No. 15-457

In The
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this proposed class action, the named plaintiffs have not moved for class certification. Instead, the defendant, before answering the complaint, moved to strike the class allegations from the complaint. The motion was granted, thus dismissing the class claims, and the named plaintiffs then voluntarily dismissed their individual claims by stipulation. The court of appeals exercised appellate jurisdiction and reversed the striking of the class claims, but withheld any opinion on whether the district court should ultimately grant or deny class certification. The question presented by the petition is:

> Should the Court grant certiorari to consider whether the federal courts of appeals have jurisdiction to review a denial of class certification after the named plaintiffs have voluntarily dismissed their individual claims with prejudice?

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INTRODUCTION

Petitioner Microsoft Corporation ("Microsoft") seeks review of a question that this case does not present. It asks the Court to grant certiorari to decide whether "a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice." Pet. i. The district court in this case, however, did not deny class certification. Instead, on Microsoft's motion, the district court "struck"—i.e., dismissed—the class claims from the complaint. The district court ruled that another district court's denial of class certification in earlier litigation prevented the current plaintiffs from asserting their class claims as a matter of law.

This case thus presents a different, and much rarer, procedural posture than an appeal following a denial of class certification. This case more resembles one in which a district court disposes of less than all claims on a motion to dismiss under Rule 12(b)(6), and then the plaintiff voluntarily dismisses the remaining claims to seek appellate review. Microsoft neither challenges that uncontroversial practice nor asks the Court to review its propriety. By its own terms, Microsoft's petition is limited to cases where a district court has denied class certification.

Even if the question Microsoft raises were properly presented, there is no genuine conflict among the circuits that would justify granting the petition. Microsoft's cases generally do not speak to

the question on which Microsoft seeks review, so resolution of the question presented must await further development in the lower courts. Certiorari should be denied.

STATEMENT OF THE CASE

I. Factual background

The Xbox 360 was introduced in 2005 and is Microsoft's second-generation video-gaming console. Until its sales ceased in 2013, more than 25 million Xbox 360s were sold in the United States on the strength of Microsoft's massive marketing campaign.

Xbox 360 video games were sold on discs priced between $30 and $60. The discs were played on an optical disc drive that accommodated compact discs and DVDs as well as game discs. CA9 ER 535, ¶¶ 17-19.

Optical disc drives are not just found in the Xbox 360—they are also found in cars, notebook computers, portable DVD players, and camcorders. Engineers have long known that discs spinning in these drives may be subjected to slight movement, and they have learned to counter this potential problem—and to protect the spinning discs from damage—with simple, inexpensive measures. *Id.* at 536, ¶¶ 25, 26.

The Xbox 360's disc drive, though, cannot withstand even small unintentional movements that are well within normal expected use. *Id.* at 537, ¶ 27.

Even a vibration induced from across the room or some other source of indirect force can be too much for the Xbox 360. *See id.* at 537, ¶¶ 27-28. These movements can cause an Xbox 360 disc to become decoupled from the spindle that rotates it, and to crash into the drive's internal components. *Id.* at 536, ¶¶ 23-24. This collision creates a telltale pattern of concentric scratches on the disc that prevent the disc's data from being played by the drive. The disc is rendered permanently useless. *Id.* at 536, ¶ 23.

Although Microsoft publicly denied that the Xbox 360 has a design defect that scratches discs, it did begin a "disc replacement program" in 2007. *Id.* at 537-38, ¶¶ 30-31, 33. Under this program, Microsoft would replace some—but not all—damaged game discs for a fee of $20. *Id.* at 538-39, ¶¶ 33-34, 36. The cost of pressing and shipping a replacement disc is well under a dollar. *Id.* at 539, ¶ 35.

Microsoft suggests that only a small minority of Xbox 360 owners have experienced disc damage, Pet. 3, 14 n.4, but in fact Microsoft does not actually know how many have suffered a scratched disc. While some Xbox 360 owners have directly complained to Microsoft about a scratched disc, CA9 ER 36, not all customers who experience a problem with a product will complain. Some customers may contact their retailer rather than the manufacturer. Others may not be able to find time to submit a complaint at all. The Xbox 360's warning sticker and instruction manual—which imply that any disc damage is the customer's fault—will also have deterred many an

innocent customer from complaining. Pet. 2-3. Microsoft cannot rely on the number of customer complaints it purportedly logged to minimize its design defect.

II. Procedural history

1. The prehistory of the present case begins in 2007, with earlier class action litigation. In that year, a number of class actions involving the Xbox 360 design defect were consolidated in the U.S. District Court for the Western District of Washington. In due course, the plaintiffs in that earlier litigation moved for class certification under Rule 23(b)(3).

The district court denied the motion. The court ruled that although every Xbox 360 may suffer from a design defect, individual issues of damages and causation predominated. *See* Fed. R. Civ. P. 23(b)(3). These individual issues predominated, concluded the district court, because the design defect had not "manifested" itself—i.e., had not scratched discs—in most of the Xbox 360 consoles. *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. C07-1121-JCC, 2009 WL 10219350, at *6 (W.D. Wash. Oct. 5, 2009).

For these conclusions, the district court in that earlier Xbox 360 litigation relied heavily on a district court decision involving the tire alignment in Land Rover vehicles. *Id.* A number of Land Rover owners had alleged that their vehicles' tire alignment was defectively designed, and moved for class certification. The district court denied the vehicle owners' motion because the allegedly defective tire alignment had not

yet manifested itself in all vehicles by prematurely wearing down the tires. *Gable v. Land Rover N. Am., Inc.*, No. CV07-0376 AG (RNBx), 2008 WL 4441960, at *4-5 (C.D. Cal. Sept. 29, 2008), *rev'd sub nom. Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). Like the district court in the earlier Xbox 360 litigation, the court presiding over the Land Rover litigation concluded that this lack of manifestation created individual issues of causation and damages that prevented certification under Rule 23(b)(3). *Id.*

It was in reliance on this Land Rover case that the district court in the earlier Xbox 360 litigation denied class certification. The plaintiffs in that Xbox 360 litigation then petitioned to appeal under Rule 23(f). When their petition was denied, the plaintiffs settled their individual claims, ending that case.

Meanwhile, the named plaintiffs in the Land Rover case secured an interlocutory appeal under Rule 23(f), and the court of appeals reversed the district court's denial of class certification. In *Wolin v. Jaguar Land Rover North America, LLC*, the Ninth Circuit held that manifestation of a design defect was not a prerequisite to class certification. Because the plaintiffs had alleged the existence of a "common defect"—an alignment defect that existed in every class member's vehicle—the existence of the defect itself, not its manifestation, was the core question. And the existence of the defect was "susceptible to proof by generalized evidence." 617 F.3d at 1173. For that reason, common issues predominated, making Rule 23(b)(3) certification proper.

2. The plaintiffs in the present action—Seth Baker, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk (collectively, "Baker")—filed their original complaint in April 2011, relying on the Ninth Circuit's intervening decision in *Wolin*. Akin to the *Wolin* plaintiffs, Baker alleged that the Xbox 360's inherent design defect was uniform in all consoles sold, so that each console breached Microsoft's warranties in the same way.

Before answering, Microsoft filed a "Motion to Strike Plaintiffs' Allegations, or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes." Baker had no chance to conduct any new discovery or to bring a motion for class certification.

After briefing, the district court entered an order explicitly striking Baker's class allegations. The district court thought that it was required to defer to the denial of class certification in the earlier Xbox 360 litigation unless the governing law had changed in the meantime. And, in the district court's view, *Wolin* had not undermined the earlier denial.

Although the district court did not deny a motion for class certification, Baker filed a petition to appeal under Rule 23(f). The petition was denied. The parties then filed a stipulation and proposed order dismissing the case with prejudice. Baker made it clear to both Microsoft and the district court that he was dismissing the action to secure appellate review of the order striking the class action allegations. Pet. App. 36a. The district court granted the dismissal

with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." *Id.* at 36a-37a.

3. After concluding that it had appellate jurisdiction, *id.* at 11a-12a, the court of appeals, relying on *Wolin*, reversed the district court's striking of class allegations. Proof that the defective disc drive manifested itself in scratched discs was "not necessary" because the claims presented two common questions: (1) the existence of the design defect *vel non*, and (2) whether that defect breached a warranty. *Id.* at 16a. Thus, the district court had erroneously struck the class allegations from the complaint. *Id.* at 18a. The court of appeals, however, withheld any opinion on whether Plaintiffs would eventually be able to certify a class. *Id*. at 19a.

REASONS FOR DENYING THE WRIT

There are three independently sufficient reasons to deny certiorari. First, because of its unusual procedural history, this case does not raise Microsoft's question presented. Second, the circuit split on which Microsoft relies is illusory. And third, the court of appeals' decision faithfully applied basic jurisdictional principles from which Microsoft now seeks to depart.

I. This case does not present the question that Microsoft asks the Court to decide.

Microsoft asks this Court to decide whether a court of appeals has jurisdiction "to review an order denying class certification" after named plaintiffs have voluntarily dismissed their claims with prejudice. Pet. i. But this case does not present that question.

1. The district court never entered an order denying class certification. *See* Pet. App. 18a. Instead, before answering, Microsoft moved for two alternative forms of relief: "to strike Plaintiffs' class allegations or, alternatively, to deny class certification." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1278 (W.D. Wash. 2012), *rev'd*, 797 F.3d 607 (9th Cir. 2015). Citing another district court's denial of class certification in the earlier Xbox 360 litigation, Microsoft argued that Baker was trying to "re-litigate" the class certification decision. CA9 ER 28. It urged the district court to "invoke principles of comity" to strike the class claims. *Id.* at 39-45. The district court agreed that it was required to defer to the earlier denial of class certification. *Baker*, 851 F. Supp. 2d at 1279-81. As a remedy, the district court explicitly chose the first form of relief that Microsoft sought—the striking of class allegations—and ordered that the class allegations be "STRICKEN." *Id.* at 1281.

Because the district court never entered an order denying class certification, this case does not present the question Microsoft asks the Court to decide. What is more, the district court's order striking Plaintiffs'

class claims differed significantly from an order denying class certification—it conducted no independent Rule 23 analysis, and simply "employ[ed] principles of comity in deferring to the [prior] Certification Denial Order." *Id.* at 1279. The concurring opinion in the court of appeals was correct to say that class "[c]ertification raises issues and procedures quite different from a motion to strike." Pet. App. 23a n.4 (Bea, J., concurring in the result).

This difference is evident from the district court's order, which reads more like an order granting a motion to dismiss on preclusion grounds than it does a class-certification denial. Like an order granting a partial motion to dismiss, the order here ruled that Baker could not bring his class claims as a matter of law, and dismissed those claims from the complaint. The district court treated the denial of class certification in the earlier Xbox 360 litigation as a decision that it lacked the power to "overrule," and ruled that the earlier class denial effectively precluded Baker from asserting class claims. *See Baker*, 851 F. Supp. 2d at 1280 ("Plaintiffs cannot ask this Court—under the guise of a separate litigation—to step into the shoes of the Ninth Circuit and effectively overrule a fellow member of this court."). Then, after an unsuccessful Rule 23(f) petition, Baker stipulated to a voluntary dismissal of his remaining claims—i.e., his individual claims—with prejudice.

This case is thus analogous to those where a district court finally disposes of less than all claims, and the prospective appellant then secures a final

appealable judgment by stipulating to a dismissal of its remaining claims. Microsoft does not argue that appellate jurisdiction is lacking in such cases, and indeed authority supports the exercise of appellate jurisdiction in those circumstances.[1] In any event, Microsoft has not asked the Court to decide whether a plaintiff can secure appellate review of dismissed claims by voluntarily dismissing its remaining claims.

2. The distinction between an order striking class claims and an order denying a motion for certification matters in another way as well. To support its argument that the court of appeals lacked jurisdiction, Microsoft relies heavily on the availability of discretionary appeals under Rule 23(f). Pet. 17-19, 22. But the court of appeals' exercise of jurisdiction here can implicate Rule 23(f), as Microsoft urges, only if Rule 23(f) applies not merely to grants or denials of class certification, but also to orders striking class allegations. Hence, if the Court grants certiorari here, it will be compelled to answer a collateral question about the scope of Rule 23(f).

Both the decision below and the court of appeals' earlier denial of Baker's Rule 23(f) petition declined to address the scope and applicability of Rule 23(f).

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[1] *See Volvo Constr. Equip. N. Am. v. CLM Equip. Co.*, 386 F.3d 581, 591 n.9 (4th Cir. 2004); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538, 540 (8th Cir. 1991); *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987); *United States v. Rent-a-Homes Sys. of Ill., Inc.*, 602 F.2d 795, 797 (7th Cir. 1979).

See Pet. App. 11a n.3 (noting only that Baker had unsuccessfully filed a 23(f) petition). In his 23(f) petition, Baker, by necessity, argued that an order striking class allegations was appealable under Rule 23(f) because it had the same effect as a denial of class certification. The court of appeals, however, denied the petition without commenting on whether Rule 23(f) applies to orders striking class allegations. *Baker v. Microsoft Corp.*, No. 12-80085 (9th Cir. June 12, 2012) (denying the petition "in its discretion," without further comment). Only one circuit appears to have addressed this issue, holding in a footnote that Rule 23(f) does apply to such orders. *See Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 110 n.2 (4th Cir. 2013) (noting, however, that the question had not been contested).[2]

This Court has not answered the question. Nor is it necessary for the Court to answer it, given the dearth of authority on the question and the infrequency with which it arises. In fact, the Court would have to depart from its normal practice before deciding the scope of Rule 23(f), since the court below did not explicitly decide it. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below." (citation and internal

[2] In addition, the Seventh Circuit has held that Rule 23(f) allowed it to assert jurisdiction over a decision granting a motion to strike a defense. *See In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002).

quotation marks omitted)). The arguments that Microsoft makes would be better decided in a case involving a denial of class certification—a context to which Rule 23(f) undoubtedly applies.

3. Microsoft does not identify a circuit split on whether named plaintiffs may voluntarily dismiss their individual claims to appeal a decision striking class claims. This should not be surprising. Pre-answer motions to strike class allegations are exceptionally rare, for generally "the pleadings alone will not resolve the question of class certification," and "some discovery will be warranted." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942 (9th Cir. 2009) (reviewing the grant of a motion to "deny class certification" under Rule 23(f)). This Court need not make room on its docket to review a procedurally unusual issue on which the circuits have not split.

4. Microsoft also contends that "[t]he jurisdictional issue is outcome-determinative here," Pet. 19, but that contention is incorrect—largely due to this case's unusual procedural posture. Because Baker appealed the district court's order striking class claims, rather than a denial of class certification, the opinion below was necessarily limited in scope. The court of appeals was careful to withhold any "opinion on whether" the case is "amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification if such a motion is filed." Pet. App. 19a. It merely held that the district court erred when it determined that Baker

was precluded as a matter of law from asserting class claims. *Id.* at 18a-19a.

II. The circuit split is illusory.

Microsoft urges review to resolve what it characterizes as a "firmly entrenched" circuit split over the question presented. Pet. 13. As an initial matter, the putative split does not affect this case. None of the cases Microsoft cites addressed whether named plaintiffs could voluntarily dismiss their individual claims to appeal a decision striking class allegations from a complaint. For that reason alone, the circuit split, even if it existed, would not warrant certiorari here. But the supposed circuit split is also illusory.

Contrary to Microsoft's insistence, the Tenth Circuit is in harmony with the Ninth Circuit. The Tenth Circuit has held that named plaintiffs may not appeal a denial of class certification after the district court has dismissed their individual claims for failure to prosecute. *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 800-01 (10th Cir. 1980). *Bowe* relied on—and agreed with—the Ninth Circuit's identical holding in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979). *Huey* remains good law in the Ninth Circuit, Pet. App. 12a n.4, and also makes good sense, since appellants should not be able to profit by their failure to prosecute diligently. While Microsoft asserts that, unlike the *Huey* plaintiffs, the plaintiffs in *Bowe* were not "dilatory," Pet. 12 n.2, nothing in the Tenth Circuit's opinion supports that assertion. In any

event, the Tenth Circuit has not yet addressed whether it has jurisdiction to review a denial of class certification after a voluntary dismissal—which counsels in favor of further percolation in the courts of appeals rather than immediate review.

While the Second Circuit, unlike the Ninth and Tenth, has allowed a named plaintiff to appeal after the district court has dismissed its individual claim for lack of prosecution, *Gary Plastics Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), that disagreement is irrelevant to the present petition. Baker's individual claims were not dismissed for failure to prosecute. Indeed, that was precisely the basis on which the court of appeals distinguished this case from its earlier decision in *Huey*. Pet. App. 12a n.4. Accordingly, this case cannot be a vehicle for resolving any circuit conflict on whether a dismissal for failure to prosecute gives the courts of appeals jurisdiction to review a preceding interlocutory decision.

Microsoft also cites the Eleventh Circuit to support an alleged circuit split, but that court has not yet addressed the question presented. In *Druhan v. American Mutual Life*, 166 F.3d 1324 (11th Cir. 1999), the appellant was not challenging a denial of class certification. Moreover, later cases have limited *Druhan*'s statements on whether a court of appeals has jurisdiction to review a final judgment that is produced by a voluntary dismissal. *See id.* at 1325-26. Since *Druhan*, the Eleventh Circuit has held that plaintiffs may indeed challenge certain interlocutory

orders through a voluntary dismissal. *See OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1357 (11th Cir. 2008). The court has not yet had an opportunity to address whether a denial of class certification is one of the interlocutory orders that plaintiffs may challenge by voluntary dismissal and subsequent appeal. Because the Eleventh Circuit has not yet addressed the question presented, immediate review of that question would be premature.

Nor has the Third Circuit squarely addressed the question presented. It has held that plaintiffs may not voluntarily dismiss their claims to challenge decertification in a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-46 (3d Cir. 2013), but it has not addressed the question Microsoft asks the Court to decide.[3] Collective actions under the FLSA and class certification under Rule 23 are "fundamentally different." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013). In particular, the relationship between the class claims and the named plaintiffs' individual claims is different. In FLSA collective actions, the mooting of the

[3] In *Camesi*, the court of appeals relied on *Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444 (3d Cir. 1977), an earlier case in which the court had dismissed an appeal seeking to challenge a denial of class certification. In *Sullivan*, however, the named plaintiffs had not voluntarily dismissed their claims, but instead, as in the Second Circuit's *Gary Plastics* case, had their case dismissed for failure to prosecute. *See Camesi*, 729 F.3d at 245.

named plaintiff's claim moots the case and deprives the federal courts of jurisdiction. *Id.* That is not necessarily the case under Rule 23. *See id.* at 1530. Hence, a voluntary dismissal in an FLSA case presents an analytically different jurisdictional issue from a voluntary dismissal in a proposed class action under Rule 23. Because the Third Circuit has not yet addressed the latter question, review of that question is not yet warranted.

The Fourth Circuit has held that plaintiffs who voluntarily dismissed their individual claims lacked Article III standing to challenge a denial of class certification, but that holding raises a different question from the one that Microsoft presents in its petition. *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 98-100 (4th Cir. 2011). Microsoft does not argue that Baker's voluntary dismissal deprived the federal courts of jurisdiction under Article III. Its only argument is that the court of appeals lacked appellate jurisdiction under 28 U.S.C. § 1291. Pet. 20-23.[4]

That leaves the Seventh Circuit's decision in *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001). There, the court of appeals said it would "not

[4] While Microsoft argues that Baker's claims would be moot if they were not revived by the court of appeals' decision, Pet. 22-23, those claims *were* revived by the decision below. The court of appeals' past decisions establish that when plaintiffs voluntarily dismiss their claims with prejudice to challenge an earlier decision, a reversal of that decision will revive the claims. *See Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995).

review" a denial of class certification because the plaintiffs had voluntarily dismissed their individual claims. *Id.* at 629. Because the Seventh Circuit failed to provide any explanation or analysis for this decision, it is unclear why it declined review. It is not even clear that the Seventh Circuit's decision to decline review was jurisdictional rather than merely prudential. Because one cannot know what the Seventh Circuit decided and why it decided it, *Chavez* provides a slender reed for a grant of certiorari. Indeed, its lack of analysis just underscores the need for additional consideration by the lower appellate courts before the Court grants certiorari. Review of the question presented must await not merely a suitable vehicle, but also a genuine conflict in appellate authority.

III. The decision below is correct.

The court of appeals' decision hewed to the fundamentals of appellate jurisdiction. Microsoft's arguments to the contrary are incorrect.

1. The regional courts of appeals have "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. A final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

The district court's judgment here satisfied the statutory finality requirement. The district court had already dismissed the class claims by striking Baker's

class allegations from the complaint. By dismissing all of Baker's individual claims with prejudice, Pet. App. 36a-37a, the judgment disposed of all remaining claims and hence disposed "of the whole case." *Catlin*, 324 U.S. at 233; *see Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000) (holding that the dismissal of all claims with prejudice was a final decision). Contrast this with *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), where the named plaintiffs had not secured a final judgment of all claims before appealing the district court's decertification decision.

Because the judgment was final, the only possible argument against appellate jurisdiction would be that Baker's voluntary dismissal somehow deprived the court of appeals of jurisdiction. Microsoft does not make this argument, however—perhaps because it would have no basis in the text of 28 U.S.C. § 1291, which requires only finality. And, in any event, the ruling that Baker challenged on appeal—the decision to strike class claims—was entered over his objection. The court of appeals therefore gained jurisdiction to review that decision through the subsequent final judgment. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 680-81 (1958) (voluntary dismissal of complaint did not strip court of appeals of jurisdiction to review an earlier decision to which the appellant had objected).

2. Microsoft appears to argue, however, that the motivation behind Baker's voluntary dismissal stripped the court of appeals of jurisdiction. Microsoft

surmises that Baker voluntarily dismissed his individual claims because the order striking his class claims deprived him of an economic incentive for further litigation. Because that motivation lay behind the voluntary dismissal, Microsoft argues, the court of appeals lacked jurisdiction. Pet. 20-21.

It is this argument, and not the court of appeals' decision, that conflicts with *Livesay*. There, the named plaintiffs had tried to appeal a denial of class certification without proceeding to final judgment. This Court held that a court of appeals did not have jurisdiction over that otherwise interlocutory decision simply because it deprived the plaintiffs of motivation to pursue their individual claims. *See* 437 U.S. at 470-72. *Livesay* makes the named plaintiffs' motivations irrelevant to appellate jurisdiction. Microsoft's attempt to make those motivations relevant conflicts with *Livesay*. Just as subjective motivations cannot bestow finality on an otherwise interlocutory order, so they cannot strip finality from an otherwise final order.

Indeed, subjective motivations cannot alter finality for the very reason this Court identified in *Livesay*: Inquiring into the appellant's motivation would waste judicial resources. *Id.* at 473. The inherent complexity of ascertaining motive threatens the "operational consistency and predictability" that stand at the core of the final-judgment rule. *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emps.*, 134 S. Ct. 773, 780 (2014). Even more fundamentally,

Microsoft's focus on subjective motivations introduces uncertainty and complexity into a threshold issue—jurisdiction—where "administrative simplicity is a major virtue." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Microsoft's novel test will also require going beyond the four corners of the final decision, and delving into the record, just to determine the threshold question of jurisdiction. This Court has previously rejected a proposed test for finality that required rummaging into details beyond the four corners of a district court order. *See Ray Haluch Gravel*, 134 S. Ct. at 781 (rejecting a rule that would have required the appellate court to consult an affidavit accompanying a motion in order to discern finality). To promote predictability and uniformity, a district court order's finality must depend on the order itself. Microsoft's novel and "[c]omplex jurisdictional test[ ]," therefore, must be rejected. *Hertz*, 559 U.S. at 94.

3. Microsoft raises a number of other miscellaneous arguments against the court of appeals' decision. Each fails.

First, it argues that the decision allows parties to circumvent the restrictions that Rule 23(f) puts on interlocutory appeals of class-certification decisions. But Rule 23(f) allows an appeal from a class-certification decision without a final judgment on the merits. Here, there was a final judgment on the

merits following entry of an adverse order striking the class allegations.[5]

This distinction matters. If Baker had failed to convince the court of appeals to reverse the district court's striking of the class claims, he would have lost his individual claims permanently. When plaintiffs voluntarily dismiss claims to appeal an earlier ruling, but fail to overturn that ruling, the voluntarily dismissed claims are extinguished. *See Concha v. London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995). By contrast, if Baker had secured an appeal under Rule 23(f) before final judgment and had lost that appeal, his individual claims would have still been live. Unlike a Rule 23(f) appellant, Baker ran "a serious risk of losing his claim[s] entirely." *Id.* at 1508. It is this risk that makes the judgment here "final." *See Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (the purpose of the finality requirement is to avoid "piecemeal disposition" of the basic controversy in a single case).

If Microsoft is arguing that the existence of Rule 23(f) deprived the court of appeals of jurisdiction over an otherwise final judgment, that argument makes little sense. The possibility of interlocutory appeal cannot deprive a final judgment of finality. If it did, the availability of an interlocutory appeal under 28

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[5] Baker assumes for purposes of the present discussion that appellate jurisdiction under Rule 23(f) extends to decisions striking class allegations. *See supra* 10-12.

U.S.C. § 1292(b) would deprive the courts of appeals of jurisdiction over all final decisions. Section 1292(b), after all, allows an appeal from *any* interlocutory order, not just an order on class certification. Yet no one thinks that § 1292(b) deprives appellants of the ability to challenge those interlocutory orders on appeal after a final judgment. Likewise here, Rule 23(f) does not deprive appellants of the ability to challenge a class-certification decision after a final judgment, let alone an order striking class claims.

Next, Microsoft contends that the court of appeals' decision gave Baker an unfair advantage by allowing him to seek immediate review. Pet. 15, 22. But this is no more unfair than any individual plaintiff's voluntary dismissal of his remaining claims following a district court's partial dismissal—a voluntary dismissal that then allows immediate review of the earlier involuntary dismissal. *See supra* 9-10. Nor was Baker's voluntary dismissal costless. To the contrary, by voluntarily dismissing his claims, he ran "a serious risk of losing his claim[s] entirely" by failing to secure a reversal. *Concha*, 62 F.3d at 1508.

Finally, Microsoft, pointing to the limited scope of the court of appeals' decision, worries that allowing an appeal from a voluntary final judgment may allow for serial appeals. Pet. 15, 22. Here, however, the limited scope of the court of appeals' decision flowed from Microsoft's own strategic decision to seek to dismiss the class claims as a matter of law before answering the complaint. The preliminary nature of the court of appeals' decision differs little from any

appellate decision in which a district court has wrongly interpreted the law at an early stage and on a dispositive issue. And, rather than receive that appellate opinion much later, Baker promoted judicial economy by voluntarily dismissing the remaining claims and appealing the district court's decision immediately.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this December 14, 2015.

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