No. 20-471

**IN THE**
# Supreme Court of the United States

Y.W.,

Petitioner,

*v.*

PATRICIA AUFIERO,

Respondents.

On Petition for Writ of Certiorari
To the Court of Appeals for The Third Circuit

## PETITIONER'S REPLY FOR CERTIORARI

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## REPLY ARGUMENT

### RESPONDENTS ARE AVOIDING THE OBVIOUS, THE CLAIM WOULD CONTINUE IF SETTLEMENT WERE NOT CONSUMMATED BY NONPARTY. THE THIRD CIRCUIT CONTRAVENES *MICROSOFT CORP. V. BAKER*, 137 S. CT. 1702, 198 L. ED. 2D 132 (2017) BY APPLYING FINALITY TO A DISMISSAL WHERE A PARTY CAN REVIVE THE CLAIM.[1]

The Third Circuit treated as final the order, dated November 8, 2018 ("November Order"), though a party could revive the claim if settlement failed.

The gist of respondents' position is that the mere settlement creates finality—even when a party can revive the claim—and that FRCP 41(a) is inapplicable for settlements. Respondents recognize a Circuit split on "the appealability of voluntary dismissals without prejudice." (Br. Op. p. 5). Yet, respondents argue when the parties settle a case, a court can on its own terminate the action, without following FRCP 41. Respondents further claim that such dismissal carries finality, even though the dismissal is not "with prejudice" and the settlement is tentative. Thus, a reply is necessary.

1. The Petition asks the Court to determine whether the Court's holding in *Microsoft Corp. v. Baker*,

[1] The same issue is now before the Court in *CBX Resources, L.L.C., v. ACE American Insurance Company, et al*, 20-478, petition filed October 7, 2020, response requested November 10, 2020.

137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017) applies to a claim dismissed without prejudice, where further developments might continue or revive the claim.

Under *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001), a dismissal without prejudice merely removes the case from the court's docket and allows the claim to return before the same court. *Microsoft* holds that if a claim can be revived after dismissal there is no finality, as the claim is still actionable. Together, one would think, they present the principle that a dismissal without prejudice, where the last claim can continue or be revived in the same court, prevents "final decision" of § 1291 from operating. But the circuits are conflicted on this very issue. (Pt. Cert. p. 9-12).

Respondents omit *Semtek* and fail to address *Microsoft* on whether finality exists from a claim that can be revived in the same court. Instead, respondents assert that this case is distinguishable from *Microsoft* (Br. Op. p. 10-12) as only involving the "manufacturing" of finality (Id at 26). That is not so. *Microsoft* does not limit the standard to manufacturing of finality, the Court rejected finality where the parties "stipulated" to a voluntary dismissal of claims with a "right to revive" should the Court of Appeals reverse the District Court's interlocutory order. *Microsoft* at 1706-07. In comparison, the November Order came following a tentative settlement where the claim continues if the settlement falls apart.

2. Respondents are distorting the issue. This case presents three variables; (1) under *Microsoft*, when

the settlement allows the last claim to be revived or continued if the indemnifier (i.e., the employer, State, insurance, etc.) refuses the settlement, whether the dismissal upon such settlement triggers finality; (2) under FRCP 41(a), whether an anticipated settlement triggers finality without the parties moving for dismissal; and (3) when a court dismisses an action upon an anticipated settlement, whether such dismissal is without prejudice when the order does not state otherwise.

Here, if the State of New Jersey were to decline the settlement, the last claim would continue; a material fact respondents' fail to address. For the State to consider the settlement, the settling parties had to negotiate and execute a release. The Third Circuit applied finality despite Y.W.'s argument that the November Order was an administrative closing. *Microsoft* and *Semtek* applies, but Circuit precedent splinters in so many directions (Pet. Cert. p. 9-12)—as respondents recognize they "vary" even within a Circuit (Br. Op. p. 5, 20, 29)—calling for this Court to address the matter.

Respondents argue that the November Order was involuntarily final because "the parties indicated that the action has been settled." (Br. Op. p. 19). This argument would still fail because "§ 1291's firm final-judgment rule is not satisfied whenever a litigant persuades a district court to issue an order purporting to end the litigation." *Microsoft* at 1715. If the claim could be revived in the same court, there is no finality. *Id.* Since the last claim could continue if the settlement were not consummated by the nonparty, the District

Court's indication that the action is settled was not enough for finality. This is precisely the holding of *Microsoft* that finality must come from an inability to revive the voluntary dismissed claim in the same court.

3. Respondents distinguish *Blair v. Scott Specialty Gases*, 283 F.3d 595, 602 (3d Cir. 2002), *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 246–47 (3d Cir. 2013), and *Cup v. Ampco Pittsburgh Corp.*, 903 F.3d 58, 62 (3d Cir. 2018), as involving arbitration. (Br. Op. p. 13). Y.W.'s petition agrees *Blair*, *Freeman*, and *Cup* should be limited to the context of arbitration, inasmuch an appeal is taken pursuant to 9 USC § 16. (Pet. Cert. p. 7, n. 1). Nonetheless, *Freeman* explicitly distinguishes dismissals from administrative closings as depending upon the "words" used by the district court. *Freeman* at 246-48. Y.W. cited *Freeman* at 247, and *Penn West Associates v. Cohen*, 371 F.3d 118 (3d Cir. 2004) before the Third Circuit for the proposition that a procedural Order of dismissal is an administrative closing and will not on its own bring finality. Yet, the Third Circuit still treated the November Order as final, for using the words that "the above captioned matter is hereby dismissed." (a3, a9).

The November Order did not state whether its dismissal was with prejudice or without prejudice. The Third Circuit incorporated in its decision the parties' briefings. (a1). *Freeman* was cited and remains the only answer for the Third Circuit's erroneous conclusion that an order without prejudice is final by not drawing any distinctions within the universe of dismissals. *Freeman* at 246. Even if the Third Circuit had reason to

assume that the District Court intended the November Order to have finality, it was aware that under FRCP Rule 41(a) such order was without prejudice.

4. Respondents assert that the case law cited in the petition does not involve "the type of dismissal that the Third Circuit deemed final in this matter" (Br. Op. p. 5) and FRCP 41(a) does not apply here (Br. Op. p. 9). Thus, the gist of respondents' position is that the Third Circuit treated an atypical order with finality. Yet, there is no precedent that can explain the Third Circuit's finality. Neither the Third Circuit nor respondents cited to any authority for such result.

5. Respondents assert, without any authority, that *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 (1949) allows an appeal from a without prejudice dismissal. (Br. Op. p. 4, 13). Respondents, however, skipped the preceding sentence, that the record in *Wallace* "fails to sustain the appellees contention that the Government [appellant] invited the [district] court to enter this order denying relief and dismissing the action." *Id.* In *Wallace,* the government appealed from an adverse final decision, where the claim could not be revived in the same action. In this case, the question is whether finality could come from a dismissal without prejudice whenever a party can revive the claim within the same action; the answer is no. Respondents repeatedly ignore this distinction by failing to address that Y.W. could revive the claim in the same action if settlement failed.

6. Finally, unlike respondents' assertion (Br. Op. p. 17), the Circuits do call voluntary dismissal a

finality trap for the unwary. *Arnold v. Williams*, 979 F.3d 262, 266 (5th Cir. 2020), *CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175 (5th Cir. 2020), *Perry v. Schumacher Grp. of Louisiana*, 891 F.3d 954, 959 (11th Cir. 2018), *Hope v. Klabal*, 457 F.3d 784, 789 (8th Cir. 2006).

## I. THE CONFLICT AMONGST THE CIRCUITS DEMONSTRATE A NEED FOR THE COURT TO DECIDE WHEN A DISMISSAL WITHOUT PREJUDICE TRIGGERS 28 USC § 1291.

1. At first, Respondents acknowledge the Circuit split on "the appealability of voluntary dismissals without prejudice." (Br. Op. p. 5, 19). Then respondents contradict themselves that there is no "material conflict" on whether an appeal may be taken from a voluntary dismissal. (Br. Op. p. 20). Meanwhile, on the same page respondents admit "the decisions of these Circuits may vary (and even some within a Circuit)." (Id).

Apparently, the very case law cited by respondents call the conflict as causing "tension." *See Corley v. Long-Lewis, Inc.*, 965 F.3d 1222, 1230 (11th Cir. 2020). Nonetheless, respondents failed to address Circuit decisions quoted in the petition showing the conflict, such as *Dukore v. D.C.*, 799 F.3d 1137, 1140 (D.C. Cir. 2015), *Blue v. D.C. Pub. Sch.*, 764 F.3d 11, 17 (D.C. Cir. 2014), and *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362 (5th Cir. 2013). The importance of resolving this conflict should not be avoided especially since the Court of Appeals repeatedly struggles with circumstances where the meaning of finality is unsettled.

2. To distinguish this case from the circuit conflict, respondents assert that this case was dismissed following a "settlement" (Br. Op. p. 3), there was an adjudication on the merits because the settlement terms was placed on the record and that the November Order "dismissed the entire matter" creating finality (Br. Op. p. 4). Then respondents' turnaround, arguing that the "November Order was not a voluntary dismissal initiated by Petitioner under Rule 41(a)" (Br. Op. p. 19), and "neither Rule 41(a)(l)(B) or (a)(2), which allow plaintiffs to voluntarily dismiss their claims, are applicable to the November Order" (Br. Op. p. 9). Instead, respondents argue that "the matter was effectively dismissed with prejudice on January 7, 2019" by inference of NJ R USDCT L.Civ.R. 41.1(b). (Br. Op. p. 7, 32).

Respondents cannot reconcile their contradictory statements. Was the dismissal upon a settlement or was it involuntarily? Is the finality date November 8, January 7, or August 8? Is the November Order a dismissal with or without prejudice? Either way, a "separate-document" is required under FRCP 58 "to clarify when the time for appeal under 28 U.S.C. § 2107 begins to run." *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 384 (1978). The November Order did not do that. (a9). The Final Order dated August 8, 2019 does it ("Final Order"). (a7).

3. Respondents deny that FRCP 41(a) applies to the November Order. (Br. Op. p. 9). Respondents cannot affirmatively say that the November Order was with prejudice. Instead, respondents seek to stretch NJ R USDCT L.Civ.R. 41.1(b) as creating—60-days after the

November Order—a dismissal with prejudice (Br. Op. p. 7, 32), in contravention of Third Circuit precedent:

> Local Rule 41.1(b) does not, by its terms, restrict or modify the court's authority in any way. The rule merely supplements Federal Rule of Civil Procedure 41(a), inter alia, to create a procedure for attorneys to notify the court when a case settles as soon as possible so that the Court will not waste further effort on the case and so that it can readjust its calendar.

*Raab v. City of Ocean City, New Jersey*, 833 F.3d 286, 295 (3d Cir. 2016). In that way, Local Rule 41.1(b) resonates with *Semtek* for removing a case from the active status. Even if L.Civ.R. 41.1(b) applies, under *Raab* the November Order was subject to FRCP 41(a).

4. Moreover, the respondents argue the time to appeal began November 8, 2018 and continued for thirty days after January 7, 2019. (Br. Op. p. 4, 7, 32). This argument is illogically distorting the local rules to expand the time to file a notice of appeal to 60 days, beyond the 30 days provided in 28 U.S.C.A. § 2107, FRAP 4(a)(1). Respondents "presume that a local rule may override the Federal Rules of Civil Procedure—which is not possible." *Raab v. City of Ocean City, New Jersey*, 833 F.3d 286, 295 (3d Cir. 2016).

5. The Local Rule is reproduced here, in accordance with U.S. Sup. Ct. R. 14.1(f) in the supplemental appendices (sa1). There are two aspects to that provision. First, "the Court *shall enter* a 60-day order administratively terminating the case." (Emphasis added). Second, "Upon failure of counsel to file a proper stipulation of

dismissal within the 60-day period… the *Court shall*, pursuant to Fed. R. Civ. P. 41(a)(2), dismiss the action with prejudice and without costs…" (Emphasis added). For the 60-days to apply, the District Court must take affirmative action and these provisions are neither automatic nor self-executing.

Indeed, the Third Circuit holds that an order creating an administrative closing is neither "self-executing"—nor maturing by themselves—into a final order. *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 248 (3d Cir. 2013). "Although orders with a built-in timetable may mature into a final decision, they are not entirely self executing" a separate order "must still be entered into the docket before they can be considered final orders of dismissal." *WRS, Inc. v. Plaza Entm't, Inc.*, 402 F.3d 424, 428 (3d Cir. 2005). Thus, respondents' reliance on L.Civ.R. 41.1(b) is misplaced. The Final Order did exactly what *WRS* required and the time to appeal began thereupon.

6. The settlement minutes state: that nonparty, State of New Jersey, will turn over funds within 12 weeks. (a10). Respondents omit that but argues that under NJ R USDCT L.Civ.R. 41.1(b) Y.W. should have filed "a stipulation of dismissal within sixty days" after the entry of the November Order. (Br. Op. p. 2, 7, 31, 32). In other words, respondents demand the impossible, that Y.W. compress a task that takes twelve weeks into sixty days.

7. Lacking the ability to pinpoint any authority to defend the Third Circuit's disposition, respondents assert that the mere placing of a settlement on the record is

enough to dismiss an action even without the parties moving for dismissal under FRCP 41(a). (Br. Op. p. 32). It is not so. There is no authority under FRCP 41(a) or any other provision for a court to *sua sponte* dismiss a meritorious claim after a settlement. Following a settlement, if the plaintiff fails to dismiss the claim, the courts are not without options. A court can direct the plaintiff to show cause why the claim should not be dismissed by the court, including for the failure to prosecute, the defendant(s) can move by under FRCP 41(b), or a court can deem the case as abandoned.

## II. THE DEPARTURE FROM ACCEPTED STANDARD AND ORDINARY COURSE OF JUDICIAL PROCEDURE CALLS FOR EXERCISING SUPERVISORY POWER.

1. Respondents argue that CTA3 App. I, IOP 10.6 does not mention the word "dismiss." (Br. Op. p. 6, 30). However, the IOP elsewhere sets forth "A case may be terminated in this court by a judgment order upon the unanimous decision of the panel." IOP 6.1. The criteria, "A judgment order is filed when the panel unanimously determines to … dismiss the appeal … for lack of jurisdiction or otherwise, and determines that a written opinion will have no precedential or institutional value." IOP 6.2.1. "A judgment order may be used when: The court has no jurisdiction." IOP 6.2.2(f). This is precisely what happened here, the motion panel disregarded the dissent and terminated an appeal by summary action without a written opinion, despite the IOP 6.1, 6.2 et seq, 10.6 requires unanimity. The

foregoing suggests that the Third Circuit departed from accepted standard and ordinary course of judicial procedure calling for exercising supervisory power.

IOP 10.3 does not apply here. The record is void of a motion on notice to dismiss except what the Third Circuit identified as "Clerk's Submission for ***Possible*** Dismissal due to Jurisdictional Defect." (a1) (emphasis added). The submission itself, did not move like a motion—in any definitive direction, instead sought responses to a purported ambiguity. (a3). Regardless, IOP 10.6 applies consistent with 6.1 and 6.2.1.

2. Respondents limiting of *Papera v. Pennsylvania Quarried Bluestone Co.*, 948 F.3d 607, 611 (3d Cir. 2020) as only involving "preclusion" is wrong. (Br. Op. p. 31). *Papera* clearly addressed whether there was notice of "cutting off litigation", precisely what finality ought to do pursuant to FRCP 58, 28 U.S.C. § 2107.

**3.** For all the reasons stated in this reply, respondents' insistence that Y.W. should have filed a stipulation of discontinuance within 60-days is inapplicable where the parties briefed the District Court that it would take at least 12 weeks to consummate the settlement after the execution of a release. There is no "indefinite period of time" present. The settling parties were consistent and filed a stipulation of discontinuance shortly after the settlement was consummated.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 23, 2020

Respectfully submitted,

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NJ R USDCT L.Civ.R. 41.1(b):

When a case has been settled, counsel shall promptly notify the Court. Upon such notification, the Court shall enter a 60-day order administratively terminating the case and any pending motions. Such an administrative termination shall not operate as a dismissal order. Within 60 days after entry of the administrative termination order, counsel shall file all papers necessary to dismiss the case pursuant to Fed. R. Civ. 41(a)(1)(A)(ii). This 60-day period may be extended by the Court for good cause. Upon failure of counsel to file a proper stipulation of dismissal within the 60-day period, or within any extended period approved by the Court, the Court shall, pursuant to Fed. R. Civ. P. 41(a)(2), dismiss the action with prejudice and without costs. Such an order of dismissal may, but need not, include any other terms the Court considers proper.