No. 18-1343

IN THE

Supreme Court of the United States

PRINCETON DIGITAL IMAGE CORPORATION,

Petitioner,

v.

OFFICE DEPOT INC., J.C. PENNEY COMPANY, INC., QVC INC., SEARS HOLDINGS CORPORATION, LIMITED BRANDS INC., GAP, INC., WILLIAMS-SONOMA, INC., COSTCO WHOLESALE CORPORATION, NORDSTROM.COM LLC, NORDSTROM.COM INC., NORDSTROM INC.,

Nominal Parties,

and

ADOBE SYSTEMS INCORPORATED,

Respondent.

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

REPLY BRIEF

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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PETITIONER'S REPLY

Respondent employs all the usual devices to avoid review of a meritorious petition, including accusing Petitioner of "mischaracterizations," even though none were shown, and attempting to paint Petitioner as a bad actor, undeserving of review, as if appellate jurisdiction turns on the quality of a litigant. (Respondent's Brief in Opposition ["Opp."] 1–8). Respondent's *ad hominem* is untrue but does not require a response here.

Petitioner notes, however, that Respondent's recitation of the circumstances leading to the entry of the appealed judgment (Opp. 2–8) largely ignores, and is directly contradicted by, the district court's opinion detailing Respondent's request to enter the final judgment (App. 20a-30a), and by the Federal Circuit's discussion of the reasons for dismissing Respondent's appeal (App. 3a-6a). Respondent asked the district court to terminate the ongoing trial, send the jury home and enter an adverse judgment—all because Respondent was piqued at an evidentiary ruling on damages.

Respondent's substantive arguments only confirm that no court has ever vacated a district court judgment after dismissing an appeal from that judgment for lack of jurisdiction, much less vacating a consented judgment that appellant had itself voluntarily requested. Further, Respondent never cites any authority that could have supported the Federal Circuit's exercise of such jurisdiction. Respondent's assertion that "equities" dictate jurisdiction (Opp. 1, 9, 20-21) would constitute an extraordinarily far-reaching expansion of jurisdiction that should be reviewed by this Court. The Federal Circuit's

decision is not only unprecedented, but in fundamental conflict with the Third Circuit, notwithstanding Respondent's focus on the cases' factual differences.

In view of Respondent's failure to cross-appeal/petition, this case is a clean and exceptional vehicle to review the unprecedented exercise of jurisdiction by the Federal Circuit, resolve a plain circuit split, and to directly address issues that were not considered in this Court's prior decisions.

I. QUESTION OF JURISDICTION BASED ON "EQUITIES" WARRANTS THE COURT'S IMMEDIATE REVIEW

A. Respondent's Arguments Demonstrate Need For Review

1. Respondent does not cite any Constitutional or statutory basis for the Federal Circuit's action. Yet, "Federal courts are courts of limited jurisdiction," and "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Respondent's inability to point to any Constitutional or statutory provision should confirm that the Federal Circuit acted without jurisdiction.

2. With no law to rely upon, Respondent justifies the Federal Circuit's actions by supposed "equities." (Opp. 1, 9, 20-21). But courts "have no warrant to expand Congress' jurisdictional grant by judicial decree." *Empire*

Healthchoice Assur., Inc. v. McVeigh, 547 U.S. 677, 696 (2006) (quoting *Kokkonen, supra*). That Respondent can only argue non-statutory "equities" as support the Federal Circuit's jurisdiction demonstrates that this Court should review such an extraordinary expansion of appellate authority claimed by a national court of appeals in a published precedential decision.

3. Further, Respondent's "equitable" arguments misread this Court's decision in *Microsoft v. Baker*, 137 S. Ct. 1702 (2017).

Respondent argues that the Federal Circuit's action is "the necessary, logical, and equitable corollary" of dismissing the appeal under 28 U.S.C. §1295; and that the Federal Circuit's dismissing the appeal necessarily meant that the district court judgment was incomplete and ineffective. (Opp. 9-10). Respondent errs, as did the Federal Circuit, in failing to recognize that "[f]inality is variously defined; [and] like many legal terms, its precise meaning depends on context." *Clay v. United States*, 537 U.S. 522, 527 (2003) . In *Microsoft*, the appealed judgment had ended the case, but, nevertheless, this Court rejected it as a "final decision" because the appellants had requested the adverse consent judgment in order to appeal an interlocutory ruling in violation of the venerable law against piecemeal appeals:

> We hold that the voluntary dismissal essayed by respondents does not qualify as a "final decision" within the compass of § 1291. The tactic would undermine §1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule

> 23(f) put in place for immediate review of class-action orders.

Microsoft, 137 S. Ct. at1707.

In dismissing the appeal in *Microsoft*, this Court did not deem the appealed judgment "ineffective," and, indeed, the concurring opinion would have ground the Court's decision on Article III rather than §1291, because the appealed judgment was "final" and "dismissed all of the plaintiffs' claims with prejudice and left nothing for the District Court to do but execute the judgment." *Microsoft*, 137 S. Ct. at1716.

4. Thus, *Microsoft* dismissed the appeal and left the otherwise final judgment intact. Respondent does not suggest any reason why the appealed judgment in this case was any more "ineffective" or incomplete than the judgment in *Microsoft*, or why a different outcome is justified. In this case, as in *Microsoft*, the appeals were dismissed for policy reasons, and not because the judgments failed to end litigations. The effectiveness and appealability of judgments are not co-extensive.

5. Respondent argues that "Petitioner makes no real attempt to explain why there should not be further proceedings…." (Opp. 10). But, Respondent chose to appeal an evidentiary ruling by asking for the adverse judgment on "the morning of August 21, 2017, on the first day of trial," while the jury pool was sitting in the courtroom, and with the district court, Petitioner and its witnesses ready to start the jury trial. (App. 27a). Respondent thus disrupted the orderly litigation process by unilaterally terminating a scheduled trial, and now seeks to prejudice

the court and Petitioner by trying the case years after it otherwise would have.

By requesting an unappealable adverse final judgment solely to appeal an interlocutory evidentiary ruling may have precluded Respondent from ever trying its case, but it is a "predicament … of [its] own making....." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) . Respondent's tactical decision, like all litigation actions, has consequences. Respondent may not shift to the court and Petitioner the burden of the disruption and delay caused by its chosen tactic.

B. Article III Precluded Federal Circuit's Jurisdiction

1. Respondent argues that Petitioner only tangentially raised Article III and "the Federal Circuit did not dismiss the appeal on Article III grounds." (Opp. 11) [1]. But the issue is not whether Respondent's appeal should have been dismissed under Article III, but whether the Federal Circuit had Article III jurisdiction to vacate the consent judgment after the appeal from that judgment was dismissed. Respondent never directly addresses that issue.

2. Respondent also ignores that the Petition incorporated the concurring opinion in *Microsoft* to

1. Petitioner had relied on *Microsoft* where the majority opinion relied on §1291 and never addressed Article III. But Petitioner also cited the concurring opinion in *Microsoft* to argue that Respondent's "voluntary decision to accept an adverse Final Judgment also precludes a justiciable case or controversy" under Article III. (Federal Circuit Docket 31 at p. 29 n. 2).

support the lack of Constitutional authority. (Petition 9). The concurring opinion explained that "[w]hen the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief," and the "parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not 'affect their rights' in any legally cognizable manner." That rationale applies with even greater force here once the appeal is dismissed, whether on statutory or Constitutional basis.

3. Respondent asserts that Article III case or controversy exists as to any voluntary stipulated judgment so long as the consenting party reserved its right to appeal. (Opp. 11-12). But Respondent contradicts established the law. In *Nashville, C. & St. L. Ry. Co. v. United States*, 113 U.S. 261 (1885) and, again in *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961) , this Court held that "a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." 113 U.S. at 265 and 368 U.S. at 323. See also *Evans v. Phillips*, 17 U.S. 73 (1819) ; *Pac. R.R. v. Ketchum*, 101 U.S. 289, 290 (1879) ("If ... the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent.... If all the errors complained of come within the waiver, the decree below will be affirmed"); *United States v. Babbitt*, 104 U.S. 767, 768 (1881) ("The consent to the judgment below was in law a waiver of the error now complained of").

Nevertheless, the rule recognized certain exceptions. *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) . One exception was that the courts have allowed appeals from

stipulated judgments that were entered after the court had made rulings that effectively precluded any relief to a plaintiff or viable defense to a defendant. *Thomsen v. Cayser*, 243 U.S. 66, 83 (1917) ("[t]he plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they may come to this court without further delay"); *United States v. Procter & Gamble*, 356 U.S. 677, 680–81 (1958) (appeal proper because the Government had already "lost on the merits and was only seeking an expeditious review").

Thus, reservations of rights to appeal have been held effective only when the consent judgment follows a dispositive court ruling and is one of form only. Otherwise, a mere reservation of a right to appeal is insufficient to appeal from an otherwise unappealable judgment. *Farmers' Loan & Tr. Co. v. Waterman*, 106 U.S. 265, 269 (1882) ("reservation of the right to appeal has no effect if there is no decree from which an appeal such as has been reserved will lie").

4. The cases cited by Respondent (Opp. 11-12) merely exemplify the above principles, because they had either dismissed the appeals for lack of jurisdiction, or they involved consent judgment as to form after the court precluded a party's claims or defenses. None suggest that there can be Article III jurisdiction as to a consent judgment, except to the extent that the consent judgment was a matter of form dictated by earlier appealable rulings of the court. Any other outcome will violate the venerable law against piecemeal appeals.

II. CONFLICT WITH THE THIRD CIRCUIT

1. Respondent's argument only proves a conflict between the ruling below and that of the Third Circuit in *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239 (3d Cir. 2013) .

2. Respondent argues that *Camesi* "involved the *total abandonment* of the plaintiffs' individual claims." (Opp. 14; emphasis in original). But Respondent had also abandoned all its claims with prejudice by requesting an adverse final judgment in Petitioner's favor. (App. 29a-30a). In both *Camesi* and here, appeals from final judgments were dismissed because appellants attempted to appeal interlocutory rulings. There is no distinction.

Further, *Camesi's* unqualified and absolute holding that the "claims that Appellants dismissed with prejudice are gone forever—they are not reviewable by this Court and may not be recaptured at the district court level," *id.* at 247, does not leave room for Respondent's attempt to limit the holding to only a particular argument then being addressed. Rather, the Third Circuit held that the dismissal of the appeal left the district court judgment intact, and then applied that ruling to the issue at hand.

3. Respondent's further argument that *Camesi* is distinguishable because Respondent reserved its right to appeal is equally immaterial. The appellants in *Camesi* had also filed a "voluntary dismissal of their claims with prejudice in order to secure a final judgment for purposes of appeal." *Id.* at 243. There is no distinction.

Respondent's citations to *Fairley v. Andrews*, 578 F.3d 518, 521–22 (7th Cir. 2009) and *Keefe v. Prudential Property & Casualty Insurance Co.*, 203 F.3d 218 (3d Cir. 2000) appear unrelated to the Third Circuit's holding in *Camesi*. In *Camesi*, the Third Circuit dismissed the appeals because the final judgments attempted to orchestrate piecemeal appeals. On the other hand, both *Fairley* and *Keefe* involved appeals from consent judgments that were entered after the district court had precluded triable issues. Here, the Federal Circuit held that Respondent had voluntarily consented to the final judgment even though it could have gone forward with its case. (App. 11a). Thus, this case is like *Camesi* and unlike *Fairley* or *Keefe*.

4. Respondent argues that "when a court of appeals concludes that it lacks appellate jurisdiction because the judgment is not 'final,' the case often goes back to the district court for further proceedings." (Opp. 16). Even if that statement was correct, Respondent's argument is irrelevant, because the issue here is not whether the parties could "go back to the district court," but whether an appellate court can vacate a judgment over which it had no jurisdiction. The only option that was open to the Federal Circuit was to dismiss the appeal and leave the parties and the judgment as they were. Respondent could then take such steps as it was allowed under the rules.

5. In any event, none of Respondent's authorities support the Federal Circuit's vacating the district court judgment. In none of the three cases cited by Respondent, *Bd. Of Trustees of the Cincinnati Plumbing & Pipe Fitting Indus. Promotion Tr. Fund v. Humbert*, 768 F. App'x 317, 318 (6th Cir. 2019), *Union Oil Co. of California*

v. John Brown E&C, 121 F.3d 305 (7th Cir. 1997) , or *Verzilli v. Flexon, Inc.*, 295 F.3d 421, 423 (3d Cir. 2002) , did the appellate courts vacate or hold "ineffective" the judgments from which an appeal was taken.

III. RESPONDENT'S "BAD VEHICLE" ARGUMENTS ARE LEGALLY FORECLOSED

1. Respondent asserts that this is a "bad vehicle" because the Federal Circuit dismissal of Respondent's appeal was "flat out wrong" and would complicate consideration of the case. (Opp. 20, 18). But, the Federal Circuit's underlying judgment to dismiss Respondent's appeal for lack of jurisdiction cannot be challenged.

2. For at least the last 140 years, this Court has consistently held that a Respondent must cross-petition in order to alter the judgment below. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) ("respondent's argument … would alter the Court of Appeals' judgment, which is impermissible in the absence of a cross-petition from Respondent"); *Nw. Airlines, Inc. v. Cty. of Kent, Mich.*, 510 U.S. 355, 364 (1994) ("A cross-petition is required … when the respondent seeks to alter the judgment below"); *Helvering v. Pfeiffer*, 302 U.S. 247, 251 (1937) ("an appellee cannot without a cross-appeal attack a judgment entered below"); *Town of Mt. Pleasant v. Beckwith*, 100 U.S. 514, 527 (1879) ("Parties who do not appeal … may be heard in support of the decree … but they cannot be heard to show that the decree below was erroneous"). Yet, even though Respondent was a judgment loser below in that its appeal was dismissed for lack of jurisdiction, Respondent did not petition or cross-appeal/petition the Federal Circuit's judgment, and thus cannot

raise any issues as to the validity of the Federal Circuit's dismissal.

3. Perhaps recognizing that it is "bound by [its] choice" to not cross-petition to alter the judgment below, *Federated Dep't Stores, supra,* 452 U.S. at 400–01, Respondent cites *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) . But that cited footnote does not involve a party seeking to alter the judgment appealed from.

4. Respondent's further arguments (Opp. 19-20) are inapt, even if they were true—which they are not. (App. 26a-28a). Parties cannot create Article III or subject-matter jurisdiction by agreement or estoppel. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("no action of the parties can confer subject-matter jurisdiction upon a federal court" and "the consent of the parties is irrelevant, principles of estoppel do not apply") (internal citations omitted).

IV. PETITIONER'S SECOND QUESTION DESERVES REVIEW

1. Petitioner agrees that the second question raises a matter of "first impression" in that no court has ever held that a party is not entitled to any appellate judicial review at any time of a court's judgment that was adverse to the appealing party.

2. There is no inconsistency between dismissing Respondent's appeal and considering Petitioner's cross-appeal. Respondent's appeal was dismissed because Respondent voluntarily requested that adverse consent judgment. On the other hand, unlike Respondent's

voluntary abandonment of its case on liability and damages, Petitioner's cross-appeal was from the court's rulings that were final in every sense of the word, and there was nothing more that could have been done by the court or parties with respect to the adverse rulings against Petitioner.

V. RESPONDENT'S QUESTION FOR REVIEW IS IMPROPER

1. Respondent proposes an additional question for review, "Whether a court of appeals has appellate jurisdiction when a party consents to judgment because a district court's prior legal holding makes it impossible to prevail on the merits of its claims."

2. The proposed question is improper because Respondent has not cross-appealed/petitioned. (III, *supra*).

3. Further, Respondent's proposed question contradicts the record. The district court held that its evidentiary ruling did not preclude Respondent from going forward with its case (App. 27a-28a), and the Federal Circuit specifically held that the district court's evidentiary rulings did not prevent Respondent from prevailing on the merits, but only limited damages. (App. 10a-11a).

VI. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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