NO. 18-_____

In the Supreme Court of the United States

THE ANDERSON LIVING TRUST, F/K/A
THE JAMES H. ANDERSON LIVING TRUST, ET AL.,

Petitioners,

v.

WPX ENERGY PRODUCTION, LLC, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The final judgment entered by the district court was the result of a settlement before trial which settlement and judgment reserved the Petitioners' right to appeal an earlier decision denying class certification under Fed. R. Civ. P. 23(b)(3). The Tenth Circuit held it lacked jurisdiction due to this Court's recent decision in *Microsoft v. Baker*, 137 S.Ct. 1702, 198 L.Ed.2d 132 (2017).

THE QUESTION PRESENTED IS

Does *Microsoft v. Baker*, 137 S.Ct. 1702, 198 L.Ed. 2d 132 (2017) mandate that only plaintiffs who litigate their individual claims to a final judgment may appeal an earlier denial of class certification?

PARTIES TO THE PROCEEDING

PETITIONERS

- The Anderson Living Trust
  f/k/a The James H. Anderson Living Trust
- Robert Westfall
- Minnie Patton Scholarship Foundation Trust

RESPONDENTS

- WPX Energy Production, LLC
- WPX Energy Rocky Mountain, LLC
  f/k/a Williams Production RMT Company, LLC

RULE 29.6 STATEMENT

Petitioners have no parent corporation or shares held by a publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

The Anderson Living Trust, *et al.*, respectfully petition this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in *Anderson Living Trust, et al. v. WPX Energy Production, et al.*, App.1a-21a.

OPINIONS BELOW

The opinion of the Tenth Circuit is recorded at 904 F.3d 1135 (10th Cir. 2018) and is reproduced in the appendix beginning at App.1a. The opinion of the District Court denying class certification under Fed. R. Civ. P. 23(b)(3) is recorded at *Anderson Living Trust v. WPX Energy Production, LLC*, 306 F.R.D. 312 (D.N.M. 2015) and is reproduced in the appendix beginning at App.30a.

JURISDICTION

The Opinion of the Tenth Circuit Court of Appeals was entered on September 21, 2018. (App.1a) Petitioners timely filed an application for extension of time to file this petition, which was docketed as Supreme Court No. 18A594. Justice Sotomayor granted an extension through January 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Cl. 1

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Fed. R. Civ. P. 23

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

STATEMENT OF THE CASE

This Court issued its decision in *Microsoft v. Baker*, 137 S.Ct. 1702, 198 L.Ed.2d 132 (2017), holding that a one-sided voluntary dismissal by a plaintiff, subsequent to an unsuccessful request to appeal the

denial of class certification under Fed. R. Civ. P. 23(f) did not "manufacture" a final appealable judgment under 28 U.S.C. § 1291. The Tenth Circuit, herein, interpreted *Microsoft* to hold a final, appealable order under 28 U.S.C. § 1291 cannot result from a settlement. *Anderson Living Trust v. WPX Energy Production, LLC*, App.16a-18a. The Tenth Circuit held that by settling, the prior, adverse decision on class certification does not "merge" into the final judgment and is only appealable by a party who has tried his individual claims on the merits. *Anderson Living Trust v. WPX Energy Production, LLC*, at App.17a-18a.

The Tenth Circuit Court of Appeals has, therefore, issued a decision denying appellate jurisdiction under 28 U.S.C. § 1291 in a manner that is both important and recurring. The Tenth Circuit expressly recognized its decision was contrary to another circuit level decision which also interpreted this Court's judgment in *Microsoft v. Baker*, 137 S.Ct. 1702 (hereafter "*Microsoft*"). *Anderson*, at App.20a, fn. 11. Decisions by other circuits are irreconcilable with the Tenth Circuit's decision in this case. The importance of the application of 28 U.S.C. § 1291 to class actions is evident from the increasing number of cases brought as class actions under Fed. R. Civ. P. 23.

Prior to the instant appeal to the Tenth Circuit, the District Court of New Mexico denied the Petitioners' request for class certification under Fed. Civ. R. P. 23 (b)(3). *See* Reason V below. A permissive appeal under Fed. R. Civ. P. 23(f) was not filed, and this case was set on the trial docket for the Petitioners' individual claims, which principally included being underpaid royalty under their oil and gas leases. The Petition-

ers and putative class members' leases required Respondent(s) to pay them a certain royalty percentage of what Respondent(s) received from its sales of the natural gas production from lands which encompass Petitioners' mineral interests. After further litigation on those claims, but prior to a trial on the merits, the individual claims of the Petitioners were settled for good and valuable consideration. The settlement also provided for the right to appeal the earlier denial of class certification.

The district court entered judgment, approving the settlement, dismissing individual claims and expressly reserving the Petitioners' right to appeal the prior denial of class certification. The Petitioners timely filed their appeal with the Tenth Circuit Court of Appeals. Following the filing of initial briefs in the Tenth Circuit, this Court issued its opinion in *Microsoft v. Baker*, *supra* and the Tenth Circuit requested and received additional briefs on whether the *Microsoft* decision was applicable. Subsequently, the Tenth Circuit ruled *Microsoft* precluded the Petitioners' appeal of the earlier denial of class certification by Petitioners, since their individual claims were settled prior to a trial on the merits. Petitioners herein seek this Court's review of that decision.

REASONS FOR GRANTING THE WRIT

I. THE CASE LAW EXISTING AT THE TIME PETITIONERS SETTLED THEIR INDIVIDUAL CLAIMS PERMITTED THEIR APPEAL OF THE ADVERSE CLASS CERTIFICATION RULING

In *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011), the court stated:

> . . . a named plaintiff . . . may appeal a denial of class certification despite the mootness of his individual claim, *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980).

Lucero, 639 F.3d at 1245-46. *Lucero* also analyzed this Court's decision in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980). In *Roper*, at 337, this Court held that the named plaintiffs asserted a continued interest in procedural rights pertinent to representing the class and thus presented a "personal stake" in the appeal of the denial of class certification, despite the action being dismissed by the district court based upon the defendant's offer to confess. The *Lucero* Court noted Justice Rehnquist's concurring opinion in *Roper* and stated the obvious, that to rule otherwise would give the defendant, "The practical power to make the denial of class certification questions unreviewable." *Lucero*, at 1247 further noted that this Court, in *Geraghty*, 445 U.S. at 403-404, held that:

> . . . sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions, these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired [or was no longer an issue].

The *Geraghty* Court recognized jurisdictional tension exists when applying the Article III jurisdictional requirements to certain aspects of a Fed. R. Civ. P. 23 class action proceedings. Nonetheless, this Court has been consistent in determining that a sufficient "case and controversy" exists, as applied to the appealability of the denial of class certification request in the district court, when the individual plaintiff's claims are otherwise mooted, satisfied, or even expired.

The record here shows there was no maneuvering or "manufacturing" of a final judgment. Simply put, rather than try the case to judgment on the individual claims the Petitioners settled their claims in an arm's length manner before trial. Other circuits have recognized this Court's opinion in *Microsoft v. Baker* can be reconciled with the Court's earlier decisions in *Geraghty*, *et al.*, recognizing the necessity for an appellate avenue and Article III jurisdiction under the unique circumstances of the class certification mechanism, without abolishing the even longer established procedure for resolving claims, *i.e.*, by settlement prior to trial.

II. JURISDICTION IS PRESENT AS A CASE OR CONTROVERSY UNDER THE U.S. CONSTITUTION, ARTICLE III, SECTION 2

The concurring opinion in *Microsoft* espoused that the appellate court lacked jurisdiction under the U.S. Constitution, Article III, § 2 since, "The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not 'affect the(ir) rights' in any legally cognizable manner." *Microsoft*, 137 S.Ct. 1702 at 1717. The concurring opinion further noted that the judicial power of the United States extends only to cases and controversies under Article III and stated, " . . . class allegations without an underlying individual claim, do not give rise to a case or controversy". *Microsoft*, 137 S.Ct. at 1716.

Before trial, the Petitioners resolved their individual claims and specifically reserved, with the Respondents' agreement, the right to appeal the earlier denial of their motion for class certification. There is no difference in the posture of the Petitioners here and a plaintiff whose motion for class certification was earlier denied and then tries his individual case to a successful judgment. By contrast, the concurring opinion in *Microsoft* determined that when the plaintiff therein asked the district court to merely dismiss his claims, he consented to the adverse judgment and released all rights to relief from Microsoft.

However, had the Petitioners herein, following the denial of their motion for class certification, continued to litigate their individual claims to a favorable, final judgment, no extant case or controversy would exist between Petitioners and Respondents, other than the question/dispute concerning whether the district court

correctly denied their earlier request for class certification. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L. Ed. 479 (1980) holds that jurisdiction for an appeal of the earlier denial of class certification still exists:

> We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification." *Ante* [referring to *Deposit Guar. Nat'l Bank v. Roper*], at 333. *See also United Airlines, Inc. v. McDonald*, 432 U.S., at 392; *Powell v. McCormack*, 395 U.S., at 497. [*Geraghty*, 445 U.S. at 402.]

The unique and statutorily created class action mechanism that allows a person(s) to adjudicate both their rights and the rights of other similarly situated persons requires an exception to the viewpoint that appellate jurisdiction of the procedural class certification question is reliant upon the "live" existence of the putative class representatives' individual claims. Otherwise, no statutory mechanism exists for the appeal of an underlying district court denial of Fed. R. Civ. P. 23 class allegations upon the entry of a favorable final judgment on the plaintiff's individual claims. The congressional drafters of Fed. R. Civ. P. 23 did not intend on creating a situation where appellate review does not exist. Prior to the passage of Fed. R. Civ. P. 23(f) in 1998, if a case or controversy was lacking under Article III, no mechanism existed for a

plaintiff to appeal the district court's prior denial of class certification whose individual claims were satisfied by a successful final judgment issued under 28 U.S.C. § 1291.

In *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 193 L.Ed.2d 571 (2016), this Court recognized that defendants have devised various mechanisms for attempting to prevent claims from proceeding as a class action pursuant to Fed. R. Civ. P. 23 through the application of statutory directives and rules drafted to be applicable to individual (non-class) cases. Fundamentally, should a motion to certify a class action be erroneously denied in the district court, an individual plaintiff must proceed to "moot" his individual claim in order to achieve a final judgment, which is necessary to appeal the denial of class certification, excepting a permissive appeal allowed under Fed. R. Civ. P. 23(f).

The permissive appeal under Fed. R. Civ. P. 23(f) is a possibility, but it is certainly the less desirable option, since such a request for review might be easily denied on grounds other than whether the lower court's decision denying the class certification was erroneous. In this case, as in many cases (unlike the plaintiffs in *Microsoft*) the Petitioners chose not to request a tenuous appeal under Fed. R. Civ. P. 23(f) to review the court's denial of class certification, but proceeded to litigate the merits of their individual case, armed with the knowledge that upon entry of a final judgment they could appeal the class certification denial "as a matter of right".

After additional litigation of their individual claims in the district court for more than a year, including the filing of an amended complaint, both Petitioners

and Respondents decided to settle the existing individual claims for an arm's length bargained amount. The settlement expressly reserved the right to appeal the earlier denial of class certification. The Petitioners then stood in no different posture than had they litigated their individual claims to a successful final judgment on the merits.

In *Geraghty*, the Court determined that the denial of a motion for class certification can be reviewed on appeal "after the named plaintiffs' personal claim has become moot." The Court characterized the jurisdictional issue to be of "substantial significance" under Article III and also noted a conflict existed among the circuits. *Geraghty*, at 390. The *Geraghty* Court therein recognized the unique posture of a putative class representative appeal as follows:

> Similarly, the fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class.

Geraghty at 402. The *Geraghty* Court, at 403, then concluded:

> We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply

> presented issue. In *Sosna v. Iowa* it was recognized that a named plaintiff whose claim on the merits expires after class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." Respondent here continues vigorously to advocate his right to have a class certified.
>
> We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.

Geraghty, at 404, goes on to hold:

> If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Geraghty, at 407, further ruled:

> We hold only that a case or controversy still exists. The question of who is to represent the class is a separate issue. fn12
>
> fn12 *See, e.g.*, Comment, *A Search for Principles of Mootness in the Federal Courts: Part Two–Class Actions*, 54 Texas L. Rev. 1289, 1331-1332 (1976); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L. J. 573, 602-608.

Microsoft did not attempt to overrule this Court's prior decision in *Geraghty*. *Microsoft* merely held that a final judgment cannot be manufactured by a plaintiff's voluntary dismissal of his claims following an unsuccessful permissive appeal request under Fed. R. Civ. P. 23(f).

III. A DIRECT CONFLICT EXISTS BETWEEN THE TENTH CIRCUIT AND OTHER CIRCUITS REGARDING THE APPLICATION OF *MICROSOFT V. BAKER*

Following this Court's decision in *Microsoft v. Baker*, numerous courts have wrestled with the application of this Court's reasoning in *Microsoft* to controversies with similarities to *Microsoft*. However, contrary to the Tenth Circuit's decision rendered herein, the Fifth Circuit, Sixth Circuit, Ninth Circuit, and the D.C. Circuit have all found that *Microsoft* is distinguishable, unless one-sided "tactics" were used to arrive at a "final" judgment.

The Tenth Circuit expressly noted that *Brown v. Cinemark USA, Inc.*, 876 F.3d 1199 (9th Cir. 2017) reached the opposite result under almost identical facts. *Anderson Living Trust v. WPX Energy Production, LLC*, at App.20a, fn.11. In *Brown*, at 1201, following a denial of class certification, the plaintiffs continued litigating their remaining individual claims. Thereafter, a mutual settlement was reached on several of the claims. The Ninth Circuit held that it possessed Article III jurisdiction to rule on the appeal of the denial of class certification: "This case is unlike *Baker* where the plaintiffs openly intended to sidestep Rule 23(f) when they voluntarily dismissed their claims."

The court in *Brown* found no evidence that the appellants engaged in any sham tactics to manufacture a final judgment for purposes of appeal. Yet in this case, the Tenth Circuit reached the direct opposite result, ruling that a settlement, instead of litigation to a final judgment, was a "death knell" to obtaining an appealable judgment under 28 U.S.C. § 1291. The Ninth Circuit also distinguished *Microsoft* in *Tourgeman v. Nelson & Kennard*, 735 Fed. Appx. 340 (9th Cir. 2018), wherein the Court held that "Tourgeman did not manufacture appellate jurisdiction" by voluntarily dismissing his remaining individual claims after a dismissal of the "class claims" following class certification. The prior district court grant of certification in *Tourgeman* is not a distinction to this matter wherein class certification was denied by the district court. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. at 337:

> Perhaps because the question was not thought to be open to doubt, we have stated in the past, without extended discussion, that an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff. . . . " *Coopers Lybrand v. Livesay*, 437 U.S. 463, 469 (1978).

In *Innovation Ventures, LLC v. Custom Nutrition Labs, LLC*, No. 17-1771 (6th Cir. 2018), ___ F.3d ___ 2018 WL 6695875, pp. 22-23, the Sixth Circuit holds that there must be a mechanism in place for parties to resolve outstanding issues without proceeding to trial. The Sixth Circuit distinguished the facts determined by the Tenth Circuit in *Microsoft* and denied the appellees' motion to dismiss.

Likewise, the Fifth Circuit in *Griggs v. S.G.E. Mgmt., LLC*, 905 F.3d 835 (5th Cir. 2018), held that the *Microsoft* ruling relied on tactics used to avoid Rule 23(f)'s procedure and found that its jurisdiction was not affected when a dismissal ended the litigation on the merits, but was not a voluntary dismissal "tactic". 905 F.3d at 844-845. In *Harrington v. Sessions (In re Brewer)*, 863 F.3d 861 (D.C. Cir. 2017), the court found that *Microsoft* did not apply because the plaintiff did not opportunistically dismiss his individual claims in order to get review of a class certification ruling for which he had been denied interlocutory review. 863 F.3d at 871. *Harrington* involved an appeal by intervenors under Rule 23(f) and clarified *Microsoft* and held its rationale is limited to its facts and not applied "across the board" to any attempted appeal of the denial of class certification that might occur following actions which rendered the individual claims of the plaintiff in good faith to be at an end. *Id.* at 871.

As noted above, the Petitioners' posture here is no different than if they had prevailed at trial on their individual claims and appealed the denial of class certification, since the judgment on their individual claims would become final (in the absence of an appeal by the Respondents). Here, unlike *Microsoft*, the Petitioners did not attempt to conditionally reserve any claims for the purpose of "reviving" them should the class certification order by reversed. They also did not engage in any "one-sided tactics". As stated by this Court in *Hall v. Hall*, 138 S.Ct. 1118, 1131, 200 L.Ed.2d 399 (2018), a final decision confers upon the losing party the immediate right to appeal. Here, a judgment was entered upon the joint settle-

ment of the parties, reserving only the right to appeal the denial of class certification. It was, therefore, a final judgment and ended all litigation in the district court between the parties, pursuant to the letter and meaning of 28 U.S.C. § 1291.

IV. THE BALANCING ACT: DOES EXISTING CASE LAW STILL PERMIT THE PETITIONERS' APPEAL? THE TENTH CIRCUIT'S "NON-MERGER" THEORY LACKS SUPPORT UNDER THE STATUTORY DIRECTIVE OF A FINAL JUDGMENT IN THE CLASS ACTION CONTEXT

The courts of appeals are now split as to the application of *Microsoft v. Baker*. In this case, the Tenth Circuit determined that any appeal of the denial of class certification from a final judgment must be preceded by a trial on the merits of individual claims. In contrast, other circuits, including the Fifth, Sixth, Ninth, and D.C. Circuits, have interpreted *Microsoft* to be more limited, to facts indicating a plaintiff has maneuvered or manufactured a way to subvert the appellate procedure.

The Tenth Circuit has determined, without any support from *Microsoft*, other case law or 28 U.S.C. § 1291, that a pre-trial settlement of the individual claims "divorces" the earlier denial of class certification from the final judgment, rendering it unappealable. App.17a. Petitioners specifically reserved from their settlement their right to appeal, and they did appeal the denial of class certification based on their assertion that the district court erred in its finding that predominance of common issues under Fed. R. Civ. P. 23(b)(3) is determined by "weighing" which issues would require most time at trial. *See* App.357a-361a. *See* Reason V below. In determining

jurisdiction was lacking, the Tenth Circuit did not find (a) that there was anything left to determine in the district court; (b) that the final judgment could become "more final"; or (c) that final judgment had been reached by manipulation or one-sided tactics. 28 U.S.C. § 1291 states the court of appeals will have jurisdiction from "all final decisions of the district courts. . . . " The parties here left only an appeal of the earlier denial of class certification by the district court as the only remaining justiciable controversy.

The Court in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. at 337-338 holds:

> The appealability of the class certification question after final judgment on the merits was an important ingredient of our ruling in *Livesay*.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), additionally holds:

> Appellate jurisdiction depends on the existence of a decision that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

The *Livesay* Court, 437 U.S. at 362-63, discussed the "death-knell" doctrine regarding financial motivation to pursue the case and held that the policy against interlocutory appeals maintained an appropriate relationship between the respective courts.

Following *Livesay*, Fed. R. Civ. P. 23 was amended to provide for interlocutory appeal of a class action decision on a permissive basis codified as 23(f). Now, the Tenth Circuit's ruling here has added to the requirements for a proceeding brought as a class action,

finding that only plaintiffs that litigate their individual claims to a final judgment (rather than by settlement) may appeal an earlier denial of a class certification motion. If the Tenth Circuit's published opinion in this matter is allowed to stand without this Court's review, Circuits will continue in conflict on this matter. An appeal of an earlier denial of class certification will not be jurisdictionally valid within the Tenth, and possibly other Circuits, unless the individual claims are tried to final judgment on the merits, even if both sides would otherwise reach a settlement before trial.

Unlike this case, the *Microsoft* Court found there was no agreement between the parties to reserve the right to appeal, 137 S.Ct. at 1711:

> Microsoft stipulated to the dismissal, but maintained that Respondents would have "no right to appeal" the order striking the class allegations after thus dismissing their claims.

The *Microsoft* appeal was decidedly a one-sided "engineered" appeal. Here, by contrast, the Respondents stipulated and entered into a written settlement agreement, approved by the district court, that the settlement reserved the right of the named plaintiffs to appeal the denial of class certification. *Microsoft*, in fact, holds, at 1711:

> . . . in the event the District Court did not change course, [make a different determination or change its mind on class certification] respondents could have litigated the case to final judgment and then appealed.

Here, Petitioners continued to litigate the case, and settled it short of a trial on the merits. Final judgment on that settlement reserved the right to appeal, and was stipulated by both parties and entered by the district court. The judgment was not an *ex parte* or one-sided maneuver in order to create an appellate order.

An increase in class actions in the federal courts has resulted from the passage of the Class Action Fairness Act (28 U.S.C. § 1332(d)). By removing the settlement avenue from parties' options, the Tenth Circuit is creating additional time and expense, both for the court system and the parties. Courts and parties have been directed to encourage settlement of disputes rather than litigate every case, no matter how large or small, to final judgment. The Tenth Circuit's ruling here, however, will have the opposite effect. This Court can and should take immediate steps to resolve this controversy among the Circuits and should make an emphatic statement clarifying that *Microsoft v. Baker* is limited to those matters where there is evidence of one-sided tactics by a party desiring to achieve immediate appellate review.

V. THE PETITIONERS' APPEAL TO THE TENTH CIRCUIT WAS MERITORIOUS

While the Tenth Circuit did not reach a review of the district court's denial of class certification, as stated in Petitioners' opening brief to the Tenth Circuit, the district court ruled on a constantly recurring issue, *i.e.* what determines an issue to be common or predominant under Fed. R. Civ. P. 23(b)(3). The District Court of New Mexico ruled that an issue cannot be "predominate" if it will consume little time at trial.

Anderson, at App.357a-361a. The record already contained ample evidence that both the class and Petitioners were being underpaid royalty through Respondents' payments which were based upon an affiliate, non-arm's length transaction. The district court held that whether these affiliate transactions resulted in compensable damage to the plaintiffs and class members was not a common, nor a predominate question, concluding that a common, predominant question is measured by the length of time it will consume at trial, not its relative importance to Petitioners' case. *Anderson Living Trust v. WPX Energy Production, LLC*, *Id.* In sharp contrast, this Court has ruled commonality and predominance, as used in Fed. R. Civ. P. 23(b)(3), are elements which are satisfied by cohesiveness and importance to relief, not trial time. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016) wherein the Court held as follows:

> The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp.

> 196-197 (5th ed. 2012) (internal quotation marks omitted). The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.*, § 4:49, at 195-196. When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." 7AA C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1778, pp. 123-124 (3d ed. 2005) (footnotes omitted).

The Tenth Circuit never addressed the important inquiry of whether the district court used the proper legal standard in denying class certification, but instead, held that the settlement of individual claims reached between the parties prior to trial prevented the district court's judgment from being an appealable final judgment under its view of the *Microsoft* decision. That ruling was improper, contrary to this Court's rulings, and in conflict with the decisions of several other circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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