No. 20-471

IN THE
Supreme Court of the United States

Y.W.,

Petitioner,

vs.

PATRICIA AUFIERO, UNKNOWN TEACHER, AND THE NEW MILFORD BOARD OF EDUCATION,

Respondents.

On Petition for a Writ of *Certiorari*
to the Supreme Court of the United States

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this Court need to reconsider well-established precedent governing final decisions to determine whether a District Court's order dismissing an entire action following a settlement between a plaintiff and the remaining defendants—a settlement that was placed on the record–as final for the purposes of appellate jurisdiction?

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The United States Court of Appeals of the Third Circuit entered an order, dated April 27, 2020, dismissing Petitioner's Notice of Appeal for lack of jurisdiction (a1).[1] On June 1, 2020, the Third Circuit denied Petitioner's petition for rehearing (a5).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

INTRODUCTION

Petitioner initiated this litigation against several defendants over five years ago. Three of them—Patricia Aufiero, Unknown Teacher, and the New Milford Board of Education ("Respondents")—responded with a motion to dismiss, and on September 10, 2015, the United States District Court of the District of New Jersey entered an order dismissing the claims against them with prejudice (a11-12). Over three years later, Petitioner settled his case with the remaining defendants, and after the parties placed a settlement on the record before the District Court on November 8, 2018 (a10), the District Court issued an order dismissing the case (a7). Although the District Court's Local Rules required the

[1] Documents referenced as (a) refers to Petitioner's Appendix attached to his Petition for Writ of *Certiorari*

settling parties to file a stipulation of dismissal within sixty days after the entry of the order, they failed to do so until August 7, 2019, nine months later—and seven months out of time (a8). The District Court thereafter dismissed the case by way of order the next day (a9), and six days later, Petitioner appealed the District Court's 2015 Order dismissing the case against Respondents to the United States Court of Appeals for the Third Circuit (a13-14).

A little more than a week after receipt, the Third Circuit, *sua sponte*, issued an order requesting responses from both parties to address the issue of the two dismissal orders, noting that if the time to appeal began in November 2018, the appeal was untimely (a3-4). After considering the responses from the parties, the Third Circuit dismissed the appeal for lack of appellate jurisdiction (a1-2). After requesting a rehearing *en banc*, which the Third Circuit denied (a5-a6), Petitioner filed a Petition for a Writ of *Certiorari* ("Petition") to this Court.

The issue in this case is whether or not a litigant may be rewarded for his dilatoriness and failure to follow applicable court rules by filing a stipulation of dismissal following a settlement of the remaining claims in his lawsuit over seven months late, and then using that late filing to appeal previously dismissed claims against other defendants. That is

what Petitioner has done here, who, because of his own error and with no other options, now urges this Court to review an issue that has long been decided: when a District Court's dismissal is considered a final decision under 28 U.S.C. § 1291 for appellate jurisdiction. Respondents submit that Petitioner's attempts to circumvent the finality of the judgment must fail, and, for the reasons set forth herein, there is no basis to grant a Writ of *Certiorari* in this matter.

SUMMARY OF ARGUMENT

Petitioner frames the issue as whether a voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41(a) is a final decision for appellate review. The true issue, however, is far narrower: whether a District Court's order unconditionally dismissing an entire action following a settlement between the parties that was placed on the record is a final decision under 28 U.S.C. § 1291. This Court has already decided that issue, which has well-established precedent. Petitioner thus characterizes this matter as involving a voluntary dismissal without prejudice in an effort to create a conflict with this Court's decision in *Microsoft v. Baker*, 137 S. Ct. 1702 (2017), and to create a purported conflict amongst several Circuits. These attempts must fail.

This Court has held in numerous opinions that the finality of a decision for the purposes of appellate jurisdiction, which "is to be given a practical rather than a technical construction," is a decision "that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Microsoft*, 137 S. Ct. at 1712. Notably, this Court has even held "that the fact that a dismissal was without prejudice to the filing of another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this as far as the District Court was concerned." *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, n.1 (1949). In considering the District Court's order, the Third Circuit followed well-established precedent and determined that the District Court's November 8, 2018 order ("November Order") dismissing the entire matter—whose sole remaining issue had been settled with the settlement terms placed on the record—was a final decision from which Petitioner filed an untimely appeal (a1-2).

Petitioner further argues that the Third Circuit's decision, in both this matter and in other decisions regarding finality of a dismissal, contravene this Court's ruling in *Microsoft*; not so. While the facts and circumstances in Microsoft differ greatly from the instant matter, the

Third Circuit's order both in this case and its past decisions are entirely consistent with the law governing the finality of a decision, and the policies behind the reasons for doing so: the avoidance of one-sided dismissals for the sake of appellate review, piecemeal appeals and protracted litigation, and the circumvention of established procedural rules. None of the facts in this case mandate a different result.

Petitioner's further reliance on an alleged Circuit split is entirely misplaced, and has no relevance to this matter. Indeed, the Circuit split to which Petitioner alludes concerns the appealability of voluntary dismissals without prejudice, which, as noted above, was not the type of dismissal that the Third Circuit deemed final in this matter. While some Circuits' decisions may vary, those are largely due to the specific facts involved in each case, since such decisions are fact-sensitive. But the analysis and fundamental approach utilized by the Circuits is consistent. Indeed, in determining whether or not decisions are final, the courts of the various Circuits take a practical (rather than a technical) construction, preserving the proper balance between the trial and appellate courts so as to "minimize the harassment and delay that would result from repeated interlocutory appeals, and promote the efficient administration of justice." *Microsoft,* 137 S. Ct. at 1712.

Lastly, Petitioner's request for this Court to exercise supervisory power warrants no consideration, because under no circumstances did the Third Circuit display improper conduct or a disrespect to the judicial proceedings in finding Petitioner's appeal untimely. There are three distinct reasons why this Court should not exercise supervisory power: First, Petitioner's claim that the Third Circuit contravened its own Internal Operating Procedures ("IOP") for deciding summary actions because it was not decided by a unanimous vote is incorrect and, even if true, has no merit. Importantly, this was not a summary action, but a motion decided in accordance with the Third Circuit's IOP Rule 10.3, which permits a panel to vote on a motion to dismiss an appeal for untimeliness, noting a dissenting vote, if any, on the order. That is precisely the motion and order decided here.

Second, Petitioner's claim that the November Order failed to give notice that it was ending the litigation is not accurate. Unlike the case Petitioner relies upon, where the parties had requested a sixty-day dismissal to finalize a settlement that they had promised to submit to the court for approval, the November Order had no such provisions. *See Papera v. Penn. Quarried Bluestone Co.*, 948 F.3d 607, 609 (3d. Cir. 2020). To the contrary, prior to the District Court dismissing the matter,

the parties agreed to the settlement and placed the terms on the record before the court on November 8, 2018. Thus, Petitioner's claim that he had no fair warning of the case's dismissal is disingenuous.

Third, Petitioner claims that this matter was voluntarily dismissed by way of a stipulation of dismissal, and that the Third Circuit holding the November Order as final, deprived the parties of the right to a discontinuance by stipulation. However, Petitioner fails to recognize that, if the November Order does not govern the finality of this matter, then this matter is governed by Local Rule of Civil Procedure 41.1(b). This Local Rule requires, following notification of settlement, that the parties file a stipulation of dismissal within sixty days after the entry of the order. Failure to do so, or failure to request an extension of time, requires the Court to dismiss the action with prejudice. Local Rule 41.1(b). Here, Petitioner neither filed a stipulation of dismissal nor requested an extension of time to do so within sixty days of the November Order. Even assuming, *arguendo*, that the November Order was not "final" for the purpose of appellate review, at the very latest, the matter was effectively dismissed with prejudice on January 7, 2019. Under either scenario, Petitioner's August 14, 2019 notice of appeal is

untimely. Therefore, the Third Circuit's order denying Petitioner's appeal as untimely is correct.

Ultimately, this Petition is nothing more than Petitioner's attempt to correct an error on his part for failing to timely file an appeal. Therefore, for the reasons stated in greater detail below, the Petitioner has not demonstrated compelling reasons for this Petition to be granted, and, therefore, this Court should not grant the Writ of *Certiorari*.

REASONS FOR DENYING PETITION

I. This Court should deny the Petition for a Writ of *Certiorari* because the Third Circuit's decision to deny Petitioner's appeal for lack of jurisdiction, and its past opinions deciding when a dismissal is deemed a final decision under 28 U.S.C. § 1291, do not contravene *Microsoft v. Baker*.

When determining appellate jurisdiction, 'the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.'" *Microsoft*, 137 S. Ct. at 1712 (citing *McLish v. Roff*, 141 U.S. 661, 665-666 (1891)). Thus, "the term 'final decision' has a well-developed and longstanding meaning. It is a decision that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'" *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000) (citing *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Coopers & Lybrand v. Livesay*, 437 U.S.

463, 467 (1978)). The final judgment rule "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft*, 137 S. Ct. at 1712. Notably, this Court has recognized that "finality is to be given a practical rather than a technical construction," precisely the approach the Third Circuit took when deciding that the November Order was a final decision.

Petitioner contends that "[t]he November Order was without prejudice under Rule 41(a)(1)(B) or (a)(2) and was premised on a pending settlement where the action would continue for trial if the settlement fell through." As a threshold matter, neither Rule 41(a)(1)(B) or (a)(2), which allow plaintiffs to voluntarily dismiss their claims, are applicable to the November Order. The dismissal in November 2018 was neither a notice of dismissal filed by Petitioner or a court-issued order at the request of Petitioner. In fact, Petitioner concedes this very point stating that the dismissal came without the request of either party.

While Petitioner attempts to have this Court believe otherwise, the November Order is clear. There is no reference to a pending or tentative settlement, or that dismissal was contingent upon the parties advising

the court of the status of the settlement. To the contrary, the settlement terms were placed on the record. Specifically, the November Order states that "the parties having indicated that the *action has been settled* and the terms of the settlement having been placed on the record in open court" it is therefore "[ordered] that the above captioned matter is hereby *dismissed*" (emphasis added). With no claims outstanding and no defendants remaining, the concern for protracted litigation and piecemeal appeals is absent. Simply put, the District Court found the litigation to have ended, leaving nothing further for it to do. Thus, following established precedent, the Third Circuit appropriately took a practical approach and deemed the November Order final.

A. The facts of this case are distinguishable from *Microsoft.*

Since he cannot directly assail the Third Circuit's approach, Petitioner now seeks to create an issue not present here by comparing his case to *Microsoft* as an end-around to the Third Circuit's decision. His arguments fail, however, because the facts of that case are not analogous to this matter. *Microsoft* involved a District Court's denial of a class certification, and the respondents' attempt to "transform a tentative interlocutory order ... into a final judgment within the meaning of 28 U.S.C. § 1291 simply by [voluntarily] dismissing their

claims with prejudice." *Id.* at 1715. It was, effectively, an attempt to subvert the final-judgment rule and bypass court rules governing the denial of class certification. This Court found that respondents' "voluntary-dismissal tactic ... invites protracted litigation and piecemeal appeals[,]" and ultimately stated that "the decision whether an immediate appeal will lie resides exclusively with the plaintiff" needing only to dismiss her claims with prejudice. *Id.* at 1713. Under this theory, plaintiff "may exercise that option more than once, stopping and starting the District Court proceedings with repeated interlocutory appeals." *Id.*

This Court explained that, "[t]he one-sidedness of respondents' voluntary-dismissal device 'reinforce[s] our conclusion that [it] does not support appellate jurisdiction of prejudgment orders denying class certification.'" *Id.* at 1715. To do so permits only the plaintiffs, and never the defendants, to force an immediate appeal of an adverse ruling. *Id.* This Court also found that "respondents' dismissal tactic undercuts Rule 23(f)'s discretionary regime[,]" which permits an appeal from an order granting or denying class-action certification. *Id.* at 1714.

Unlike *Microsoft*, there was no interlocutory order or voluntary dismissal entered in this case in an attempt to dismiss the matter to

obtain a final judgment for appellate jurisdiction, without ever litigating the merits of the claims, or a circumvention of a rule of procedure. Rather, the District Court dismissed the entire action following a settlement between the parties on the sole remaining issue in the matter that was placed on the record before the District Court (a9). Petitioner's attempt to analogize his case to *Microsoft* is devoid of merit.

B. The Third Circuit decisions governing finality of a decision do not conflict with this Court's precedent that was followed in Microsoft.

Petitioner's attempts to undermine a number of Third Circuit's decisions involving the issue of whether a dismissal is final and appealable, and to create a purported conflict with the decisions of this Court, are of no avail. The Third Circuit's order is not inconsistent with its own precedent, whose decisions have been guided by this Court's own reasoning in determining when a dismissal is final and subject to appellate review.

Petitioner asserts that "[i]n the Third Circuit there is no 'distinctions within the universe of dismissals.'" However, Petitioner is under a mistaken belief that the sole determining factor in determining whether a decision is final, is if the decision indicates with or without prejudice; that is not true. In fact, as demonstrated above, any distinction between

different types of dismissals is not material to this Court's analysis for determining what may be a final decision. Even this Court has stated "that the fact that a dismissal was without prejudice to filing of another suit does not make the cause unappealable." *Wallace & Tiernan Co.*, 336 U.S. 793, n.1. Therefore, the fact that there is no "distinctions within the universe of dismissals" in the Third Circuit is not relevant.

Petitioner further claims that the Third Circuit's precedent of *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002) and *Freeman v. Pittsburg Glass Works, LLC*, 709 F.3d 240 (3d Cir. 2002) cannot be reconciled with *Microsoft*. He also claims that even following this Court's *Microsoft* opinion, the Third Circuit continued to disregard Microsoft in its decision in *Cup v. Ampco Pittsburgh Corporation*, 903 F.3d 58 (3d Cir. 2018). Petitioner's position has no merit. Principally, the cases cited by Petitioner involve orders compelling arbitration, not orders dismissing a case following settlement of the entire action. Nonetheless, the Third Circuit's analysis in determining whether a dismissal is final remains consistent with that of this Court.

In *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002), the Third Circuit held that a District Court's order compelling arbitration and dismissing plaintiff's claims without prejudice is final. *Id.* The Third

Circuit relied upon this Court's reasoning in *Green Tree*. In that case, the District Court dismissed the plaintiff's claims with prejudice after referring the parties to arbitration. 531 U.S. at 86. In considering whether that dismissal was an appealable final order, this Court held that the "order plainly disposed of the entire case on the merits and left no part of it pending before the court." *Id.* This Court acknowledged that while the parties may bring "a separate proceeding in a District Court to enter judgment on an arbitration award once it is made (or to vacate or modify it) . . . the existence of that remedy does not vitiate the finality of the District Court's resolution of the claims." *Id.* Thus, anyone wishing to challenge an arbitration after dismissal of the case must bring a separate action. *Id.*

As in *Green Tree*, every claim in *Blair* was held to be arbitrable, and no claim remained before the court. *Blair*, 283 F.3d at 602 Thus, there was "nothing more for the court to do but execute judgment." *Id.* As such, the Third Circuit found that the order fell within this Court's definition of an appealable final order. *Id.* Certainly, the parties would have had an opportunity to challenge the arbitration decision, but as this Court opined in *Green Tree*, that can be done by way of another filing which is separate and apart from the initial proceeding deemed final.

With similar procedural facts as *Blair*, the Third Circuit reached a different conclusion in *Freeman v. Pittsburg Glass Works, LLC*, 709 F.3d 240 (3d Cir. 2002). However, unlike *Blair* and *Green Tree*, "the district court never mentioned a dismissal – either with or without prejudice." *Freeman*, 709 F.3d at 247. Instead, following the close of discovery, a settlement conference was held whereby the parties agreed to proceed to arbitration. *Id.* Thereafter, the case was administratively closed, leaving the option for the court to reopen the case either on its own or at the request of either party. *Id.* As the Third Circuit explained, "by closing the case – rather than dismissing it – the court maintained an implicit supervisory role over the arbitration." *Id.* This, unlike *Blair, Green* Tree, and the instant matter, did not end the litigation on its merits and certainly left something more for the court to do, which was why the District Court retained jurisdiction.

Following *Freeman*, in *Cup v. Ampco Pittsburgh Corporation*, the Third Circuit decided that an order compelling arbitration is final for the purposes of appellate review, despite the matter being administratively closed by the District Court. *Cup*, 903 F.3d at 62. Unlike *Freeman*, however, "where the plaintiff's substantive claim remained pending despite the arbitration order," the District Court in

Cup dismissed the remaining substantive claims prior to compelling arbitration. *Id.* Consistent with precedent, the Third Circuit found that the dismissal ended the litigation on the merits and left nothing more for the court to do. *Id.* Thus, holding that "the District Court's order falls within the Supreme Court's definition of an appealable final order." *See also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 n. 1-2 (2019) (finding that an order compelling arbitration but also dismissing the claims qualifies as a "final" decision).

It is clear that the Third Circuit's decisions in *Blair*, *Freeman*, and *Cup* share this Court's understanding of a final decision – "a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute judgment." *Green Tree*, 531 U.S. at 86. To say that these cases cannot be reconciled with *Microsoft* is false. Although *Microsoft* is inapplicable to the issues raised in this Petition, the fundamental reason for this Court's decision in *Microsoft* was to foreclose the ability of any one party to manipulate appellate jurisdiction, which can invite piecemeal appeals and protracted litigation. *Microsoft*, 137 S. Ct. at 1713. Allowing such manipulation would go against the general rule that "the whole case and every matter in controversy in it [must be] decided in a single appeal." *Id.* at 1712

(quoting *McLish v. Roff*, 141 U.S. 661, 665 (1891)). Just as the Third Circuit followed those principles when deciding what constituted a final decision in *Blair*, *Freeman* and *Cup*, so too did it when it gave finality to the November Order in this matter.

C. The precedent the Third Circuit follows to guide its decisions in determining the finality of a dismissal is clear and does not create a trap for the unwary or procedural uncertainty.

Petitioner further argues that "the Third Circuit's precedent as applied is a trap for the unwary and creates a guessing procedure" and that "[a] lawyer would need to file a notice of appeal from every tentative dismissal order to avoid malpractice." Petitioner's argument is baseless. As clearly set forth herein, the Third Circuit's precedent is consistent with the precedent this Court has established.

In *Weber v. McGrogan*, 939 F.3d 232 (3d Cir. 2019), a case upon which Petitioner relies, a District Court issued an order dismissing a case without prejudice and afforded plaintiff a certain amount of time to file an amended complaint. The *pro se* plaintiff, however, misunderstood the procedures for appeal, and more specifically, when to appeal; she thus filed an appeal of the dismissal order. *Id.* The Third Circuit, dismissing the case for lack of jurisdiction, concluded that the District Court's order was not final, because the "deficiency in a complaint may be corrected

by the plaintiff without affecting the cause of action," simply by filing an amended complaint or showing an intent to stand on the complaint; the plaintiff did neither. *Id.* at 238. In such a scenario, the Third Circuit rightly concluded that the District Court needed to enter a final order. *Id.* at 242. Simply put, the District Court's initial order did not end the litigation on the merits, leaving nothing further for the court to do.

The Third Circuit's precedent as applied is neither a trap for the unwary nor a guessing game. As the Third Circuit has demonstrated through multiple decisions, if, when taking a practical approach, it is evident that a District Court's dismissal leaves nothing further for the court to do, such as in *Blair*, *Cup*, and in the instant matter, it has consistently held the decision to be final and appealable. By contrast, where a District Court dismisses or administratively closes an action, leaving issues within its jurisdiction, such as in *Freeman* and *Weber*, the Third Circuit has correctly determined that such dismissals are not final or appealable. Therefore, because Petitioner's arguments are completely basis, his Petition must be denied.

II. **Petitioner's claim that review is warranted to resolve a Circuit conflict on whether an appeal may be taken by voluntarily dismissing claims or parties from an action is inapplicable here, because the order in this case was not a voluntary dismissal.**

Petitioner argues that there is a conflict among the Circuits on whether an appeal may be taken by voluntarily dismissing claims or parties from an action. But this ignores the fact that the November Order was not a voluntary dismissal initiated by Petitioner under Rule 41(a). Rule 41(a) provides, in part, that a plaintiff may voluntarily dismiss an action without a court order by the filing of a notice of dismissal or a stipulation of dismissal. A plaintiff may also request for the court to enter an order dismissing an action. Rule 41(a)(2). Generally, these dismissals are without prejudice. Rule 41(a)(1)-(2).

Here, Petitioner neither filed nor requested the entry of the November Order. Indeed, Petitioner concedes in the Petition that "the District Court *sua sponte* dismissed the action stating, the parties 'indicated that the action has been settled and the terms of the settlement having been placed on the record in open court.'" Petition at 3. In other words, Petitioner seeks this Court's review on an issue that is not even present in this matter. Accordingly, this Court has no reason to give consideration to Petitioners' claim that a conflict exists among the Circuits regarding voluntary dismissals and their finality.

III. To the extent this Court seeks to review the purported Circuit conflict on whether an appeal may be taken by voluntarily dismissing claims or parties from an action, there is no such material conflict that supports a grant of a Writ of *Certiorari*.

Notwithstanding the foregoing, even if this Court seeks to review the purported Circuit conflict, there is not a material conflict that supports a grant of a Writ of *Certiorari*. In support of his request, Petitioner briefly cites a number of cases from eight Circuits to demonstrate this purported conflict. However, while some of the decisions of these Circuits may vary (and even some within a Circuit), it is only because the outcomes are fact-sensitive; the legal analysis utilized by the Courts of Appeal for the various Circuits to determine when a decision is final and appealable is consistent. More importantly, each Circuit shares the same fundamental goal of preventing one-sided initiated appeals and protracted litigation and piecemeal appeals. Quite to the contrary of Petitioner's assertion, the consistency among Circuits is readily apparent in the cases Petitioner cites in support of his request.

For instance, the Court of Appeals for the Eleventh Circuit stated that "[u]nder section 1291, '[a] final decision is one by which a district court disassociates itself from a case." *Corely v. Long-Lewis, Inc.*, 965 F.3d 1222, 1227 (11th Cir. 2020) (quoting *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408 (2015)). In *Corely*, the defendants were dismissed by

way of summary judgment, with the exception of two defendants, who filed for bankruptcy. *Id.* at 1226. The plaintiff moved for a voluntary dismissal of the bankrupt defendants so that she could proceed to appeal the grant of summary judgment. *Id.* In recognizing that "[a] 'final decision' is one by which a district court disassociates itself from a case," the Eleventh Circuit found the District Court's grant of a plaintiff's motion to dismiss the remaining defendants, who had been eliminated as a matter of law in the bankruptcy court, ended the suits so far as the District Court was concerned. *Id.* Accordingly, the Eleventh Circuit held that it had jurisdiction over the matter. *Id* at 1228.

Petitioner points to the Court of Appeals for the Tenth Circuit's decision where it refused to consider an appeal on a matter in which a claim against one of the defendants who had filed for bankruptcy was stayed, while the remaining defendants were dismissed with prejudice. *Eastom v. City of Tulsa*, 783 F.3d 1181, 1183 (10th Cir. 2015). But there is no conflict between the Tenth and Eleventh Circuits, because unlike *Corely*, where the bankrupt defendants were dismissed as a matter law, in *Eastom* the bankrupt defendant's claim was stayed, and thus remained pending in the lower court. *Id.* The Tenth Circuit therefore

properly held it lacked jurisdiction because the order granting the stay did not have the finality associated with a dismissal. *Id.*

The Ninth Circuit's decision in *Galaza v. Wolf*, 954 F.3d 1267, 1271 (9th Cir. 2020) similarly does not implicate an inter-Circuit conflict. There, the Court of Appeals denied an appeal of certain dismissed claims where the plaintiff did not voluntarily dismiss her remaining retaliation claim. Ordinarily, the Ninth Circuit permits appeals from voluntary dismissals without prejudice where there was no evidence of any attempt to manipulate appellate jurisdiction and the plaintiff had sought the District Court's permission to dismiss all remaining claims. *Id.* at 1270 (citing *James v. Price Stern Sloan, Inc.*, 283, F.3d 1064, 1066-68 (9th Cir. 2002)). But in *Galaza*, the plaintiff's retaliation claim remained pending, and the District Court did not separately mention that claim in its order; therefore, the Ninth Circuit properly concluded that the matter was not ripe for appeal. *Id.* at 1272.

As with this Court, the Court of Appeals for the District of Columbia Circuit has held that "allowing parties to create their own superficial finality could 'generate overlapping lawsuits, piecemeal appeals, and splintered and harassing litigation.'" *Shatsky v. Palestine Liberation Org.*, 955 F.3d 1016, 1026 (D.C. Cir. 2020) (citation omitted). The

Shatsky case, and its line of analysis, likewise does not conflict with the analysis used by the other Circuits. There, the plaintiffs had dismissed the Syrian defendants without prejudice twelve years prior to the District Court granting the Palestinian defendants' motion for summary judgment, which the plaintiffs appealed. *Id.* at 1025. The Palestinian defendants argued that because the plaintiffs had voluntarily dismissed the Syrian defendants without prejudice, the District Court's grant of summary judgment against them was not a final and appealable judgment. *Id.* In other words, the Palestinian defendants effectively sought to preclude appellate review of the case because defendants dismissed over a decade earlier theoretically could be brought back into the case. The D.C. Circuit did not agree, concluding that the plaintiffs never intended to create their own superficial finality simply to create a right of appeal because their voluntary dismissal of the Syrian defendants occurred twelve years prior to the District Court's dismissal of the Palestinian Defendants. *Id.* at 1027. The intent to do so was clearly lacking. Thus, that ruling does not conflict with the analysis used by the other Circuits.

Similar to the D.C. Circuit, the Court of Appeals for the Second Circuit has held that allowing a plaintiff to voluntarily dismiss (without

prejudice) some of its claims in order to seek appellate review violates "the long recognized federal policy 'against piecemeal appeals.' *Rabbi Jacob Joseph School v. Province of Mendoza*, 425 F.3d 207, 209 (2d Cir. 2005). In keeping with this policy, the Second Circuit in *Rabbi Jacob* found that the plaintiff's voluntary dismissal of some of its claims without prejudice was not a final and appealable order. *Id.* at 211. Notably, unlike the plaintiff in *Shatsky*, the plaintiff in *Rabbi Jacob* had promptly appealed the District Court's order following its voluntary dismissal, thereby showing a clear intent to manufacture a right of appeal before the case was legitimately over in the District Court. *Id.* Thus, the Circuits share a consistent approach, which is to ensure that there is finality in the orders being appealed.

Furthermore, Petitioner attempts to establish an intra-Circuit conflict within the Third Circuit by comparing other Third Circuit opinions to its opinions in *Blair*, *Cup*, and *Freeman*. This represents a misrepresentation of these cases, which do not establish an intra-Circuit conflict. Petitioner first states that "the Third Circuit held that an order closing a case 'after the full and final settlement' is not a 'final decision' even if there was a mistaken assumption that litigation has terminated." *See Penn. W. Assocs., Inc. v. Cohen*, 371 F.3d 118 (3d Cir.

2004). While on its face the *Penn.* decision may appear to support Petitioner's position, it is entirely consistent with *Freeman* and *Cup*. Much like the case in *Freeman*, the District Court in *Penn.* only administratively closed the case, and as in *Cup*, there was no dismissal, with or without prejudice. *Penn.* 371 F.3d at 121). Therefore, the Third Circuit's opinion in *Penn* in no way conflicts with its other decisions.

Petitioner next cites to *Morton International v. A.E. Staley Manufacturing, Company*, 460 F.3d 470, 477 (3d Cir. 2016), wherein the Third Circuit held that "[a]n order dismissing a complaint without prejudice is a not a final and appealable order," and *Weber*, where it similarly held that a "dismissal without prejudice did not provide for appellate jurisdiction." These decisions, however, are also not in conflict with other Third Circuit opinions. In *Morton*, the order in question "dismissing the remaining defendants without prejudice did not purport to end the litigation on the merits and specifically contemplated that there could be subsequent proceedings in which the litigation over the controversy would resume." *Morton*, 460 F.3d at 482. Similarly, in *Weber*, the District Court's order dismissing a complaint without prejudice left open the opportunity for the plaintiff to cure the deficiencies in the complaint. *Weber*, 939 F.3d at 238. The Third Circuit

was well within reason to find that both of these orders were not final because, as it held in *Blair* and *Cup*, neither order ended the litigation on the merits and left nothing more for the court to do but execute the judgment. *Id.* at 238. Again, there is no apparent conflict amongst the Third Circuit's decisions.

Petitioner appears to also claim that because the Court of Appeals for the Fourth Circuit distinguished a matter from *Microsoft*, the Fourth Circuit misapplied law, or somehow issued a decision that conflicts with this Court's precedent set in *Microsoft*. This is also inaccurate. Notably, the Fourth Circuit holds that an order dismissing an action without prejudice may be appealable, and when it determined the finality of a voluntary dismissal in *Affinity Living Group, LLC v. StarStone Specialty Insurance Company*, 959 F.3d 634, 637 (4th Cir. 2020), it took into consideration this Court's concerns addressed in *Microsoft* regarding the "manufacturing" of finality through a voluntary dismissal. *See also Bing v. Brivo Sys., LLC*, 959 F.3d 605, 614 (4th Cir. 2020).

In *Affinity*, the District Court granted judgment on the pleadings against the plaintiff for counts 1 and 2. Id. at 635. The plaintiff filed a stipulation of dismissal on counts 3 and 4, and sought to appeal. *Id.* The Fourth Circuit carefully considered whether the plaintiff's appeal was

simply an attempt to create a right of appeal, just as the plaintiffs had done in *Microsoft*. *Id.* at 638. However, unlike in *Microsoft*, where the plaintiffs reserved their right to revive their dismissed claims if the order striking class certification was reversed on appeal, the counts that were voluntarily dismissed in *Affinity* were legally deficient without counts 1 and 2. *Id.* In other words, those counts could not survive on their own. Because any amendment to counts 3 and 4 could not revive the cause of action in the case, the Fourth Circuit found there was nothing left for the District Court to do and held that the voluntary dismissal without prejudice was a final judgment. *Id.* The Fourth Circuit thus concluded that "the case was not just practically over but legally over." *Id* at 639. As such, while there is a distinguishing fact between these two cases (the ability to revive a claim), the analysis applied by the Fourth Circuit is entirely consistent with that applied in *Microsoft*. The Fourth Circuit, therefore, did not misapply law or conflict with this Court's decision in *Microsoft*.

Lastly, Petitioner attempts to establish a conflict within the Court of Appeals for the Fifth Circuit. However, Petitioner neglects critical facts that lead to the Fifth Circuit's opposite holdings. For instance, in *CBX Res., L.L.C. v. ACE American Insurance Company*, 959 F.3d 175, 176

(5th Cir. 2020), the plaintiff was the party who voluntarily initiated the dismissal of its remaining statutory claims without prejudice following a denial of its claim for declaratory judgment. Thus, because plaintiff's statutory claims were not resolved in the District Court, the Fifth Circuit held that plaintiff's voluntary dismissal was not a final appealable judgment. That does not conflict with the ruling in *Umbrella Insurance Group, LLC v. Wolters Kluwer Financial Services, Inc.*, 972 F.3d 710, 712 (5th Cir. 2020), because the plaintiff had not voluntarily dismissed any claims; rather the District Court granted a Rule 12(b)(6) motion and dismissed "all claims" without prejudice. *Id.* Thus, the Fifth Circuit concluded that "the district court denied relief, dismissed the case, and ended this suit so far as the court was concerned." *Id.* at 713. While a superficial review makes it clear that the results of those decisions differ, the Fifth Circuit's analysis in *CBX* and *Umbrella Insurance* are not in conflict. A critical fact in *Umbrella Insurance* that was lacking in *CBX* is the fact that the District Court was involved and declared "all claims" dismissed, whereas in *CBX*, it was plaintiff who initiated the dismissal in an effort to create a right of appeal. Those cases are simply not analogous, and the Court of Appeals' decisions are not in conflict.

In sum, Petitioner's claim that this Court's review is necessary because a conflict between Circuits creates confusion is baseless. The brief review of these cases above confirms that there is no material conflict among, or within, the Circuits. Instead, the Circuits, in following this Court's precedent, similarly analyze the finality of a decision or judgement when determining appellate jurisdiction. The varying opinions, if any, are a direct result of the merits presented in each case. The Circuit opinions are consistent with this Court's precedent set in *Microsoft* and in other opinions involving the finality of a decision, and, therefore, there is no basis to grant the Writ of *Certorari*.

IV. This Court's Supervisory Power is not necessary because under no circumstances did the Third Circuit depart from standard and ordinary course of judicial procedure; rather, it was Petitioner who failed to adhere to procedures that resulted in his untimely appeal.

This Court's Supervisory Power is unnecessary because the Third Circuit has not departed from standard and ordinary course of judicial procedures for three reasons. First, the Third Circuit did not act contrary to the procedures set in its own IOP. Second, the motion panel decision denying Petitioner's notice of appeal is in not inconsistent with recent precedent. Third, it was Petitioner's own neglect of Local Rules that deprived him of the right to file a stipulation of dismissal, not the Third Circuit's decision in this matter.

Petitioner insists that this matter was a summary action and because the Third Circuit's motion panel did not have a unanimous vote on the motion, there was an obvious departure from the acceptable and usual course of judicial proceedings. Petitioner is mistaken. Nowhere does the Third Circuit's order or decision indicate that this was a summary action (a1). In fact, the IOP for the Third Circuit provides, in part, that a summary action may be taken to affirm, reverse, vacate, modify, set aside, or remand "the judgment, decree, or order appealed from; granting or denying a petition for review; or granting or refusing enforcement of the order of an administrative agency." IOP Rule 10.6. A motion for lack of jurisdiction or untimeliness, however, is not a matter considered under a summary action. Indeed, these are motions governed under IOP Rule 10.3, which provides, in part, that a motion panel may grant a motion to dismiss an appeal for lack of jurisdiction or for untimeliness, and that "[t]he order notes a dissenting vote on request of the dissenting judge." Here, the motion filed was for lack of jurisdiction, and the Order dismissing Petitioner's appeal noted Judge Kent A. Jordan's dissent as required under IOP 10.3.1. The motion panel for the Third Circuit thus complied fully with its own IOP, revealing Petitioner's claim to be meritless.

Petitioner further claims that the motion panel departed from its own precedent set in *Papera*. However, that case dealt with the issue whether or not an order of dismissal that is silent as to whether or not the dismissal is with or without prejudice can bar a suit on the basis of claim preclusion, *not* whether or not the dismissal order was final for the purposes of appellate jurisdiction. *Id.* at 610. Moreover, unlike the dismissal in the instant matter, the settlement terms were not placed on the record, and the District Court in *Papera* conditionally dismissed the matter expressly stating that "the parties had sixty days to finalize the settlement." *Id.* That is not the case here. Since *Papera* is distinguishable from this matter, and had no relevance to the motion considered here, the motion panel for the Third Circuit did not depart from its own precedent.

Lastly, Petitioner argues that the Third Circuit holding the November Order as final deprived the parties from the right to discontinuance by stipulation. Petitioner's argument completely overlooks the District Court's Local Rules. *See* Local Rule 41.1(b). If the November Order was not a final order, as Petitioner has alleged, Petitioner was then required to follow the procedures under Local Rule 41.1(b), which he failed to do. Under that Local Rule, upon notification

that a case has settled, counsel must file a stipulation of dismissal within sixty days following the court's order. Local Rule 41.1(b). In the event that counsel fail to do so, or do not request an extended period of time to file same, the District Court must dismiss the action with prejudice. As of January 7, 2019, sixty days after the issuance of November Order, Petitioner neither filed a stipulation of dismissal nor requested an extension of time to do so. As a result, the District Court was obligated to dismiss this case with prejudice on that date. The Third Circuit in no way deprived the parties from the right of discontinuance by stipulation. To the contrary, any deprivation of rights was a consequence of Petitioner's inaction.

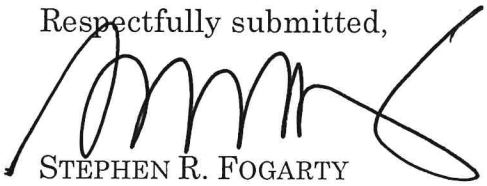
Essentially, Petitioner's position is that following a settlement that was placed on the record, the case should remain open for an indefinite period of time until it is convenient for Petitioner to dismiss the case, even if that violates the District Court's own rules. Such a holding results not only in undue prejudice to Respondents, but ignores this Court's holding that a plaintiff should not have the ability to create a right of appeal. In other words, Petitioner is attempting to create a right of appeal by dictating the timelines for appeal, which this Court has

expressly held cannot be done. As such, Petitioner's request for this Court's supervisory power should be denied.

CONCLUSION

For the reasons articulated above, Respondents respectfully requests that this Court deny Petitioner's petition for a Writ of *Certiorari*.

Respectfully submitted,



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