No. 22-172

IN THE

Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,

v.

TRENDSETTAH USA, INC. AND TRENDSETTAH, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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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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REPLY BRIEF FOR PETITIONER

This Court has held that "[a]n order granting a new trial is interlocutory in nature and therefore not immediately appealable." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). But the Ninth Circuit categorically held in this case that a plaintiff's voluntary dismissal of its claims with prejudice "can render [an] earlier interlocutory order appealable"—including, among myriad other orders, an interlocutory new-trial order—"*so long as the discretionary regime of Rule 23(f) is not undermined*." Pet. App. 14a (emphasis added; internal quotation marks omitted). That sweeping endorsement of manufactured appellate jurisdiction squarely conflicts with *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), where the Court concluded that a voluntary dismissal is insufficiently final to support jurisdiction under 28 U.S.C. § 1291. *See id.* at 1713. Nor can it be reconciled with Justice Thomas's concurring opinion in *Microsoft*, which reasoned that a plaintiff's voluntary dismissal destroys Article III jurisdiction. *See id.* at 1715–17 (Thomas, J., concurring in the judgment). And the decision below both deepens and creates conflicts with the decisions of other courts of appeals, including opinions expressly recognizing that "*Microsoft*'s reasoning extends beyond th[e] [class-action] context." *Princeton Digital Image Corp. v. Office Depot Inc.*, 913 F.3d 1342, 1347 (Fed. Cir. 2019).

Cutting through TSI's hyperbole and *ad hominem* asides, its response boils down to two ploys. First, TSI mischaracterizes the case law in an effort to narrow the Ninth Circuit's expansive rule and conceal the clear-cut conflicts. For example, TSI insists that the Ninth Circuit's decision is limited to "voluntary dis-

missal[s] after a grant of Rule 60 relief," Opp. 14—despite the opinion's broad language confining *Microsoft* to the class-action context and its endorsement of pre-*Microsoft* cases arising outside the Rule 60 setting, *see* Pet. App. 13a–14a. And TSI's attempt to portray appeals following dismissals with prejudice as a regular occurrence in other circuits relies exclusively on cases decided *before Microsoft*. *See* Opp. 22–24.

Second, TSI ignores or downplays arguments, cases, and facts that are inconsistent with its position. For example, TSI fails even to cite *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995)—decisions that squarely condemned efforts to manipulate finality through mechanisms that undermine § 1292(b)—and relegates to footnotes its response to the key flaws in the Ninth Circuit's opinion, including the fact that the decision systematically disadvantages defendants, *see* Opp. 21 n.3.

Ultimately, these tactics are unavailing because no amount of obfuscation or rhetoric can diminish the need for this Court to restore uniformity to § 1291 and Article III by definitively rejecting plaintiffs' attempts to manufacture appellate jurisdiction through voluntary dismissals with prejudice.

I. THE NINTH CIRCUIT ADOPTED A BROAD RULE LIMITING *MICROSOFT* TO THE CLASS-ACTION CONTEXT.

TSI attempts to minimize the significance of the decision below based on its supposedly unusual Rule 60 posture. *See* Opp. 14, 32. But the Ninth Circuit's decision did not turn on the factbound considerations

that TSI highlights. On the contrary, the court premised its jurisdictional ruling on decisively limiting *Microsoft* to the class-action context.

The court began by explaining that "[o]ver twenty years ago, [it] held in a case not involving a class action"—nor a new-trial order—"that a plaintiff may voluntarily dismiss claims with prejudice 'to secure[ ] review of an order that would not ordinarily be reviewable until after a trial on the merits.'" Pet. App. 13a (quoting *Concha v. London*, 62 F.3d 1493, 1508–09 (9th Cir. 1995) (appeal of motion to remand)). In the court's view, this rule "was not impacted by *Microsoft*, which 'involved an attempt to use the voluntary dismissal tactic to obtain an appeal as of right in order to review an earlier denial *of class certification*.'" *Id.* (emphasis added). The court then "distilled [its] holding . . . to this: 'a voluntary dismissal of remaining claims *can* render the earlier interlocutory order appealable, *so long as the discretionary regime of Rule 23(f) is not undermined*.'" *Id.* at 14a (emphases added).

TSI notes that the Ninth Circuit has "applied *Microsoft* to equally foreclose appeals of orders compelling arbitration through the tactic of voluntary dismissal." Opp. 15 (citing *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115 (9th Cir. 2020); *Sperring v. LLR, Inc.*, 995 F.3d 680 (9th Cir. 2021)). But, in the decision below, the Ninth Circuit interpreted those cases as turning on the Federal Arbitration Act's "'explicit[ ] prohibit[ion] [on] the appeal of orders compelling arbitration,'" Pet. App. 14a—not on the general principles of finality articulated in *Microsoft*. The Ninth Circuit thus distinguished *Langere* on the ground that TSI's "appeal does not implicate any similar statutory restrictions." *Id.* at 15a.

Accordingly, even after *Microsoft*, a plaintiff in the Ninth Circuit can satisfy § 1291's finality requirement with respect to *any* interlocutory ruling simply by dismissing its claims with prejudice. That is an exceptionally broad rule, and one that not only justifies, but necessitates, the purportedly broad question presented. *Cf.* Opp. 22–25.

II. THE DECISION BELOW IS IRRECONCILABLE WITH THIS COURT'S PRECEDENT.

Although TSI argues at length that the decision below is correct, *see* Opp. 14–21, it has conspicuously little to say about *Microsoft*, relegating its discussion of that case largely to footnotes, *see id.* at 20 n.2, 21 n.3. This is unsurprising given that commentators have highlighted the unmistakable inconsistencies between *Microsoft* and the decision below. *See* Bryan Lammon, *The Ninth Circuit Limits* Baker*, Preserves Manufactured Finality*, Final Decisions (Apr. 19, 2022), https://tinyurl.com/2akxj5af; WLF *Amicus* Br. 11–19. TSI cannot eliminate those inconsistencies simply by ignoring them.

First, like the voluntary dismissal in *Microsoft*, the decision below "invites protracted litigation and piecemeal appeals." 137 S. Ct. at 1713. TSI does not dispute that voluntary dismissals generally present this risk. Instead, it insists that this case is different because "the procedural posture here means that the district court's work is done no matter what." Opp. 19.

Even assuming TSI correctly described the proceedings below, these case-specific features would be beside the point. This Court has rejected a case-by-case approach to finality because the "incremental

benefit is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice." *Coopers & Lybrand*, 437 U.S. at 473. TSI says this is "truly weird," Opp. 21, but it does not even mention *Coopers & Lybrand*, much less distinguish it.

In any event, TSI does not correctly describe the proceedings below. This is not a case where "there were only two possible outcomes from the appeal." Opp. 19. On the contrary, Swisher's Rule 60 motion identified a third option: "limited discovery to investigate additional facts, evidence and grounds for relief" under Rule 60. Swisher Mot. for Relief from Judgment 23 (Dkt. 377). Thus, one possible outcome of the appeal was a ruling vacating the Rule 60 order and remanding for further discovery and another Rule 60 motion—and, likely, another appeal. TSI does not dispute this possibility. *See* Opp. 20 n.2.

Second, the voluntary-dismissal tactic endorsed by the Ninth Circuit would undermine the "'measured, practical solutio[n]' to the questions whether and when adverse [interlocutory] orders may be immediately appealed." *Microsoft*, 137 S. Ct. at 1714 (first alteration in original). Congress established that solution in § 1292(b). While TSI asserts that "§1292(b) is available in every case, and so if that mattered, the entire collateral order doctrine would need to be jettisoned," Opp. 20 n.1, that view is inconsistent with this Court's decisions emphasizing that the possibility of an interlocutory appeal under § 1292(b) *does* matter when assessing finality, *see*, *e.g.*, *Swint*, 514 U.S. at 47 (rejecting pendent appellate jurisdiction because "the two-tiered arrangement § 1292(b) mandates would be severely undermined"); *Coopers & Lybrand*, 437 U.S. at 475 ("[T]he 'death knell' doctrine circumvents

[§ 1292(b)'s] restrictions."). Again, TSI ignores these cases. Moreover, § 1292(b) is not available for all orders, but only those that "involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion" and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Here, the district judge concluded that those criteria were met, but the Ninth Circuit declined to hear the appeal, *see* Pet. 8—a decision TSI then attempted to override through its dismissal with prejudice.

Third, the Ninth Circuit's rule is one-sided because it "permits plaintiffs only, never defendants, to force an immediate appeal" of an interlocutory ruling. *Microsoft*, 137 S. Ct. at 1715. TSI disputes this on the ground that "a defendant who wins a jury trial only to have its verdict vacated under Rule 60 could likewise concede to the full judgment the plaintiff seeks and place all of its eggs in the basket of successfully overturning the Rule 60 order." Opp. 21 n.3. But the same option is available in the class-action setting at issue in *Coopers & Lybrand* and *Microsoft*: class-action defendants can theoretically consent to a class judgment against them and then appeal that judgment to obtain review of an order certifying a class. The Court nevertheless found the voluntary-dismissal tactic impermissibly one-sided in each case.

This is unsurprising. A defendant's ability to consent to an adverse judgment is fundamentally unlike a voluntary dismissal with prejudice because it requires the plaintiff's consent. And as the price of that consent, a plaintiff is likely to demand that the defendant stipulate to the full amount of its alleged damages—often tens of millions of dollars or more.

TSI identifies no case in which a defendant has resorted to this perilous approach. Indeed, it is not even clear that a defendant in the Ninth Circuit could appeal from such a consensual judgment under the pre-*Microsoft* precedent resuscitated by the decision below. *See Concha*, 62 F.3d at 1507 (a party may not appeal "from a joint stipulation to voluntary dismissal, entered unconditionally by the court *pursuant to a settlement agreement*") (emphasis added).

Rather than meaningfully contend with *Microsoft*, TSI relies almost exclusively on the Court's century-old decision in *Thomsen v. Cayser*, 243 U.S. 66 (1917). Opp. 16. But *Thomsen* is manifestly distinguishable.

Most notably, that case did not involve § 1291. The court of appeals' jurisdiction in *Thomsen* was uncontested because the defendants appealed from a final judgment after the case "was tried to a jury." 243 U.S. at 74. Although this Court concluded that the plaintiffs' decision *on appeal* to forgo a new trial was sufficient to establish jurisdiction in this Court, *id.* at 83, that holding does not implicate circuit courts' jurisdiction under § 1291 or undermine the final-judgment rule, which "preserves the proper balance between *trial and appellate* courts," *Microsoft*, 137 S. Ct. at 1712 (emphasis added).

Nor does *Thomsen* provide analysis relevant to Article III jurisdiction—an independent basis for reversal that TSI (again) largely ignores. *Thomsen* does not even mention the long line of cases holding that "a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it." *Microsoft*, 137 S. Ct. at 1717 (Thomas, J., concurring in the judgment) (collecting cases).

TSI's attempt to distinguish that line of cases rests on a misreading of Justice Thomas's *Microsoft* concurrence. According to TSI, that opinion interprets this Court's precedent as establishing that Article III jurisdiction is lost only where the interlocutory order that precipitates the voluntary dismissal "'in no way touch[es] the merits.'" Opp. 4 (quoting *Microsoft*, 137 S. Ct. at 1717 (Thomas, J., concurring in the judgment)). But the opinion says no such thing. Rather, Justice Thomas clearly expressed his view that Article III jurisdiction was absent in *Microsoft* because the plaintiffs "consented to the judgment against them and disavowed any right to relief from Microsoft," such that the parties "were no longer adverse to each other." 137 S. Ct. at 1717. The language quoted by TSI appears only in responding to the plaintiffs' contention that Article III was satisfied because "they hope[d] to revive their [individual] claims should they prevail on the appeal." *Id.* (second alteration in original; internal quotation marks omitted). Justice Thomas stated that this interest was insufficient because "[t]his Court has interpreted Article III 'to demand that an actual controversy be extant at all stages of review, not merely at the time the complaint is filed,'" and only then went on to explain that, "in any event, a favorable ruling on class certification would not 'revive' their individual claims" because a "court's decision about class allegations 'in no way touch[es] the merits' of those claims." *Id.* (second alteration in original).

In sum, TSI's arguments leave the conflict with *Microsoft*'s statutory and Article III analyses undiminished.

III. THE DECISION BELOW BOTH DEEPENS AND CREATES CIRCUIT CONFLICTS.

TSI is equally unsuccessful in reconciling the Ninth Circuit's decision with the decisions of other courts of appeals.

First, TSI attempts to sidestep the circuit conflicts by recasting the decision below as addressing only "a situation where the appellant already held a verdict in its favor" that was "disturbed under Rule 60." Opp. 25. But as discussed above, the Ninth Circuit's decision is much broader, categorically holding that a voluntary dismissal with prejudice is sufficient to establish finality under § 1291 except in the class-action context at issue in *Microsoft*. *Supra* Part I.

That rule directly conflicts with other circuits' interpretations of *Microsoft* and applications of § 1291. *See*, *e.g.*, *Princeton Digital Image*, 913 F.3d at 1347; *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 243 (3d Cir. 2013) (holding that the plaintiffs could not appeal an order decertifying an FLSA collective action through a voluntary dismissal with prejudice).

Second, TSI points to three cases where a plaintiff "faced an adverse new trial order and solicited entry of a final judgment against itself instead so it could immediately appeal." Opp. 26. But, like TSI's cases exemplifying the purportedly "quotidian practices" through which appellate jurisdiction has been manufactured using a voluntary dismissal, *id.* at 22–24, each of those cases was decided *before* (and sometimes decades before) *Microsoft*. *See Nat'l Polymer Prods., Inc. v. Borg-Warner Corp.*, 660 F.2d 171 (6th Cir. 1981); *Deas v. PACCAR, Inc.*, 775 F.2d 1498 (11th Cir. 1985); *Bethel v. McAllister Bros., Inc.*, 81 F.3d 376 (3d

Cir. 1996). Subsequently decided cases in each of those circuits have found jurisdiction lacking under either § 1291 or Article III (or both) in circumstances indistinguishable from this case. *See*, *e.g.*, *Bd. of Trs. of Plumbers, Pipe Fitters & Mech. Equip. Serv., Local Union No. 392 v. Humbert*, 884 F.3d 624, 626 (6th Cir. 2018) (§ 1291); *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1326 (11th Cir. 1999) (Article III); *Camesi*, 729 F.3d at 243, 247 (both).

TSI's attempts to dismiss those cases fail because its arguments depend either on facts that are no different from this case (*Humbert*) or on the irrelevant distinction between merits-related determinations and non-merits-related determinations that TSI purports to glean from Justice Thomas's concurrence in *Microsoft* (*Druhan* and *Camesi*). *See* Opp. 29 (noting that in *Humbert* the parties "preserved their ability to litigate the exact issues they purported to stipulate," which created a risk of piecemeal appeals also present here); *id.* at 30–31 (arguing that *Camesi* is distinguishable because the interlocutory order involved "a non-merits determination"); *id.* at 31 (asserting that in *Druhan*, "the interlocutory order . . . was, again, not merits related").[*]

[*] TSI argues that several circuits straddle the circuit conflict, but it again relies on pre-*Microsoft* cases. *See* Opp. 28, 32 (citing, *e.g.*, *Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874 (3d Cir. 1990); *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009)). Those cases are distinguishable in any event. While courts in several of the cases exercised jurisdiction over claims that were finally adjudicated before the plaintiff's voluntary dismissal, they "refused to consider claims that"—like TSI's claims—"were

Third, TSI does not meaningfully address the split regarding Article III jurisdiction. It brushes aside the cases dismissing appeals for lack of Article III jurisdiction on the irrelevant ground that they either arose in the class-action context (which does nothing to limit their Article III reasoning) or did not involve merits determinations (which, again, depends on TSI's fabricated distinction between merits-related and non-merits-related determinations). *See* Opp. 26–27 (citing *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011): class action); *id.* at 30–31 (citing *Camesi*: non-merits-related determination); *id.* (citing *Druhan*: non-merits-related determination); *id.* at 31 (citing *Lush v. Bd. of Trs. of N. Ill. Univ.*, 29 F.4th 377 (7th Cir. 2022): non-merits-related determination).

TSI makes no attempt to distinguish *Brewer v. Sessions*, 863 F.3d 861 (D.C. Cir. 2017), which held that "a stipulated dismissal . . . is no different in jurisdictional effect from a dismissal by court order: Each resolves all claims before the court, leaving it without a live Article III case or controversy." *Id.* at 869. Instead, it points to the D.C. Circuit's earlier decision in *LeFande v. District of Columbia*, 841 F.3d 485 (D.C. Cir. 2016), for the proposition that a "voluntary dismissal with prejudice may or may not result in appealable final judgments within the court's Article III jurisdiction depending on different aspects of the case." Opp. 25. But *LeFande* simply underscores the need for this Court's review. Lamenting that "Ar-

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still live when plaintiffs asked for judgment." *Fairley*, 578 F.3d at 522; *see also Trevino-Barton*, 919 F.2d at 878; *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 591 n.9 (4th Cir. 2004).

ticle III appellate jurisdiction over voluntary dismissals with prejudice is a largely uncharted doctrinal area," the court noted that "the Supreme Court will soon hear a case concerning the issue." 841 F.3d at 492. The Court ultimately resolved that case—*Microsoft*—on statutory grounds, leaving the Article III issue "uncharted." This case now presents the Court with the ideal opportunity to provide long-sought-after guidance on that issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 8, 2022