or I'm
4 not reading it right? Probably the latter.

5 MR. GOLDSTEIN: They -- there is some -- a
6 piece of the puzzle that's missing, and that is that
7 ours is the rule that for decades has been applied in
8 the great majority of the country. There are --

9 JUSTICE BREYER: In 54 - in fifty -- in the
10 majority of the country judges have said, when we have
11 four cases in front of us, we have consolidated and we
12 wish to dismiss one but keep the others going, they have
13 said, we cannot use 54(b). They have to have an appeal.

14 MR. GOLDSTEIN: No, Justice Breyer. What
15 it -- here's the situation. In MDL litigation, which is
16 consolidated --

17 JUSTICE BREYER: I'm not talking about MDL.
18 I'm just talking about consolidated cases.

19 MR. GOLDSTEIN: Well, if it's consolidated
20 for all purposes, that's quite different. You get --

21 JUSTICE BREYER: Okay.

22 MR. GOLDSTEIN: -- a single action.

23 JUSTICE BREYER: Okay. Then talk about MDL.

24 MR. GOLDSTEIN: Okay. MDL litigation, the
25 rule is, as described in the cert papers, overwhelmingly

1 in our favor, and that is the district courts enter
2 judgments when they are prepared for the issue to go up
3 on appeal. The rule is, in the great majority of
4 circuits, that if you do enter a judgment in an
5 individual action in MDL litigation, you appeal. And so
6 district courts are perfectly aware of it.

7 We call it formal as if it were a bad thing
8 that we have a final judgment rule, but it is not a bad
9 thing. It is really important to have clarity.

10 JUSTICE KAGAN: But if I could understand,
11 Mr. Goldstein, what you're saying. Do you think that a
12 judge properly considers the exact same factors whether
13 it's done as the Respondents would like under Rule 54,
14 or instead, whether it's done your way by staying the
15 action or by holding off on a final order?

16 MR. GOLDSTEIN: The answer to that question
17 is I am agnostic on it. My point is that to the extent
18 that you all -- that the Court agrees with Mr. Waxman's
19 point, the district courts need that discretion, then
20 our solution is simply to give them that discretion with
21 respect to the entry of the final judgment. It is not
22 an argument against our position.

23 The argument for our position that I have
24 not gotten to, and I do want to make sure we don't miss
25 it, is that I am required under Rule 4 of the Federal

1 Rules of Appellate Procedure and Section 2107 of the
2 statutes, to appeal within 30 days of the order or
3 judgment that is affecting me. At the end of the MDL,
4 there is no such order or judgment. The only thing that
5 I can appeal from is the dismissal of my action. I do
6 not know, at the end of the MDL, what it is that I'm
7 actually appealing from. They have -- the other problem
8 that they have is that Rule 54(b) doesn't apply here
9 because the entire act -- you're going to have to change
10 the meaning of what an action is throughout the -- all
11 of the Rules of Civil Procedure, which is uniformly the
12 single piece of litigation, the single complaint, and
13 there is no reason to create confusion.

14 Imagine after the ruling that Mr. Waxman
15 wants, there are four cases in the district court, and
16 they relate to the same sort of facts, and the district
17 court dismisses one. If you introduce this ambiguity
18 about what an action is, then people are going to be
19 unclear about when it is that they should be appealing.
20 Because our lawsuit is a separate one; it is in a
21 separate docket, we have a separate complaint.

22 JUSTICE SOTOMAYOR: Doesn't -- doesn't it
23 become clear once we announce it? It's not like anybody
24 involved in the MDL doesn't carefully know what's going
25 on. That's the advantage of those cases.

1 MR. GOLDSTEIN: It does not.

2 JUSTICE SOTOMAYOR: And there is an order.

3 There's an order terminating the MDL --

4 MR. GOLDSTEIN: Justice --

5 JUSTICE SOTOMAYOR: -- and sending the cases
6 that are going to be sent back, back, and the ones who are
7 finalized, those are finalized.

8 MR. GOLDSTEIN: Here's what happens. And I
9 suggest that the Court look at the docket, for example,
10 in the Fontainebleau MDL, which is I think number 2106.
11 So what happens here is that at the end of the
12 proceedings, imagine the district court dismisses
13 complaint A, that will be my complaint, and then later
14 on complaints B and C settle. So they are done. They
15 are voluntarily dismissed.

16 So there is no final judgment there. It
17 could be years later. What the district court will do
18 is it will send a recommendation to the JPML saying I
19 think that this case is over. The JPML, which is not
20 even in that circuit, will enter an order saying, we
21 agree. It is possible that the district court will just
22 enter a notation in the main MDL docket saying the MDL
23 is closed. But that is not an order or judgment from
24 which we are appealing. It is not an order or judgment
25 that affects us. It's not a judgment at all. It's just

1 an administrative notation.

2 This is a place where turning square corners
3 matters, where you should apply the actual status and
4 rules. We don't need a new regime about what an action
5 is, what a judgment is, what a final judgment is. In
6 order to in -- accommodate the important policy concerns
7 that Mr. Waxman may be raising, we don't have to change
8 the meaning of Rule 54(b). I have a lawsuit. It has a
9 judgment. The district court judge decided to dismiss
10 it. I'm supposed to appeal.

11 JUSTICE KENNEDY: If -- if there's an MDL
12 for pretrial purposes and the district court thinks that
13 one -- that some cases like yours just should not
14 proceed, does the district judge have authority on its
15 own to dismiss those few cases from the MDL? Does he
16 have that authority or does he have to go back to the
17 MDL panel to do that?

18 MR. GOLDSTEIN: The district judge cannot --
19 the district judge can dismiss cases in the MDL and
20 frequently does. Now, administratively, if the district
21 judge thinks that they just don't belong in the MDL --

22 JUSTICE KENNEDY: That's my question.

23 MR. GOLDSTEIN: They will send a
24 recommendation to the JPML. Now, this is, I think, an
25 important point. And if I could just take you to

1 Section - forty -- fifty -- the 1407, again, this is a case about a
2 statute. And this is going to be in the blue brief at
3 page 2; the block quote is the MDL statute.

4 And the MDL statute makes quite clear that
5 the actions inside the MDL are separate actions during
6 the MDL. And so what I recommend to you is the -- if we
7 go about halfway down, there is a sentence after the
8 word "actions" that begins "Each action." It's the line
9 that and begins "Actions." "Each action so transferred
10 shall be remanded by the panel" -- so it's a separate
11 action, -- "at or before the conclusion" -- so "at or
12 before the conclusion of such pretrial proceedings to
13 the district from which it was transferred" -- so that's
14 when it begins or after it's done -- "unless it shall
15 have been previously terminated: Provided, however," --
16 and this is the sentence that deals with during the MDL,
17 that pan -- "that the panel may separate any claim,
18 cross-claim, counter-claim, or third-party claim and
19 remand any of such claims before the remainder of the
20 action is remanded."

21 The MDL statute provides for consolidated
22 proceedings, that is, the district judge is going to
23 bring the cases together, administer discovery together,
24 enter orders. Sometimes they'll apply to individual
25 actions; sometimes it will apply to all of the actions.

1 But the relevant point is that they are separate
2 actions. They are actions that get initiated and at the
3 end they get dismissed and it's called the final
4 judgment rule, because it's a rule. It's not called the
5 semi-final constituent matter principle. When our case
6 gets dismissed, it's over and we are supposed to appeal.

7 If there are no further questions, I'll
8 reserve the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Waxman.

11 ORAL ARGUMENT OF SETH P. WAXMAN

12 ON BEHALF OF RESPONDENTS

13 MR. WAXMAN: Mr. Chief Justice, and may it
14 please the Court:

15 Let me start with what's now been the
16 accepted terminology of the disingenuous approach to
17 achieving the flexibility of the district court's need
18 and to avoid the obligation that the courts of appeals
19 must -- because his rule requires immediate seriatim
20 piecemeal appeals -- hear those. I have been calling it
21 the -- a form of guerilla judging, but the point is that
22 the flexibility that both sides agree and the retired
23 district judges certainly underscore that district
24 courts need and the relief that the courts of appeals
25 need from the obligation to hear seriatim piecemeal

1 appeals, is achieved by application of the rule that was
2 specifically designed for this, which is Rule 54(b).

3 Now, he says 54(b) doesn't apply. What that
4 means is -- let me just first start by saying, in this
5 entire litigation, one and only one authority has been
6 cited for that proposition.

7 JUSTICE ALITO: Well, but that --

8 MR. WAXMAN: And that is Petitioner's brief.

9 JUSTICE ALITO: The text of 54(b) refers to
10 a separate appeal for a claim, counterclaim,
11 cross-claim, or third-party claim. So your 54(b)
12 argument, I think, is dependent on the proposition that
13 Mr. Goldstein's complaint became part of a single
14 action. Otherwise, so -- it was consolidate -- it be --
15 became part of a single action and, therefore, it was --
16 it was tantamount to a claim.

17 MR. WAXMAN: Yes.

18 JUSTICE ALITO: On that theory it could fit
19 within 54(b). That takes a little bit of -- more than
20 perhaps a little bit of pounding to fit that in there,
21 don't you think?

22 MR. WAXMAN: No, I don't. And neither does
23 every single court that has construed the application of
24 54(b) to consolidated litigation.

25 JUSTICE ALITO: Well, how did -- where do we

1 look to find that -- that his complaint became part of a
2 single action?

3 MR. WAXMAN: Well, the --

4 JUSTICE ALITO: The MDL statute doesn't --
5 doesn't make any reference to that. Quite to the
6 contrary.

7 MR. WAXMAN: Yes. The MDL statute doesn't
8 consolidate cases. It transfers cases to a transferee
9 MDL court for --

10 JUSTICE GINSBURG: Where they remain
11 separate actions, and Rule 54(b) was designed for a
12 single action with multiple claims.

13 MR. WAXMAN: And my --

14 JUSTICE GINSBURG: I don't see a single
15 reference in the rule, nothing by the advisory committee
16 that so much as suggests that a consolidation for
17 pretrial purposes only makes it one action for purposes
18 of 54(b).

19 MR. WAXMAN: Let me -- before I get to
20 the -- to the terminology, let me just underscore -- I
21 realize this may be waving a red flag in front of this
22 body, but there -- not a single court or commentator
23 anywhere has suggested that in consolidated cases,
24 whether they are -- that -- that are all consolidated
25 under Rule 42 whether they come in by an MDL or not,

1 that -- that action refers to the consolidated
2 proceedings for such a length as they are consolidated.
3 And, you know, Judge Ginsburg's -- the other Ginsburg on
4 the D.C. Circuit's opinion in -- I think it's Hill v.
5 Henderson, explains that it is a commonplace in
6 consolidated actions for courts that want a piecemeal
7 appeal to employ Rule 54(b).

8 JUSTICE KAGAN: Well, you know, maybe
9 they're wrong.

10 MR. WAXMAN: Now, it's possible that
11 everyone is wrong.

12 JUSTICE KAGAN: Yes, maybe they are wrong,
13 Mr. Waxman, because I mean, they're -- they're obviously
14 looking for a certain kind of flexibility, which is
15 important, and which I take it both sides have agreed is
16 important. But the question is whether they found it in
17 the right section. And I think what you're being asked
18 is, if you just look at this section, this section is
19 about multiparty, multicclaim single actions; that's what
20 this section is all about. And it's being used for a
21 purpose for which it was never designed.

22 MR. WAXMAN: I think that is quite incorrect
23 as an historical matter. Rule 54(b) was the product of
24 the Court's experience arising out of these multiple
25 mass actions, particularly exemplified in the Electric

1 Equipment Antitrust Litigation, and that's all over the
2 legislative history of Rule 54(b) where 54(b) and 1407
3 don't -- didn't exist at the time, and were enacted in
4 the wake of that.

5 And the -- what the legislative history
6 shows is that these four, 50 -- I guess 54(b) was in
7 existence but not 1407. 54(b) was the mechanism in
8 those consolidated actions by which particular issues of
9 law were reviewed by the courts of appeals --

10 JUSTICE KENNEDY: But in this --

11 JUSTICE GINSBURG: Not any --

12 MR. WAXMAN: -- were not.

13 JUSTICE KENNEDY: But in this -- in this
14 case, at the end of the day, the actions are, in effect,
15 unconsolidated. When -- when the pretrial M -- MDL
16 is -- is completed here, the separate judgments will be
17 remanded to the separate courts. So you're -- what
18 you're saying is, well, it's one action for a while, but
19 then it's many actions again. Begins as many, then it's
20 one for a while, then it's going to be many again.
21 Isn't that -- isn't that the dynamic that you're --

22 MR. WAXMAN: That -- that is exactly the
23 dynamic for whatever length of time the consolidation
24 occurs.

25 JUSTICE BREYER: But his last point, this in

1 my mind is that if we take your route -- one problem
2 with his route -- one problem with your route is you
3 have to muck around with the word "action." Well, you
4 do. I mean, there's no doubt you do. You have to
5 consider it a single action while it's consolidated.

6 One problem with his route is that, A,
7 nobody's ever done it, they've all thought you're right,
8 and nobody's said much about it. And one problem with
9 his route is you treat consolidations where the
10 multidistrict panel is involved and you consolidate it
11 for discovery differently than you treat consolidations
12 in an ordinary district court, has four cases and
13 consolidates them. That's the problem with his route.

14 So it seems to me a sort of balance there.
15 But one thing he said that I don't -- that did register
16 is he said if we take your route, what happens when the
17 multidistrict is over, see. Eight months ago, his case
18 was dismissed, and a judgment was entered in his -- in
19 his case, which is now only part of the case, on your
20 theory.

21 When is he supposed -- what is he appealing
22 from? When did the 30-day clock begin to run? And
23 suppose, by the way, it was never sent -- it was never
24 really sent back because everybody else settled. How
25 does that work?

1 MR. WAXMAN: Well, let me just make -- I
2 have your question firmly in mind. I want to just
3 observe two things about the premises to your question.
4 One is that 3 percent of cases that are consolidated
5 under the -- of MDL cases get returned to districts for
6 trial. The overwhelming majority never leave the
7 transferee courts.

8 JUSTICE GINSBURG: Well, that's because the
9 parties, either they get dismissed pretrial, or they
10 settle, or the parties agree that the transferee court
11 can be the trial court. But at no -- no one in a
12 multidistrict litigation can be forced into going before
13 the transferee court for trial.

14 MR. WAXMAN: That -- that's --

15 JUSTICE GINSBURG: And I think it was quite
16 clear that Congress didn't give multidistrict forum the
17 option to be the trial court.

18 MR. WAXMAN: Justice Ginsburg, I totally
19 agree. And if there were any ambiguity, this Court's
20 unanimous decision in Lexecon made that clear.

21 The point is that it is up to the transferee
22 judge, as it is up to any judge in a civil case, using
23 the tools provided under rule 42 to decide how to manage
24 all of the cases that have been transferred. The judge
25 may decide to let them proceed -- only a couple of them, let

1 me them all proceed on their own. The judge may
2 consolidate them, which is a formal act that has a known
3 meaning and has real world consequences not just with
4 respect to finality but with respect to the compromise
5 of the individual litigant's rights during the period in
6 which consolidation occurs.

7 JUSTICE SCALIA: But these statutes do not
8 speak of consolidation of cases, they speak of
9 consolidated proceedings. Where -- where do you get the
10 notion that the cases have been consolidated? And if
11 that notion were true, surely the consolidation must
12 terminate when one of the cases is dismissed, how can it
13 still be consolidated when it's dismissed and the other,
14 and the other cases are proceeding.

15 MR. WAXMAN: I'm not quibbling at all,
16 Justice Scalia, with the language. I'm perfectly happy
17 to say that the proceedings are consolidated. The point
18 here um is --

19 JUSTICE SCALIA: It makes a big difference.

20 MR. WAXMAN: Well, the -- I don't -- I think
21 it doesn't really make a big difference. The point here
22 is, as this Court has repeatedly admonished, what
23 constitutes a final decision under section 1291 is not a
24 technical concept but, rather, quote, "the means to
25 achieving a healthy legal system and that does not" --

1 JUSTICE SOTOMAYOR: So please answer Justice
2 Breyer's question, because that is troubling me as well,
3 at what moment, and if it's a notation from -- if it's a
4 settled case, when does he appeal?

5 MR. WAXMAN: The -- the -- the appeal period
6 runs from the time that all of the -- that there is --
7 that all of the other consolidated proceedings, cases,
8 have resolved or been transferred, and so --

9 JUSTICE SOTOMAYOR: What does he appeal
10 from? I mean --

11 MR. WAXMAN: Excuse me?

12 JUSTICE SOTOMAYOR: There is an awkwardness
13 here, because he's not appealing from the judgment
14 entered on behalf of or against the other parties.

15 MR. WAXMAN: Let's be very, very clear about
16 what he says he's appealing from. The only document
17 that he has pointed to that suggests that he had a
18 judgment way back in March of 2013 is entry 43 in the
19 Gelboim docket, which is reproduced on Page 11A of the
20 joint appendix.

21 JUSTICE GINSBURG: He has the word of the
22 district judge you have an appeal of right, that's what
23 she said.

24 MR. WAXMAN: Well, what she said in
25 adjudicating the request by other parties for a 54(b)

1 certification, this is on Page 220 of the petition
2 appendix is that these plaintiffs and the Schwab
3 plaintiffs have an appeal of right, there is no question
4 that she misapprehended the rule in the Second Circuit
5 that just because she had dismissed all of the claims in
6 their suit they have an appeal of right. But the notion
7 that she entered a judgment --

8 JUSTICE GINSBURG: She thought that she
9 needed to the to do the 54(b) for the other cases that
10 had more than one claim, not just the antitrust claim.

11 MR. WAXMAN: Correct, and let me say
12 something about their subsequent motion under -- the
13 Gelboim subsequent motion under 54(b) after the
14 dismissal for lack of jurisdiction by the court of
15 appeals, but first point out to you that the order that
16 she's referring to, 43, which says that the case is
17 terminated pursuant to instructions from chambers, you
18 know, I wondered, well, why isn't there anything in the
19 docket that in fact terminates it, and the answer is on
20 page -- pages 15 through 19 of the joint appendix where,
21 as you can see on Page 19, she has reissued the same
22 memorandum and order as modified, three days later.

23 And the language that they like to cite for
24 the notion that there was a judgment in their case is
25 missing. And that's why they, in fact, continue to be a

1 party to the consolidated --

2 JUSTICE BREYER: Well, then you're just --
3 let's go back to my question. I agree with you, I'd
4 always learned like Hornbook rule number 1 is, there is
5 a separate piece of paper called a judgment entered by
6 the district court, and that is what you appeal from.
7 Now you have just told me, there isn't one here, in
8 which case he can't appeal, okay, that's a separate
9 reason. I'm now assuming another case. The case is,
10 there is a separate piece of paper in his case called a
11 judgment. His point is, that gives me a piece of paper
12 called a judgment to appeal from, it was entered at a
13 certain time and now I know when the clock starts.

14 MR. WAXMAN: That's right, yes.

15 JUSTICE BREYER: Now, what I said was,
16 some time ago, that I thought he had a point, is in such
17 a case, if we treat the consolidation of
18 proceedings like we treat a consolidation of cases
19 without the multidistrict, he cannot appeal from that
20 piece of paper. He has to wait in the ordinary
21 situation, not multidistrict, until there is another
22 piece of paper resolving everything, then he starts to
23 appeal but at least he has a piece of paper which maybe
24 he lacked here. All right, now, he's saying here in the
25 multidistrict situation, there will be a separate piece

1 of paper, I can't appeal from, what is the piece of
2 paper from which I know the clock on appeal begins to
3 run?

4 MR. WAXMAN: The same piece of paper that he
5 lacks even to this day.

6 JUSTICE BREYER: That's a red herring at the
7 moment.

8 MR. WAXMAN: Well okay but, let me at least finish my
9 sentence.

10 At the end, when the district judge
11 certifies that the consolidation period is over, whether
12 that's, you know, at the end of discovery or at the end
13 of pretrial proceedings or in a case under rule 42 at
14 the end of the trial of the case, or a case, the parties
15 will seek to the extent the court has not entered it,
16 under rule 58 a separate piece of paper that says either
17 judgment or that's the functional equivalent of judgment
18 under rule, under rule 54(A), which says a judgment is
19 an appealable order.

20 JUSTICE SCALIA: Mr. Waxman, have you made
21 this argument before, did you make this argument in
22 opposition to the petition for certiorari, namely that
23 there was no final judgment here.

24 MR. WAXMAN: We did, and it got discouraged
25 when the Court granted cert. But I mean, I'm not here

1 just making a jurisdictional argument, my point in this
2 case is --

3 JUSTICE GINSBURG: Mr. Waxman, the Second
4 Circuit didn't think that there was a problem because
5 the -- a judgment hadn't been entered. They said in all
6 of these cases when a consolidated or pretrial, there is
7 no right of appeal, you have to get permission under
8 rule 54(b). They did not say anything about the problem
9 in this case is that there was no judgment document.
10 And isn't there, I know that there -- there is a
11 provision that says, if the judgment -- if for some
12 reason you don't have the piece of paper, that's not
13 fatal.

14 MR. WAXMAN: Justice Ginsburg, I
15 respectfully suggest that you're mistaken in reading
16 what the Second Circuit said. This is on Page 2A of the
17 petitioner appendix and what it says is, this court has
18 determined sua sponte that it lacks jurisdiction over
19 these appeals because a final order has not been issued
20 by the district court as contemplated by section 1291,
21 comma, and the orders of -- the orders appealed from did
22 not dispose of all the claims in the consolidated
23 action. The court --

24 JUSTICE GINSBURG: Are you telling me that
25 the Second Circuit doesn't have that rule if there is a

1 piece of paper that says judgment on it?

2 MR. WAXMAN: The piece of -- the Second
3 Circuit's rule, which is the rule we think that ought to
4 be applied throughout the country is that the -- when
5 there is -- when all of the claims of a party or, in
6 a -- in any multi claim, multidistrict proceeding,
7 whether it's a single consolidated complaint or
8 consolidated proceedings, judgment is entered by
9 district courts when a rule 54(b)(1) certification is
10 made, or, assuming the court of appeals agrees, when
11 there is a recommendation under section 1292(b). That
12 is --

13 JUSTICE SCALIA: But aren't --

14 MR. WAXMAN: -- the way courts issue
15 judgments during the period of consolidation when the
16 other cases are proceeding.

17 JUSTICE GINSBURG: Well, 1292(b) can't be
18 applicable here.

19 MR. WAXMAN: No, it's not.

20 JUSTICE GINSBURG: 1292(b) is when you don't
21 have a final judgment. It's an interlocutory appeal,
22 the typical case for 1292(b) is the court decides
23 liability, but it hasn't decided damages yet. You can't
24 run upstairs at that point unless you get a 1292(b)
25 order.

1 MR. WAXMAN: You are absolutely right, and I
2 stand corrected. My point is that during the period,
3 when there are multi claim, multiparty proceedings,
4 either because they are different cases that are
5 consolidated for a period of consolidation or a single
6 omnibus complaint which could have happened in this
7 case, a ruling as to all the claims of a particular
8 party or all of the parties as to a particular claim
9 becomes a judgment when and only when the district court
10 certifies a judgment under 54(b).

11 JUSTICE SCALIA: Yes, but that's quite
12 different. You were defending the proposition, I
13 thought, that the Second Circuit said that there had
14 been no final judgment in this case. Not in the
15 consolidated cases but no final judgment in this case.
16 And I don't read that -- that order on -- on Page 2A as
17 saying anything other than that there's not been a final
18 order under -- under 1291 because all the cases have not
19 been disposed of.

20 MR. WAXMAN: Well, I guess, you know, we can
21 speculate about what they meant. They didn't say
22 because, they said there's no final order under 1291,
23 and all of the cases in the consolidated proceedings
24 haven't been disposed of. But let me just make one
25 point.

1 JUSTICE SCALIA: Well, I -- that's a very
2 strange way to read that.

3 MR. WAXMAN: I mean, our -- look --

4 JUSTICE SCALIA: Given the opinion of --

5 MR. WAXMAN: My case isn't turning on what
6 actually happened here, but I think in thinking about
7 the meaning of "final decision" under 1291, which
8 doesn't use the word "action" what a final decision is,
9 with an eye toward what is a healthy legal system, this
10 case, I think -- I think it's important to focus on just
11 the features of this case as one of many, many examples
12 why the rule that they're advocating is not correct.

13 JUSTICE ALITO: You raised the argument
14 before us this morning that there wasn't a final
15 judgment and Petitioner argues that there was under Rule
16 58(c)(2)(b) and you didn't address that, I believe, in
17 your brief. So what is wrong with that argument?

18 MR. WAXMAN: 58(c)(2)(b).

19 Well, the 58(c)(2)(b) is 150 days from the,
20 quote, judgment that's reflected in 58(b), and 58(b)(1)
21 in particular says, you know, entering judgment without
22 the court's direction. And it says that if a court
23 issues an order otherwise -- unless the court orders
24 otherwise, the clerk has to enter a written judgment.

25 But the caveat there, which does apply in

1 this case for reasons because this does involve -- these
2 consolidated proceedings are an action within the
3 meaning of 54, is that 58(b)(1) is, quote, "subject to
4 54(b)."

5 Now, in terms of -- let me just make the
6 point I was trying to make before, which is, look
7 exactly at what the Petitioner is trying to do in this
8 case, just as an example of what a healthy judicial
9 system is.

10 They say that they're entitled to -- they're
11 required immediately to appeal and the Second Circuit is
12 obligated immediately to consider their appeal,
13 notwithstanding, among other things, two things in
14 particular; one, even as we are -- the Court is
15 considering this case, the district judge is considering
16 claims by the Plaintiffs in seven other consolidated
17 cases that have raised Sherman Act claims that, in fact,
18 her prior ruling on Sherman Act antitrust injury does
19 not apply to them. The briefing on those motions, on
20 that issue, will be completed, I believe, on Christmas
21 Eve, and so if an appeal had been proceeding, the Second
22 Circuit would be considering precisely the same thing
23 that the judge is reconsidering, and the cases are
24 legion in which --

25 CHIEF JUSTICE ROBERTS: Well, that would

1 seem to be very efficient. It would save her the
2 difficulty of reconsidering it if the Second Circuit
3 rules one way or another.

4 It seems to me that the efficiency arguments
5 in these cases, you know, they can go either way and
6 probably do go either way depending upon the nature of
7 the case. It would be very efficient, would save her
8 the time to reconsider it, if she had a ruling from the
9 Second Circuit.

10 MR. WAXMAN: Just to be clear, Mr. Chief
11 Justice, what she's considering are not requests to
12 reconsider. She denied those a year ago August. These
13 are Plaintiffs who claim that their antitrust claims
14 are, in their mind, significantly different than the
15 claims that Gelboim brought.

16 CHIEF JUSTICE ROBERTS: Okay. I thought you
17 were making the other point. So the claims that she's
18 looking at really are not affected by the Gelboim
19 claims.

20 MR. WAXMAN: That's right, although --

21 CHIEF JUSTICE ROBERTS: Then what problem is
22 it to appeal?

23 MR. WAXMAN: Excuse me?

24 CHIEF JUSTICE ROBERTS: Then what's the
25 problem with going ahead with the Gelboim appeal?

1 MR. WAXMAN: Well, the problem with going
2 ahead with the Gelboim appeal is the inefficiency and
3 the lack -- and the threat to the --

4 JUSTICE GINSBURG: But it's a different
5 reason. She said in the Gelboim case you have no
6 antitrust injury. In other words, you have no standing,
7 out the door. And you say the other cases are different
8 from that. Is -- they don't center on antitrust injury?

9 MR. WAXMAN: No, they do. They are claiming
10 that we -- notwithstanding your prior ruling in the
11 circumstances of our cases, we do have antitrust injury,
12 and from a point of view of a healthy judicial system,
13 you would want the court of appeals to be able to
14 consider the question of antitrust injury after the
15 district judge has finally come to a concluded view as
16 to all of the consolidated cases.

17 JUSTICE KAGAN: Well, I think what the Chief
18 Justice is indicating is to the extent that the issues,
19 the claims are the same, the efficiency argument can cut
20 both ways; to the extent that the claims are different,
21 what's the problem with an appeal?

22 MR. WAXMAN: Well, the -- the court of
23 appeals is being asked to consider the -- the
24 sufficiency of the allegations as to antitrust injury
25 with respect to a common core of -- of - of a alleged

1 facts, a course of conduct, and different parties --

2 JUSTICE KAGAN: But is that the only thing,
3 that they're going to have to learn the facts twice?

4 MR. WAXMAN: Well, there -- look, you can
5 always argue that there are certain efficiencies in
6 taking immediate piecemeal appeals. Our system, since
7 the Judiciary Act of 1789, has set its sight against
8 that and said that piecemeal appeals are disfavored.

9 Another feature of this very case --

10 JUSTICE GINSBURG: But if the district judge
11 had been right the first time, she said I have a claim
12 that's totally been dismissed, it's out, then there are
13 these other people that have antitrust claims and other
14 claims, so what I'm going to do is this, final judgment
15 for the one that has no other claims, 54(b) on the
16 antitrust claims for the others so that the Second
17 Circuit will then hear antitrust standing all at once.

18 MR. WAXMAN: And the -- the point is that
19 there are other parties in the consolidated pre --
20 pleadings that say that their claims and their
21 Plaintiffs stand in a different position under the
22 Sherman Act with respect to antitrust injury than
23 Gelboim does, and why wouldn't a healthy system --

24 JUSTICE GINSBURG: Well, the district judge
25 obviously didn't think so because she said, I'm -- one

1 party has an appeal of right and I am going to do the
2 54(b) order for the others.

3 MR. WAXMAN: She didn't consider, Justice
4 Ginsburg, the seven parties that are now claiming that
5 they are different. She was only considering the
6 application by certain other parties for a 54(b)
7 certification.

8 And if you look at what the judge did after
9 the Second Circuit held that it lacked jurisdiction, I
10 think it's pretty revealing. Mr. -- Ms. Gelboim's
11 lawyers and the lawyers of the parties who previously
12 had had a 54(b) certification went back to the judge and
13 said, okay, there was -- the Second Circuit thinks that
14 there wasn't a final order, but it would be great to
15 have the court of appeals decide the antitrust injury
16 issue, please issue a 54(b) certification. And here is
17 what the judge said. This is on Page 294 of the joint
18 appendix: Quote, This case has a wonderful host of
19 interesting issues. We could send six different issues
20 up to the circuit. We're not doing that seriatim, we're
21 going to clean up this complaint, we're not picking and
22 choosing particular questions and sending them up.

23 And at the end of that hearing, the counsel
24 for some of the Plaintiffs with Sherman Act claims said,
25 well, when you get done resolving -- when you get done

1 cleaning up the complaint and resolving the issues as
2 the pleading disputes, would you then con -- would you
3 then grant a 54(b) certification? And she said, I'm not
4 prepared to rule on that at this moment. And obviously
5 --

6 CHIEF JUSTICE ROBERTS: Well, there's
7 efficiencies -- there's efficiency to the system and you
8 have arguments about that, but there's also fairness to
9 the parties. I mean, how many years are these people,
10 whose case is done as far as the District Court is
11 concerned, supposed to sit around and wait for the big
12 fish to resolve their cases?

13 MR. WAXMAN: Well, the -- the -- it is a
14 feature of the rule against piecemeal litigation that
15 individual litigants sometimes have to wait. But what
16 is particularly --

17 CHIEF JUSTICE ROBERTS: That just kind of
18 begs the question whether this is piecemeal or not for
19 these people.

20 MR. WAXMAN: Well, I think here's the point,
21 there is no case, they have found not a single case in
22 46 years of MDL litigation where any party in their
23 position or a similar position has had to wait an
24 inordinate amount of time and that is because in
25 appropriate cases, whether the cases are consolidated

1 for all purposes or some limited purpose, the courts
2 exercised their discretion under Rule 54(b).

3 It has never happened that someone in their
4 position has had to re -- has been required to wait for
5 years and years, at least neither we nor they, who I'm
6 confident have scoured the record of MDLs, in fact, has
7 done this. And --

8 JUSTICE GINSBURG: Well, then that sort of
9 contradicts what you said before. You said she wasn't
10 going to deal with these things piecemeal. By the way,
11 on that point, she said, given the reaction of the
12 Second Circuit more than once, it's time to give up.
13 She said that first, as -- as far as that's --

14 MR. WAXMAN: I think, Justice Ginsburg, that
15 the point I wanted to make here is she has left fully
16 open the possibility that when she finishes resolving
17 the pleading problems, including the claims of the other
18 seven Sherman Act plaintiffs who say they're different,
19 she will reconsider whether to grant Rule 54(b).

20 And while I, you know, my -- my friend on
21 the other side says, well, there is -- you know, there
22 are all sorts of obscure procedural mechanisms where you
23 could get this flexibility, the point here is that we
24 have a rule that has already been made to deal with the
25 resolution of all the claims of a party or all the

1 parties of a claim which is 54(b) and --

2 JUSTICE GINSBURG: But to what -- what --

3 MR. WAXMAN: -- the advantage of --

4 JUSTICE GINSBURG: What is obscure about a
5 stay? Multidistrict cases have lots and lots of issues,
6 and quite often stays of some cases are issued. That's
7 not --

8 MR. WAXMAN: Here --

9 JUSTICE GINSBURG: -- obscure.

10 MR. WAXMAN: Here's the difference. The
11 difference is that under the -- under the stay regime,
12 the status quo, that is the presumption is that
13 piecemeal appeals will go forward unless the district
14 judge affirmatively acts. Under the regime, as we
15 understand it, and as all courts and commentators have
16 understood it, the pros -- the appeal will not go
17 forward unless the district court makes the two findings
18 that Rule 54(b) requires. One is that there really is a
19 final order or final decision; and, second, that there
20 is no just cause for delay, and it is that discipline,
21 that focus, that the rules place on the party that
22 benefit the system.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Goldstein, you have six minutes

1 remaining.

2 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

3 ON BEHALF OF THE PETITIONERS

4 MR. GOLDSTEIN: Thank you, Mr. Chief
5 Justice.

6 Three brief preliminary points and then just

7 --

8 JUSTICE SOTOMAYOR: Excuse me. You believe
9 that the notation on 11a is the final judgment you're
10 speaking about?

11 MR. GOLDSTEIN: I do, and this goes to
12 Justice Scalia's point and the questions that were asked
13 at oral argument. This argument was raised in the brief
14 in opposition whether we did have an appealable
15 judgment. We addressed it in Footnote 1 of our cert.
16 reply brief, and we were so obviously right that this is
17 governed by Rule 58(c) that the respondents abandoned
18 this argument in the merits brief. The district said
19 our action is terminated and we have an appeal as a
20 matter of right.

21 That was quite plainly the judgment. We
22 appealed within 150 days after that. So this -- you
23 considered this fully, I am sure, because if --

24 JUSTICE SCALIA: You addressed it where,
25 Footnote 1 of --

1 MR. GOLDSTEIN: Footnote 1 of the brief
2 in -- excuse me, our reply brief on cert. We have only
3 one footnote.

4 JUSTICE SCALIA: Okay.

5 MR. GOLDSTEIN: And we discuss at length
6 their concession that there was a final judgment, what
7 it is the Second Circuit did, why it is terminating as a
8 judgment, all of those points. This was presented to
9 you. And we were so plainly right that they didn't even
10 make the argument in their merits brief. It's still
11 jurisdictional, but there quite clearly was a
12 termination of the action that the district court
13 understood was appealable. That's why Rule 58 exists.

14 JUSTICE KENNEDY: And what are -- what are
15 your other three points --

16 MR. GOLDSTEIN: Okay.

17 JUSTICE KENNEDY: -- that make you plainly
18 right on the rest of the case?

19 MR. GOLDSTEIN: That was actually the first
20 point.

21 The second one goes to Justice Breyer's
22 concern that no one thinks that we are right. And
23 just -- and Mr. Waxman's point that, oh, everyone
24 understands -- understands, every commentator, that this
25 is done under Rule 54(b), that is, in a word,

1 ridiculous. Ours is the rule in the overwhelming
2 majority of the country and has been for decades. Every
3 time --

4 JUSTICE KENNEDY: Excuse me, what is that
5 word.

6 MR. GOLDSTEIN: I'll give you two kinds of
7 case cites. The cert. petition cites all the cases in
8 the court of appeals --

9 JUSTICE KENNEDY: Okay. Okay.

10 MR. GOLDSTEIN: -- including the D.C.
11 circuit, that say when you enter the judgment in the
12 individual action, it's appealable. I have given you
13 the 1935 MDL that uses the 58(b) example.

14 JUSTICE KENNEDY: Okay.

15 MR. GOLDSTEIN: But as Justice Ginsburg
16 indicates, it's commonplace for MDL courts to enter
17 stays and put act -- individual actions on ice without
18 entering judgments. The system, as we describe it, has
19 been working for decades without any difficulty.

20 And, Justice Ginsburg, my third preliminary
21 point is that when Mr. Waxman says there are all of
22 these other actions out there, it is a little bit of an
23 optical illusion. When this district court entered this
24 opinion which resulted in our judgment, she entered the
25 same order in every other single pending case. She was

1 quite clear that it applied to all of the cases in the
2 MDL. She denied reconsideration, explained that no one
3 could have antitrust standing.

4 If there are other unrelated antitrust
5 claims, then there's no problem with our appeal.

6 Now, my big point is that there is no reason
7 for you to muck about with and cause confusion in the
8 law with respect to what a final judgment is, what an
9 action is, what a -- what a constituent matter in an
10 action is, when we can address all of his policy
11 concerns in the way that MDL courts have been doing for
12 decades. There is going to be considerable confusion
13 that results.

14 What are we supposed to appeal from?
15 Justice Breyer, if you know the answer to your question
16 which you asked three times at the -- at the end of this
17 argument, you are alone, I believe. I do not know what
18 it is that I am supposed to appeal from, particularly if
19 some of the cases settle. What is a -- it's called the
20 Final Judgment Rule. We have a final judgment in our
21 action.

22 Imagine the following forms of confusion.
23 What happens with American Pipe tolling? When was our
24 action dismissed? Therefore, some other individual
25 person is required to file an individual lawsuit. What

1 happens when you have multiple lawsuits that are
2 together that look alike? Are those now a single
3 action? What if the different lawsuits are coordinated
4 rather than consolidated? Because, remember, the three
5 Schwab lawsuits were consolid -- coordinated here, not
6 consolidated. What do those people do?

7 Why is it that you want to create a regime
8 that creates all of these doubts that has a new Final
9 Judgment Rule, a new definition of action, despite the
10 uniform meaning in all of the civil procedures, that
11 will create just follow-on confusion when I have offered
12 you the simple solution, and that is the district judge
13 will enter a final judgment in the action if the
14 district judge wants it to be appealable?

15 If the district judge --

16 JUSTICE SOTOMAYOR: His is -- basically
17 you're saying are there any other mechanisms for the
18 district court to get to where it wants? A rake-off,
19 don't enter anything.

20 MR. GOLDSTEIN: Don't enter -- enter
21 anything.

22 JUSTICE SOTOMAYOR: Stay and don't enter
23 under 58. Tell the court --

24 MR. GOLDSTEIN: Yes.

25 JUSTICE SOTOMAYOR: -- the clerk of the

1 court not to enter it?

2 MR. GOLDSTEIN: Under -- under 42 create a
3 consolidated complaint as was done here with the OTC and
4 exchange actions. That's actually very common. And
5 that is the MDL court will say, I have four lawsuits in
6 front of me. I am, under Rule 42, going to consolidate
7 them into a single master complaint. That master
8 complaint will have four different claims in it. And
9 then the district court will simply resolve one of the
10 claims in the master action without entering a judgment
11 in the individual action -- not the master action, the
12 master complaint. It's not actually an action. There's
13 an MDL docket, a main MDL docket, and the district court
14 just doesn't enter a judgment in the individual
15 action --

16 JUSTICE SOTOMAYOR: Can that be done when
17 it's consolidated only for purposes of pretrial
18 discovery?

19 MR. GOLDSTEIN: It can. It is what's
20 known -- there's a Sixth Circuit case called Refrigerant
21 that discusses this issue and a Second Circuit case
22 called Katz. It is called an administrative complaint.
23 The district court uses this administrative complaint to
24 manage the litigation, and that administrative complaint
25 doesn't have the same docket as the individual actions.

1 And the district court is perfectly capable of saying,
2 I'm going to resolve the antitrust claim -- not an
3 action, an antitrust claim -- inside this larger
4 administrative complaint without entering a judgment.
5 And when there is no judgment, there's no appeal. And
6 you can announce that rule and give the district courts
7 the flexibility that the retired district judges want
8 without creating all this necessary docket here trial.
9 As you say, Justice Sotomayor, district judges pay a lot
10 of attention to your rulings. They will know what it is
11 that they are supposed to do, and we just don't have a
12 mess later on.

13 JUSTICE GINSBURG: I don't see anything in
14 the rules about it, and this is the first time I've
15 heard about this administrative --

16 MR. GOLDSTEIN: Yes.

17 JUSTICE GINSBURG: -- complaint.

18 MR. GOLDSTEIN: The administrative
19 complaints are the most common tools the district judges
20 use in MDL litigation. I suggest the -- the Refrigerant
21 and Katz cases do explain it.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

24 (Whereupon, at 11:11 a.m., the case was
25 submitted.)

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