FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADTRADER, INC.; SPECIALIZED COLLECTIONS BUREAU, INC.; CLASSIC AND FOOD EOOD; LML CONSULT LTD.; AD CRUNCH LTD.; *Plaintiffs-Appellants*, GAW | POE LLP, *Appellant*, v. GOOGLE LLC, *Defendant-Appellee.*	No. 20-15542 D.C. No. 5:17-cv-07082-BLF OPINION

Appeal from the United States District Court
for the Northern District of California
Beth Labson Freeman, District Judge, Presiding

Argued and Submitted May 11, 2021
San Francisco, California

Filed July 30, 2021

Before: J. Clifford Wallace and Daniel P. Collins, Circuit Judges, and Jed S. Rakoff,[*] District Judge.

Opinion by Judge Rakoff

SUMMARY[**]

Attorneys' Fees/Appellate Jurisdiction

The panel dismissed for lack of appellate jurisdiction an appeal from the district court's attorneys' fee award in a class action against Google by plaintiff AdTrader Inc. on behalf of itself and advertisers who used Google advertising services but did not receive refunds for invalid traffic that does not represent genuine human activity.

Google informed AdTrader and the district court in April 2019 that Google would issue refunds to the advertisers who used a Google platform called DoubleClick Bid Manager ("DBM Advertisers"), but would continue to litigate the claims asserted by AdTrader on behalf of other putative advertiser classes and by AdTrader individually. Google stipulated that it would pay AdTrader's attorneys' fees, if awarded by the Court, out of Google's own pocket, rather than have them deducted from any common fund for payments to class members.

[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

After Google announced that it would provide $65.7 million in refunds to DBM Advertisers for invalid ad traffic between 2012 and 2017, the district court issued an order awarding AdTrader some but not all of the attorneys' fees it had requested. AdTrader had argued that it was entitled to a percentage of the monetary benefit it conferred on DBM Advertisers and moved for attorneys' fees pursuant to a California fee-shifting statute or, alternatively, the common fund doctrine, which permits counsel to recover attorneys' fees from any settlement account when counsel obtains a benefit for non-clients through litigation. The district court denied attorneys' fees under the fee-shifting statute but awarded fees under the common fund doctrine. AdTrader challenged on appeal the amount of the fee award.

The panel reasoned that although in some cases, an order awarding attorneys' fees from a common fund can be appealed immediately under the collateral order doctrine, this case was neither a traditional common fund case nor one that met the requirements of the collateral order doctrine. The panel noted that the litigants and the district court may have agreed that attorneys' fees should be determined in light of common fund principles, but they also agreed that any award of attorneys' fees would not come from a sum that Google has been ordered to pay the class. This alone showed that this case neither fit the situation under which the common fund doctrine developed nor met the requirement of unreviewability that is essential to the limited collateral order exception to finality. The panel therefore dismissed the appeal for lack of jurisdiction because the ongoing class action had reached neither a final judgment on the merits nor a final settlement, and because no exception to the final judgment rule here applied.

COUNSEL

Randolph Gaw (argued), Mark Poe, Samuel Song, Victor Meng, and Flora Vigo, Gaw Poe LLP, San Francisco, California, for Plaintiffs-Appellants.

Jeffrey M. Gutkin (argued), Michael G. Rhodes, Kyle C. Wong, Audrey J. Mott-Smith, and David S. Houska, Cooley LLP, San Francisco, California, for Defendant-Appellee.

OPINION

RAKOFF, District Judge:

Google LLC ("Google") operates platforms that help advertisers find and purchase advertising space on third-party websites. When Google succeeds in placing such ads, it receives payments from the advertisers, a portion of which are passed to the website publishers, with Google keeping the remainder for itself. Google charges advertisers and pays publishers based on the number of users who view, click on, or purchase products in response to the advertisements so placed. Google represents, however, that it does not charge advertisers or pay publishers for "invalid traffic," that is, traffic that does not represent genuine human activity.

In this case, plaintiff AdTrader, Inc. ("AdTrader") brought a class action lawsuit in December 2017 on behalf of itself and advertisers who used Google advertising services but did not receive refunds for invalid traffic. Google informed AdTrader and the district court in April 2019 that Google would issue refunds to the advertisers who used a Google platform called DoubleClick Bid Manager ("DBM Advertisers"), but would continue to litigate the

claims the claims asserted by AdTrader on behalf of other putative advertiser classes and by AdTrader individually. Google stipulated that it would pay AdTrader's attorneys' fees, if awarded by the Court, out of Google's own pocket, rather than have them deducted from any common fund for payments to class members.

Seeking such an award, AdTrader argued that it was entitled to a percentage of the monetary benefit it conferred on DBM Advertisers and moved for attorneys' fees pursuant to a California fee-shifting statute or, alternatively, the "common fund" doctrine, described below. The district court denied attorneys' fees under the fee-shifting statute, but awarded fees under the common fund doctrine. Unsatisfied, AdTrader now challenges on appeal the amount of the fee award.

We dismiss the appeal for lack of jurisdiction, because the class action below has reached neither a final judgment on the merits nor a final settlement, and because no exception to the final judgment rule here applies.

BACKGROUND

I. Factual Background

As noted, Google acts as a broker for digital advertisement sales, operating exchanges that match advertisers with website publishers that have advertising space. Google runs three such advertising platforms: (1) DoubleClick Ad Exchange ("AdX"); (2) AdWords ("AdWords"); and (3) DoubleClick Bid Manager ("DBM"). On the buyer side of the exchange, advertisers pay Google to place their ads on third-party websites. On the seller side, Google offers website publishers a portion of the revenue Google receives from the advertisers.

Advertisers whose advertisements are thus placed on a third-party website pay Google based on the number of users who view such ads (“impressions”), click on their ads (“clicks”), or purchase the products so advertised (“conversions”). Google does not charge advertisers (or pay publishers) when Google determines, using automated filters, that an impression, click, or conversion does not “reflect genuine user interest,” or when the advertising traffic is connected to a website publisher’s violation of Google’s policies. Google refers to false impressions, conversions, and clicks, as well as violations of its publisher policies, as “invalid traffic.” When Google spots invalid traffic during a billing cycle, Google automatically reverses the charge to the advertiser and stops the corresponding payment to the publisher. However, if Google detects invalid traffic only after a billing cycle has ended, Google offers publishers debits and advertisers credits to cancel out charges that stem from invalid traffic. Similarly, when a publisher egregiously violates Google’s publisher policies, Google’s stated practice is to terminate the publisher’s account, debit the publisher for all unpaid amounts, and issue credits to advertisers to offset the charged-for traffic to the terminated publisher’s website.

AdTrader is an advertising network that uses DBM to bid on ad space for its clients. AdTrader’s clients include: Classic and Food EOOD (“Classic”), LML Consult Ltd. (“LML”), and Fresh Break Ltd. (“Fresh Break”), three restaurants that use DBM to advertise on AdX publisher websites; Ad Crunch Ltd. (“Ad Crunch”), a digital advertising agency that uses DBM to advertise on AdX publisher websites; and Specialized Collections Bureau, Inc. (“SCB”), a collections agency that advertises through AdWords. AdTrader claims that when its advertiser clients were charged for false clicks, impressions, and conversions,

"AdTrader sometimes bore the brunt of those overcharges and had to absorb those costs itself." AdTrader also sells advertising space for website publisher clients, and guides the publishers' compliance with policies governing online advertising exchanges. On May 19, 2017, Google terminated AdTrader's account, claiming that AdTrader had violated provisions of Google's advertising exchange program policies. AdTrader alleges that Google improperly withheld earnings that were owed to AdTrader prior to termination.

II. Procedural Background

In December 2017, AdTrader sued Google on behalf of itself, a putative class of advertisers who did not receive refunds or credits for transactions that Google represented to publishers as "invalid traffic," and a putative subclass of "[a]ll business and Google-recognized advertising agencies and advertising networks that had an active AdWords account as of September 1, 2017." AdTrader alleged, *inter alia*, breach of contract, unjust enrichment, and violations of California's unfair competition statute.

In February 2018, Google moved to dismiss the class action complaint. The motion to dismiss was mooted when AdTrader filed a First Amended Complaint three weeks later. Google then moved to dismiss the First Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on April 17, 2018. In July, the district court dismissed the unjust enrichment claim, but allowed AdTrader to proceed on its breach of contract, unfair competition, and false advertising claims.

On August 13, 2018, AdTrader again amended its Complaint to add Classic, LML Consult, and Ad Crunch, and SCB as co-plaintiffs. Each of the Plaintiffs brought individual claims for breach of contract, breach of the

implied covenant of good faith and fair dealing, and intentional interference with contract, and sought a declaration that the limitation of liability clause in the AdX Publisher Agreement was unenforceable. Plaintiffs also sought "to represent three classes and one subclass of advertisers who entered into advertising platform agreements with Google and who did not receive refunds for invalid traffic" or had earnings withheld for noncompliance with a Google policy. On behalf of those classes, Plaintiffs alleged breach of contract, breach of the implied covenant of good faith and fair dealing, breach of the implied duty to perform with reasonable care, and false advertising and unfair competition under California state statutes.

Google again moved to dismiss and again secured only a partial victory. On April 22, 2019, the district court dismissed Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and the implied duty to perform with reasonable care. The court denied, however, the motions to dismiss the causes of action based on breach of the DBM agreement, false advertising, unfair competition, and, with respect to traffic determined to be invalid after invoicing, breach of the AdX and AdWords Agreements. Three days later, Google informed AdTrader and the district court that it would provide $65.7 million in refunds to DBM Advertisers for invalid ad traffic between 2012 and 2017. Google ultimately issued two categories of refunds. "Category I" refunds credited DBM Advertisers for invalid traffic between 2012 and 2017. "Category II" refunds credited DBM Advertisers for refunds that could not be processed because doing so would have resulted in a negative balance on the recipient's account. Google distributed nearly all of those refunds by September 2019.

On March 13, 2020, the district court certified the AdWords Advertiser Class for the breach of the AdWords Agreement, false advertising, and unfair competition claims. The Court appointed SCB as class representative and Gaw Poe, the law firm for all Plaintiffs, as class counsel. But the Court denied certification of the proposed DBM Advertiser Class and DBM-AdX Advertiser Subclass, because AdTrader and its clients were not members of the proposed classes and were therefore inadequate representatives.

Two weeks after class certification, the district court issued an order, awarding AdTrader some but not all of the attorneys' fees it had requested (the "Fee Order"). As the basis for making an attorneys' fee award, the court first denied AdTrader's request for attorneys' fees made pursuant to California's public-interest litigation fee-shifting statute, California Code of Civil Procedure § 1021.5. But the district court awarded some attorneys' fees "under the common fund doctrine," reasoning that AdTrader's efforts meaningfully benefitted the relevant class by preserving a common fund to which others would have a claim. Nevertheless, the amount of the award was limited because the court determined that "Google's legal department approved the issuance of DBM refunds in May 2018," and therefore concluded that only the attorney hours spent before that date "arguably could have conferred a benefit on others."

The district court chose to use the lodestar method to calculate the amount of this fee award. The court declined to apply Plaintiffs' requested 4.0 multiplier, explaining that that the high hourly rates of the partner attorneys on the case adequately compensated class counsel for their skill. The district court also excluded from the lodestar calculation those attorney hours that the court believed to be unnecessary. The district court then applied a 1.6 multiplier

to fees incurred before May 2018 and calculated an adjusted fee award of $725,580.80. The parties disputed whether a $65.7 million valuation of the common fund, or some other valuation, should be used to perform a cross-check of the fee award based on the percentage-of-recovery method. However, the court confirmed that the fee award was less than the standard 25% benchmark using either figure for the common fund. Thus, the court saw no need to make a factual finding as to the amount of the common fund.

After the entry of the Fee Order, Google continued to litigate against AdTrader's individual claims and the remaining AdWords Advertiser class claims, including bringing multiple discovery disputes before the Court. While this continues, however, AdTrader now appeals the Fee Order.

DISCUSSION

A federal appellate court "has a special obligation to satisfy itself . . . of its own jurisdiction." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citation and internal quotation marks omitted). This Court has jurisdiction over appeals from "final decisions" of federal district courts pursuant to 28 U.S.C. § 1291. Section 1291's grant of jurisdiction is given a "practical construction" rather than a technical one. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Accordingly, this Court's jurisdiction extends to a "small class" of orders that do not bring litigation to a halt. *Id.* Under the collateral order doctrine, an appellate court has jurisdiction over an appeal from an order that conclusively determines a disputed issue that is separate from the merits and effectively unreviewable upon final judgment. *Rosenfeld v. United States*, 859 F.2d 717, 720 (9th Cir.

1988); *see also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11–12 (1983).

Litigants have "asked many times to expand the 'small class' of collaterally appealable orders," but courts have repeatedly rebuffed these requests, upholding the sensible tenet that a single appeal is preferable to piecemeal litigation. *Will v. Hallock*, 546 U.S. 345, 350 (2006). AdTrader nonetheless argues that orders awarding attorneys' fees under the common fund doctrine belong to this "narrow and selective" club of collaterally appealable orders. *See id.* Whether or not this might be true in some cases, we find that it does not apply here.

I.

The so-called "common fund doctrine" arises when counsel obtains a benefit for non-clients through litigation, as is often the case in class actions. In such cases, counsel is allowed to recover attorneys' fees from any settlement fund, so that those class members who benefit from the lawsuit at no cost to themselves are not unjustly enriched at the lawyers' expense. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) (explaining that "the common fund doctrine provides that a private plaintiff, or his attorney . . . is entitled to recover from the fund . . . to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive their benefits at no cost to themselves").

In some cases, an order awarding attorneys' fees from a common fund can be appealed immediately under the collateral order doctrine. As previously noted, to fall within the collateral order doctrine, an order must:

(1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits," and (3) be "effectively unreviewable on appeal from a final judgment." *Rosenfeld*, 859 F.2d at 720. An order is "effectively unreviewable on appeal" when "the legal and practical value of [the asserted right] will be destroyed if not vindicated" before judgment. *United States v. MacDonald*, 435 U.S. 850, 860 (1978). For instance, a fee award might be unreviewable on appeal if the fee recipient's financial instability might make return of the award impossible. *See, e.g.*, *Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp.*, 893 F.2d 1109, 1114 (9th Cir. 1990) ("A strong likelihood of insolvency satisfies the third prong of the collateral order doctrine test.").

There may be occasions when an attorneys' fee award from a common fund might conceivably meet the three requirements of the collateral order doctrine. For example, if a district court were to order immediate disbursement of a common fund, including both awards to class members and "interim fees" to attorneys, additional fees might not later be recoverable from that already-disbursed fund if the award was later determined to have been too low. *See Rosenfeld*, 859 F.2d at 720–21. Such an order may "threaten[]" sufficient harm to justify appellate review" under the collateral order doctrine. *Id.* at 721. Because it would be immediately implemented, such an order is, as a practical matter, not subject to further revision. *Cf.* Fed. R. Civ P. 54(b) (ordinarily, any interlocutory order "may be revised at any time before judgment"). Such a fee order would also presumably be independent from the merits of the ongoing litigation. And if the payments were made to "class members [who] might, by the close of the litigation, be insolvent, have disappeared, or no longer even be parties," the order may be

effectively unreviewable on appeal. *Rosenfeld*, 859 F.2d at 721.

In AdTrader's view, however, a fee award is immediately appealable even when the underlying litigation is still ongoing and the requirements of the collateral order doctrine are not met, as long as the district court's order invokes the "common fund doctrine." AdTrader tries to root this supposed "common fund exception" to the final judgment rule in case law. First, AdTrader points to *Trustees v. Greenough*, 105 U.S. 527 (1881). But that case concerned an appeal of a fee award when the court below had already rendered a final decision on the merits and simply left the case open for "purposes of administration of the [trust] fund." *Id.* at 531. Because the attorneys in *Greenough* asked that their fees be paid from the common fund, they faced the risk that a payment on the claims would exhaust the fund, leaving nothing to compensate the attorneys for their labor. *Id.* at 529.

Second, AdTrader cites *Fahey v. Calverley*, 208 F.2d 197 (9th Cir. 1953). But *Fahey* involved the "final disposition of a fund in controversy" and raised similar reviewability concerns if the appeal were delayed. 208 F.3d at 200.

Finally, AdTrader cites *American Re-Insurance Co. v. Insurance Commissioner of State of California*, 696 F.2d 1267, 1268 (9th Cir. 1983). But that decision had nothing to do with the common fund doctrine at all. In that case, this Court treated as final an order that resolved the merits of the case, "disposing of all issues other than appellee's motion for attorneys' fees." *Am. Re-Ins. Co.*, 696 F.2d at 1268.

In short, the case law does not reveal a special "common fund exception" to § 1291 separate from the collateral order

doctrine. Rather, the precedents on which AdTrader relies involve either final judgments on the merits or orders that actually fit the classic collateral order doctrine.

II.

Because we thus conclude that there is no special and separate "common fund exception" to 28 U.S.C. § 1291, we turn to whether the collateral order doctrine is satisfied here. As noted, this Court has jurisdiction over AdTrader's appeal only if the Fee Order "conclusively determined" a disputed question, resolved an important issue separate from the merits, and is "effectively unreviewable on appeal from a final judgment." *Rosenfeld*, 859 F.2d at 720. Failure to meet "any one of these requirements" is fatal. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988). We find that the Fee Order is not a collaterally appealable order because the order is not effectively unreviewable on appeal.

AdTrader argues the district court's order is "definitive," because the court knew that Google's issuance of $65.7 million in refunds to DBM Advertisers would extinguish the damages claims of DBM Advertisers. AdTrader adds that the Fee Order is distinct from the merits, because the "remaining events of the underlying litigation will have no impact on whatever fees and expenses are awarded to AdTrader from this common fund." But even assuming arguendo that an order that does not determine the total amount of attorneys' fees could be final, *contra Rosenfeld*, 859 F.2d at 720, AdTrader's argument stumbles at the final hurdle. Unlike the above-described cases on which AdTrader relies, AdTrader's request for attorneys' fees is not effectively unreviewable on appeal, because there is little risk counsel's right to fees—whether equitable or

contractual—will be destroyed if not vindicated before judgment.

AdTrader suggests that the opportunity to review the attorneys' fee award will be lost once the DBM Advertisers' claims for damages have been mooted. But the mootness of DBM Advertisers' claims for damages will not eliminate AdTrader's opportunity to recover fees upon final judgment. While AdTrader will seek recovery from a portion of a fund that has technically been exhausted (because "about all" of the DBM refunds were completed by September 2019), those fees will remain available because Google has undisputedly agreed to pay whatever amount the district court ultimately determines AdTrader is entitled to. Indeed, as this shows, this is really not a classic common fund award, since payment of the attorneys' fees will not come from the fund, but directly from Google. There is, needless to say, no suggestion that Google will no longer have the $65.7 million to pay AdTrader's attorneys' fees if AdTrader waits to appeal until after a final disposition on the merits. Delay will not change "the legal and practical value" of AdTrader's asserted right to attorneys' fees. *MacDonald*, 435 U.S. at 860. Thus, there is no risk that deferring review of the fee award until after final judgment could "imperil a substantial public interest or some particular value of a high order." *Copeland*, 852 F.3d at 905 (citations and internal quotation marks omitted).

While AdTrader cites Ninth Circuit decisions reviewing under the collateral order doctrine awards of attorneys' fees, these decisions are, once again, inapposite to the instant case. In *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960), this Court exercised jurisdiction over an appeal of a district court order denying attorneys' fees for services rendered to nonparties to the litigation. *Id.* at 515–16. Unlike *Preston*,

AdTrader does not seek attorneys' fees from nonparties. Similarly, in *Finnegan v. Director, Office of Worker's Compensation Program*, 69 F.3d 1039 (9th Cir. 1995), this Court held that a fee award was immediately appealable when the district court's fee award definitively resolved entitlement to fees for work performed on settled claims, despite ongoing litigation before an administrative law judge on other claims. *Id.* at 1040–41. Unlike *Finnegan*, however, the instant case involves ongoing litigation before the same court, not in a distinct proceeding, and so we cannot say the action has concluded.

AdTrader also relies on several distinguishable cases holding that orders directing government litigants to pay attorneys' fees may be appealed under the collateral order doctrine. *See United States v. Baker*, 603 F.2d 759, 762 (9th Cir. 1979) (unreviewable because jury acquitted); *United States v. Indep. Med. Servs., Inc.*, 804 F. App'x 787, 788 (9th Cir. 2020) (unpublished); *Copeland v. Ryan*, 852 F.3d 900, 904 (9th Cir. 2017); *Sutton v. New York City Transit Auth.*, 462 F.3d 157, 160 (2d Cir. 2006). But government litigant cases invariably rely on the "substantial public interest in protecting the state fisc against the unauthorized expenditure of public funds" that may not be easily recoverable. *See Copeland*, 852 F.3d at 905. The erroneous denial of fees here would not be nearly so urgent. Class counsel has not been ordered to pay a sum they may never recover; rather, they seek to increase the sum they stand to gain.

III.

In short, this is neither a traditional common fund case nor one that meets the requirements of the collateral order doctrine. The litigants and the district court may have agreed that attorneys' fees should be determined in light of common fund principles, but they also agreed that "any award of

attorneys' fees here would not come from a sum that Google has been ordered to pay the class." This alone shows that this case neither fits the situation under which the "common fund" doctrine developed nor meets the requirement of unreviewability that is essential to the limited collateral order exception to finality. We have also considered appellants' other arguments for an immediate appeal and find them to be without merit.

Accordingly, we hereby **DISMISS** this appeal for lack of appellate jurisdiction.