No. 15-457

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

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

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300
Of Counsel

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
JORDAN SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Microsoft Corporation ("petitioner" or "Microsoft").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondents have consented to the filing of this *amicus* brief and that *amicus curiae* timely notified counsel of record of its intent to file this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

Since 1983, PLAC has filed more than 1,050 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.

PLAC's members have an interest in this case because the decision below endorses a rule that favors plaintiffs in dubious class actions that fail at class certification by allowing them to dismiss their claims voluntarily and obtain an immediate appellate ruling on class certification – *even after* the Court of Appeals refuses to hear the appeal on a Rule 23(f) petition. The effect of the ruling is to hand plaintiffs a second bite at the apple (with no corresponding opportunity for defendants to seek review notwithstanding denial of a Rule 23(f) petition). That approach to appellate jurisdiction circumvents the requirement of finality set forth in 28 U.S.C. § 1291, as illustrated by this Court's prior precedent strictly limiting interlocutory review of class-certification orders. It also renders the case-or-controversy requirement of Article III a dead letter.

Moreover, and of greatest concern for PLAC's members, the decision below will make the defense of putative class actions more expensive for class-action defendants, including PLAC's members, given the additional layer of appeals that will be mounted by plaintiffs disappointed by an unfavorable class-certification ruling. This increased cost, coupled with the possibility that a once-defunct class action will ultimately be revived upon successive appeals, will exacerbate the settlement pressure that class-action litigation already wreaks on PLAC's members. Ac-

cordingly, the Court should reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below endorses a tactic increasingly used by plaintiffs to manufacture appellate jurisdiction over an adverse class-certification ruling: voluntary dismissal of the case in lieu of litigating it on an individual basis to final judgment. This practice is contrary to this Court's precedents, which expressly hold that litigants cannot manipulate appellate jurisdiction by dismissing a case to turn a fundamentally interlocutory ruling into a final judgment. Nevertheless, the U.S. Court of Appeals for the Ninth Circuit endorsed just such a maneuver in this case – and did so without acknowledging this Court's decisions on point. The Court should reverse the decision below and clarify that both the "finality" requirement of 28 U.S.C. § 1291 and the case-or-controversy element of Article III unequivocally foreclose appellate jurisdiction over interlocutory class-certification rulings.

The plaintiffs in this case are Xbox 360 console owners who allege that a design defect in the product scratches game discs. Only a tiny fraction of the putative class experienced the problem about which plaintiffs complain. The district court struck the class allegations, relying heavily on a prior ruling by a different judge denying class certification in a virtually indistinguishable case involving a different set of plaintiffs. According to the district court, the class allegations were legally insufficient because individual issues of causation and damages precluded class treatment. Plaintiffs subsequently sought permis-

sion to appeal the class-certification ruling under Rule 23(f), arguing that "the district court's order effectively kill[ed] th[is] case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18.

The Ninth Circuit denied the petition and remanded the case to the district court. Pet. App. 10a. Rather than press their individual claims, plaintiffs voluntarily dismissed them for the express purpose of appealing the district court's unfavorable class-certification ruling. The Ninth Circuit denied Microsoft's motion to dismiss the appeal, assumed jurisdiction and reversed.

The Ninth Circuit's assumption of jurisdiction over plaintiffs' appeal ignored this Court's prior command that "the fact that an interlocutory [class-certification] order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978). The Ninth Circuit's decision also flouted the well-established Article III precept that a plaintiff must have a sufficiently concrete "personal stake" in the underlying litigation. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990). Because the Ninth Circuit clearly erred in allowing plaintiffs to manufacture finality and bypass the requirement of an Article III case or controversy, the decision below should be reversed.

The decision below also has the potential to do great harm to American product manufacturers, providing further grounds for reversing it. Class actions are already inherently expensive for product manufacturers to defend, regardless of their merits, given their high stakes – namely, the risk of a poten-

tially crippling class verdict. These costs would only increase under the approach endorsed by the Ninth Circuit, which would add an additional layer of uncertain and expensive appellate litigation to the class-certification calculus. Moreover, such an approach unfairly gives plaintiffs a second opportunity at appellate review of an adverse class-certification ruling, increasing their settlement leverage over American businesses.

For both of these reasons, the Court should hold that the only avenue for immediately appealing an unfavorable class-certification ruling is seeking a discretionary appeal under Rule 23(f).

ARGUMENT

I. The Ninth Circuit's Decision Runs Afoul Of Rudimentary Jurisdictional Principles Under 28 U.S.C. § 1291 And Article III.

This Court's precedents clearly reject the notion that the finality requirement of 28 U.S.C. § 1291 can be circumvented based on the notion that an adverse interlocutory ruling will persuade a plaintiff to abandon his suit. Voluntary dismissal does not convert an interlocutory order into a final judgment. Instead, it destroys the adversity required to maintain jurisdiction under Article III. The ruling below should be reversed because it ignored this Court's precedents construing § 1291 and misapprehended the jurisdictional aspects of a voluntary dismissal.

First, the decision below contravenes the "finality" requirement of 28 U.S.C. § 1291, as articulated by this Court in *Livesay*. In that case, the U.S. Court of Appeals for the Eighth Circuit concluded that it had jurisdiction over an order decertifying a class action on the ground that the lower court's ruling "had

sounded the 'death knell' of the action" and constituted a final judgment for purposes of 28 U.S.C. § 1291. 437 U.S. at 466. The court of appeals had reasoned that the lack of resources and anticipated costs effectively prevented the plaintiffs from pursuing their claims individually through trial, converting the decertification order into a final judgment. *Id.* at 466-67.

This Court reversed, holding that "[a]n order refusing to certify, or decertifying, a class does not of its own force terminate the entire litigation *because the plaintiff is free to proceed on his individual claim*." *Id.* at 467 (emphasis added). In reaching its decision, the Court underscored the importance of the final judgment rule embodied in § 1291: it "evinces a legislative judgment that '[r]estricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.'" *Id.* at 471-72 (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)). The so-called "death knell" doctrine, the Court declared, runs "directly contrary" to that legislative judgment because it predicates appellate jurisdiction on a costly and inefficient examination of the possible impact a class-certification order will have on the fate of the litigation. *Id.* at 471, 473-74 (internal quotation marks and citation omitted). As the Court explained, "the principal vice" of the "death knell" doctrine is that it "authorizes *indiscriminate* interlocutory review of decisions made by the trial judge," in disregard of the fact that "Congress carefully confined the availability of such review." *Id.* at 474.

In addition, the Court recognized that the doctrine unfairly "operates only in favor of plaintiffs" by

giving them an immediate and automatic right to appeal "even though the class issue – whether to certify, and if so, how large the class should be – will often be of critical importance to defendants as well." *Id.* at 476. Accordingly, because Congress "made 'finality' the test of appealability," *id.* at 472, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291," *id.* at 477.

Since *Livesay*, most federal appeals courts have understood its reasoning to bar efforts by plaintiffs "to manufacture finality" by voluntarily dismissing their claims following the denial of class certification. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013) (plaintiffs could not "avoid the strong presumption against interlocutory review of such orders by voluntarily dismissing all of their claims under Rule 41"); see also, *e.g.*, *Chavez v. Ill. State Police*, 251 F.3d 612, 629 (7th Cir. 2001) (declining to "review the district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their . . . claims"); *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800 (10th Cir. 1980) (similar); William P. Barnette, *The Limits of Consent: Voluntary Dismissals, Appeals of Class Certification Denials, and Some Article III Problems*, 56 S. Tex. L. Rev. 451, 477 (2015) ("a ruling denying class certification is procedural in nature and does not resolve the merits of the named plaintiff's individual claim" and therefore is not immediately appealable under the final judgment rule).

The Ninth Circuit disagreed, reasoning that it had jurisdiction in the present case "under 28 U.S.C. § 1291 because a dismissal of an action with preju-

dice, even when such dismissal is the product of a stipulation, is a sufficiently adverse – and thus appealable – final decision." Pet. App. 12a (internal quotation marks and citation omitted). Notably, the Ninth Circuit's cursory discussion of appellate jurisdiction *did not even cite Livesay* – or any of the many decisions by other circuit courts addressing whether *Livesay* permits appeals in these circumstances.

The Ninth Circuit's decision squarely contradicts *Livesay*, reviving the "death knell" doctrine that this Court previously rejected. As the Third Circuit succinctly explained in rejecting plaintiffs' "attempts to manufacture finality" by voluntarily dismissing their claims in the wake of a class-certification denial:

> [i]f we were to allow such a procedural sleight-of-hand to bring about finality . . . there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action.

Camesi, 729 F.3d at 245-46. Permitting such tactics "would greatly undermine the policy against piecemeal litigation embodied by § 1291," *id.* at 246 – the very policy that prompted this Court to retire the "death knell" doctrine as a basis for immediately appealing class-certification orders. As the U.S. Court of Appeals for the Tenth Circuit put it, the only difference between *Livesay* and a case in which a plaintiff voluntarily dismisses a claim in the hope of manufacturing appellate jurisdiction is that the death knell in the latter case is more "graphic." *Bowe*, 613 F.2d at 800 (court lacked appellate jurisdiction where plaintiff allowed claim to be dismissed for fail-

ure to prosecute after class certification had been denied). The effect in both circumstances is the same: to permit interlocutory review as a matter of right for disappointed class plaintiffs. This Court's decision in *Livesay* "does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed" voluntarily. *Id.* at 800-02.

Moreover, the panel's decision is all the more egregious because it is fundamentally at odds with the limitations imposed on class-action appeals by Rule 23(f), which was promulgated in response to *Livesay,* and authorizes *discretionary* review of class-certification orders. See Fed. R. Civ. P. 23(f); Brian C. Walsh, *Feature, A Primer on the Finality of Decisions for Appeal*, 42 Litig. 30 (2015). This Court could have exercised its authority under 28 U.S.C. § 2072(c) and 28 U.S.C. § 1292(e) to define class-certification orders as appealable as a matter of right. But it did not do so, instead granting the courts of appeals "unfettered discretion whether to permit the appeal" of a class-certification order. Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendment. The Ninth Circuit chose not to exercise that discretion when it denied plaintiffs' petition for interlocutory review under Rule 23(f). That decision was later evaded by plaintiffs' dismissal of their individual claims with prejudice and successive appeal of the district court's adverse class-certification ruling, which "manufacture[d] finality" and "short-circuit[ed] the procedure for appealing" class-certification orders. *Camesi*, 729 F.3d at 245-46. Because such procedural gyrations clearly do not suffice to create "final" judgment for purposes of § 1291 as this Court has construed it, the Ninth Circuit's decision should be reversed.

Second, beyond its error in endorsing "manufactur[ed] finality" in derogation of 28 U.S.C. § 1291, the decision below is also fundamentally at odds with Article III standing and mootness principles as applied by this Court and the other federal courts of appeals. As this Court has recognized, Article III's "case or controversy" requirement dictates that plaintiffs maintain a "personal stake" in the litigation. *Lewis*, 494 U.S. at 477-78. This requirement applies with equal force in the class-action context such that "a putative class representative [must] maintain[] a sufficiently concrete interest in the certification question." *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 99 (4th Cir. 2011). This requirement "must be extant at all stages of review, not merely at the time the complaint is filed." *Camesi*, 729 F.3d at 247 (internal quotation marks and citations omitted).

"Applying the principles set forth by the Supreme Court," the U.S. Court of Appeals for the Fourth Circuit previously "conclude[d] that when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification . . . there is no longer a 'self-interested party advocating' for class treatment in the manner necessary to satisfy Article III standing requirements." *Rhodes*, 636 F.3d at 100 (citation omitted). In such a case, the plaintiff does not possess the particularized "stake" in the appeal, vitiating its case-or-controversy status. *Id.*; accord *Ruppert v. Principal Life Ins. Co.*, 705 F.3d 839, 844 (8th Cir. 2013) ("We therefore agree with the Fourth Circuit that 'when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . ., there is no longer a self-interested party advocating for class treatment in the manner necessary to satisfy

Article III standing requirements.'") (quoting *Rhodes*, 636 F.3d at 100); see also Barnette, *supra*, at 478-79 ("[T]he perceived economic feasibility of ongoing individual litigation is not a substitute for the concrete injury necessary to establish and maintain jurisdiction under Article III."). The Third Circuit reached the same conclusion just two years later, reasoning that plaintiffs in a putative collective action under the Fair Labor Standards Act no longer possessed a sufficient "personal stake in the matter" following their voluntary dismissal of their individual claims with prejudice. *Camesi*, 729 F.3d at 247-48.

The same is true here. Plaintiffs abandoned any personal stake in this case when they voluntarily dismissed their individual claims with prejudice following the district court's decision to strike the class allegations. Plaintiffs' conduct "not only extinguished [their] individual claims, but also any residual representational interest that they must have once had." *Camesi*, 729 F.3d at 247. Accordingly, even if the voluntary dismissal of their claims could be construed as a final judgment under 28 U.S.C. § 1291 – which it cannot – there would no longer be an Article III case or controversy. See *Ruppert*, 705 F.3d at 843 ("[I]f we are wrong about finality, then Ruppert's voluntary dismissal of his individual claims renders the case moot.").

For all of these reasons, the Court should reverse the Ninth Circuit's decision, clarifying that plaintiffs may *not* evade *Livesay* and Article III by voluntarily dismissing their claims in the wake of an adverse class-certification ruling in order to seek immediate appellate review of that unfavorable decision.

II. The Rule Followed By The Ninth Circuit Is Damaging To American Product Manufacturers.

The Court should also reverse the decision below because affording plaintiffs multiple bites at the appellate apple will hurt American product manufacturers.

Rule 23(f) is supposed to limit class-action appeals (and by extension the costs associated with litigating them). Indeed, that rule requires that petitions be filed within 14 days after the adverse order on class certification, Fed. R. Civ. P. 23(f), and "specifically cautions the appellate courts to act expeditiously on such petitions for permission to appeal." *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 199 (3d Cir. 2008). In so doing, it advances the central objective of the Federal Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

In stark contrast, the Ninth Circuit's rule would promote slow-moving, piecemeal review by spawning dismissals and appeals in every case involving an unsuccessful class-certification bid, often many months after the adverse class-certification order was issued and after an initial 23(f) petition was denied. Moreover, because the Ninth Circuit's rule works only in favor of plaintiffs, it would provide them with greater leverage over defendants in settlement negotiations, using the threat of possible reversal on a guaranteed appeal from any adverse ruling on class certification to force resolution. It would also foster greater uncertainty, delay and costs in defending against a purported class action. For these reasons, the Ninth Circuit's rule stands to greatly expand the

costs of litigation and the potential exposure to liability in questionable class actions.

Increasing the costs to American businesses of litigating class actions would be bad policy. "By their very nature, class actions are high-stakes endeavors." John Doroghazi & Armel Jacobs, *Basic Strategic Considerations in Defending Consumer Class Actions Against Franchisors*, 33 Franchise L.J. 167, 192-93 (2013); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing the "higher stakes of class litigation"). This is so because "[a]ggregation of claims . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards" than individual actions. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). For example, "[a] verdict in a consumer fraud class action will deliver a crippling blow to all but the most well-heeled" defendant. Doroghazi & Jacobs, *supra*, at 192-93.

These costs are magnified in cases where – as here – the plaintiffs seek to pursue claims on behalf of nationwide classes, which "can propel the stakes of a case into the stratosphere." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995)); see also Andrew S. Tulumello & Geoffrey C. Weien, *A Practitioner's Guide to Class Actions*, Chapter 24: *Multistate Class Actions and Choice of Law*, at 621 (2010), http://www.gibsondunn.com/publications/Documents/TulumelloWeien-MultistateClassActions.pdf ("[C]ertification of a . . . nationwide class increases the stakes of litigation and can create significant settlement pressure for defendants."). These costs pose an acute threat to product manufacturers, whose

goods are increasingly being challenged in sprawling putative class actions. The purported consumer class in the instant case is illustrative. According to Microsoft, the class "may exceed 10 million people." Pet. 16. While each class member could only recover – at best – a fraction of the purchase price in an individual proceeding, aggregation of *millions* of disparate claims in a single nationwide proceeding exposes the manufacturer to the possibility of a multi-million-dollar verdict.

In light of these enormous stakes, companies already spend considerable sums defending against putative class actions. In fact, a 2015 study on class actions found that companies spent $2 billion on class-action lawsuits in the preceding year. *The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3; see also Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition) (noting the "very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."). Simply put, defending against putative class actions is already an inherently expensive proposition for American businesses given the high stakes involved – i.e., the risk of a gargantuan class verdict.

Granting plaintiffs an additional layer of appeal in every case involving an adverse class-certification ruling will needlessly prolong class-action litigation, generating further litigation costs for American

manufacturers. Indeed, that dynamic is already playing out in full force in the wake of the Ninth Circuit's ruling, with plaintiffs relying on that decision to manufacture jurisdiction over unfavorable class-certification rulings before final judgment on the merits. See*, e.g.*, *Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1069 (9th Cir. 2015) (relying on instant case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"), *petition for cert. filed*, 80 U.S.L.W. 3338 (U.S. Dec. 4, 2015) (No. 15-734); Order Granting Pls.' Mot. to Dismiss at 1, *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-09366-SVW-MAN, ECF No. 203 (C.D. Cal. Oct. 26, 2015) (granting motion to dismiss claims following denial of class certification and rejecting argument by defendant that "dismissal . . . risks the possibility of wasteful multiple appeals"); see also *Gannon v. Network Tel. Servs., Inc.*, No. 13-56813, 2016 WL 145811, at *1 (9th Cir. Jan. 12, 2016) (affirming denial of class certification; "We have jurisdiction of this appeal under 28 U.S.C. § 1291 because the parties stipulated to dismissal of Gannon's Second Amended Complaint."). For example, in *Saavedra*, the district court twice rejected proposed classes of purchasers of the drug Cymbalta. See Def.'s Opp'n to Pls.' Mot. to Dismiss at 1, No. 2:12-cv-09366-SVM-MAN, ECF No. 201 (C.D. Cal. Oct. 14, 2015). After the court's first denial of class certification, the plaintiffs petitioned for interlocutory review under Rule 23(f), which the Ninth Circuit denied. *Id.* Following the district court's second certification ruling, the plaintiffs moved to dismiss their individual claims "in a transparent bid for a second chance to appeal orders denying their motions for class certification." Joe Van Acker, *Consumers Pulling a Fast One in Cym-*

balta Case, Eli Lilly Says, Law360, Oct. 14, 2015, http://www.law360.com/articles/714385/consumers-pulling-a-fast-one-in-cymbalta-case-eli-lilly-says.

In pressing their motion, the plaintiffs relied on the instant case, *Baker v. Microsoft Corp.*, for the proposition that a voluntary dismissal with prejudice after the denial of class certification confers appellate jurisdiction over the adverse class-certification ruling. See Pls.' Mot. to Dismiss at 2-3, No. 2:12-cv-09366-SVW-MAN, ECF No. 199 (C.D. Cal. Sept. 30, 2015). The district court granted the voluntary motion to dismiss, Order Granting Pls.' Mot. to Dismiss at 1, *Saavedra v. Eli Lilly & Co.*, No. 2:12-cv-09366-SVW-MAN, ECF No. 203 (C.D. Cal. Oct. 26, 2015), which precipitated a second round of appellate review, prolonging the litigation and costing the defendant considerable sums of money.

This type of gamesmanship would become the norm – as opposed to the exception – in all federal courts if the Court affirms the Ninth Circuit's decision, with plaintiffs' attorneys taking solace in the fact that they can automatically appeal an adverse class-certification ruling by simply dismissing their individual claims with prejudice.[3] The ensuing delays in class-action litigation and the expenditures in time and resources generated by this practice will likewise proliferate and wreak havoc on the parties and the judicial system alike.

Moreover, because the approach endorsed by the Ninth Circuit only inures to the benefit of *plaintiffs* –

---

[3] Such tactics are particularly likely in the context of class actions, which tend to be lawyer-driven and, as a consequence, unlikely to feature individual plaintiffs who insist on vindicating their individual claims to final judgment.

not defendants – plaintiffs would gain greater leverage over defendants in inducing settlements. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail." *Castano*, 84 F.3d at 746 ("These settlements have been referred to as judicial blackmail."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."); see also Kristen L. Wenger, *The Class Action Fairness Act of 2005: The Limits of Its Text and the Need for Legislative Clarification, Not Judicial Interpretation*, 38 Fla. St. U. L. Rev. 679, 688 (2011) ("Critics of class action litigation have also pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations."). As this Court recognized in *Livesay*, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle [the case] and to abandon a meritorious defense." 437 U.S. at 476.

Affording plaintiffs multiple opportunities in seeking class certification will exacerbate the pressure to settle regardless of the merit of the underlying claims. The resultant increased costs of class litigation will put settlement pressure on many

defendants, as will the possibility of reversal that would not exist but for the Ninth Circuit's one-sided rule. At bottom, the Ninth Circuit's ruling countenances a slanted rule that plaintiffs will undoubtedly exploit to coerce defendants into high-dollar settlements that bear no relationship to the merits of the claims at issue.

For these reasons too, the Court should reverse the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Microsoft Corporation, the Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300
Of Counsel

JOHN H. BEISNER
Counsel of Record
JESSICA DAVIDSON MILLER
GEOFFREY M. WYATT
JORDAN SCHWARTZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
John.Beisner@skadden.com

Attorneys for Amicus Curiae

March 18, 2016

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
Altec, Inc.
Altria Client Services LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
The Boeing Company
Bombardier Recreational Products, Inc.
Boston Scientific Corporation
Bridgestone Americas, Inc.
Bristol-Myers Squibb Company
C. R. Bard, Inc.
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chevron Corporation
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eisai Inc.
Emerson Electric Co.

Endo Pharmaceuticals, Inc.
Exxon Mobil Corporation
FCA US LLC
Ford Motor Company
Fresenius Kabi USA, LLC
General Motors LLC
Georgia-Pacific LLC
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products

Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Stryker Corporation
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.
Techtronic Industries North America, Inc.
Teleflex Incorporated
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
U-Haul International
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Western Digital Corporation
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
ZF TRW
Zimmer Biomet