UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMP CAPITAL INVESTORS LIMITED, et al., Objectors-Appellants, CHARLES N. DORNFEST, Plaintiff-Appellant - against - PUBLIC PENSION FUNDS, et al., Plaintiffs-Appellees, BANK OF AMERICA CORP., et al., Defendants-Appellees.	Docket Nos. 13-cv-1573 and 13-cv-1677 Appeal from the United States District Court for the Southern District of New York 09-md-2058 (PKC) 10-cv-275 (PKC)

PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLEES' MOTION TO DISMISS THE APPEAL OF PLAINTIFF-APPELLANT CHARLES N. DORNFEST FOR LACK OF APPELLATE JURISDICTION OR, IN THE ALTERNATIVE, TO DE-CONSOLIDATE THIS APPEAL FROM OTHERS

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Lead Plaintiffs[1] respectfully submit this memorandum in response to the Bank Defendants' Motion To Dismiss The Appeal of Plaintiff-Appellant Charles N. Dornfest For Lack of Appellate Jurisdiction Or, In The Alternative, To De-consolidate This Appeal From Others. For the reasons set forth below, Lead Plaintiffs join in the Bank Defendants' arguments that the appeal filed by Appellant Charles N. Dornfest ("Dornfest") should be dismissed for lack of appellate jurisdiction, or alternatively, de-consolidated from the other pending appeals.[2]

I. THIS COURT LACKS JURISDICTION OVER DORNFEST'S APPEAL

Dornfest has not asserted a valid basis for appellate jurisdiction, let alone valid grounds for appeal of the District Court's September 29, 2011 Order in Dornfest's individual action (A1488-92) (the "September Order") and April 9, 2013 Judgment Approving Class Action Settlement in the Consolidated Securities Action (A2009-22) (the "Judgment"). Dornfest claims that this Court has jurisdiction under 28 U.S.C. § 1291 (Dornfest Br. 2), which provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the

[1] Lead Plaintiffs are the Court-appointed lead plaintiffs for the Consolidated Securities Action in *In re Bank of America Corp. Securities, Derivative and ERISA Litigation*, No. 09-MD-2058 (S.D.N.Y.).

[2] The facts relevant to these issues are set forth in the Bank Defendants' motion at pages 4-13.

district courts." However, there has been no final decision in Dornfest's action from which to appeal, and Dornfest has no standing to appeal the Judgment in the class action.

A decision is final if it "ends the litigation of [a] claim on the merits and leaves nothing for the court to do but execute the judgment entered on that claim[.]" *Ginett v. Computer Task Group, Inc.*, 962 F.2d 1085, 1092 (2d Cir. 1992) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978)). Dornfest contends that although he was excluded from the settlement of the Consolidated Securities Action, his complaint was nonetheless dismissed by the approval of that settlement, and thus, the Judgment is purportedly a final decision in his action. Dornfest Br. 11-12. Dornfest's argument is meritless; the same language which Dornfest recognizes as excluding him from participating in the settlement also establishes that his claims were not released or dismissed. *See, e.g.,* A2009-10 (defining the "Class" represented in the Action as certain common stock and January 2011 call options purchasers); A2013 (dismissing with prejudice the claims asserted by Lead Plaintiffs and the Class). As Dornfest is admittedly not a member of the Class, there is no colorable argument that his case was dismissed by the Judgment.

Likewise, the September Order in Dornfest's individual action is not a "final decision" from which Dornfest may appeal. Dornfest acknowledged as much with

his two previous attempts to appeal the September Order under statutory exceptions to the final decision rule[3]—first, under Rule 23(f) of the Federal Rules of Civil Procedure, and second, under a Section 1292(b) request for interlocutory appeal. Moreover, the September Order expressly provided that Dornfest "may pursue his claims individually" (A1492), and thus, did not end the litigation of his claims.

As there has been no final decision or judgment from which an appeal under 28 U.S.C. § 1291 may lie, Dornfest's appeal should be dismissed.

II. DE-CONSOLIDATION IS APPROPRIATE

In light of the fact that (1) Dornfest's claims are not impacted by the Judgment and (2) Dornfest's appeal substantively challenges only the propriety of the September Order entered in his individual case, Dornfest's appeal should be de-consolidated from the other pending appeals, if it is not dismissed. Because Dornfest's appeal solely concerns issues distinct to his case, consolidation does not further the efficient management of the appeals, but rather, risks confusing the unrelated issues of the different appellants.

[3] "The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 440 (1956).

III. CONCLUSION

For the reasons set forth above and more fully described in the Bank Defendants' motion, Dornfest's appeal should be dismissed for lack of appellate jurisdiction or, alternatively, de-consolidated from the other pending appeals.

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