UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP BOBBITT, individually and on behalf of all others similarly situated; et al., Plaintiffs, and LANCE LABER, Intervenor-Plaintiff-Appellant, v. MILBERG LLP; et al., Defendants-Appellees.	No. 13-15812 No. 4:09-cv-09-629-TUC-FRZ District of Arizona (Tucson)

APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the Supreme Court endorsed the procedure followed in this case. After dismissal of the named class representatives' class allegations and subsequent voluntary dismissal of their individual claims, unnamed class members timely intervened to appeal the court's refusal to permit class certification. The Court authorized the appeal by intervention and affirmed the court of appeals' judgment that the district court had erred in refusing to certify a class. The Court also concluded it had been appropriate for the unnamed class members to wait to intervene until after dismissal of the named plaintiffs' claims, since requiring intervention earlier would have made the intervenors "superfluous spectators." *Id.* at 394 n.15. Subsequent Supreme Court cases recognized the validity of *United Airlines*, relying on its principle of allowing intervention to appeal certification denials as a foundation for the development of the Court's appellate standing jurisprudence in class actions.

The Supreme Court's opinion in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017), did not alter the viability of the procedure endorsed in *United Airlines*. *Baker* simply interpreted the word "final" in 28 U.S.C. § 1291, and held that when a named plaintiff voluntarily dismisses his individual claims purportedly "with prejudice," but also "reserve[s] the right to revive [his] claims should the Court of Appeals reverse," *id.* at 1707, that same plaintiff cannot then claim finality and

appeal. To reach its conclusion, *Baker* relied heavily on principles stated in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), a case that expressly recognized the validity of the procedure endorsed in *United Airlines*.

United Airlines remains good law. Unless and until the Supreme Court overrules itself and holds that its repeated approval of intervention to appeal certification denials has been in error, this Court should continue to follow *United Airlines* and its progeny.

BACKGROUND

Philip Bobbitt and John Sampson brought a putative class action against Milberg in the District of Arizona for malpractice. *Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1068 (9th Cir. 2015) (vacated). The district court denied certification on suspect grounds, and Bobbitt and Sampson voluntarily dismissed their claims with prejudice. ER 240. They have repeatedly disclaimed any right to pursue their individual claims (on remand or otherwise) or to appeal the resulting judgment. *See* p. 6, *infra*.

When Bobbitt and Sampson decided not to pursue their individual claims or appeal, Lance Laber, an unnamed class member not previously involved in the action, filed a motion asking to intervene in the district court for the purpose of appealing the district court's denial of class certification, as permitted by *United Airlines*. The district court granted the motion, and Laber filed a timely appeal.

This Court held that it had jurisdiction over Laber's appeal and found the district court had committed legal error in refusing to certify a class. Milberg filed a petition for certiorari to the United States Supreme Court, arguing, among other things, that the Court should either hear this case along with *Baker* or hold the certiorari petition pending resolution of *Baker*. Pet. in No. 15-734 (U.S. 2015). The Court declined to hear this case, but held the petition and, after deciding *Baker*, granted certiorari, vacated this Court's judgment, and remanded for further consideration in light of *Baker*. *Milberg LLP v. Laber*, 137 S. Ct. 2262, 2263 (2017). This Court ordered supplemental briefing.

For the following reasons, the Court should reinstate its opinion holding that the district court erred in denying class certification.

DISCUSSION

I. *United Airlines* Allowed An Unnamed Class Member To Intervene To Appeal Denial Of Class Certification After A Voluntary Dismissal

In *United Airlines*, a group of female flight attendants pursued a class action against United Airlines for sex discrimination under the Civil Rights Act. 432 U.S. at 387–88. The district court struck the complaint's class allegations – the equivalent of denying class certification – leaving only the individual claims of the remaining named plaintiffs in the suit. *Id.* at 388. The district court certified its order denying certification for interlocutory appeal under 28 U.S.C. § 1292(b), but

the court of appeals declined jurisdiction. *Id.* After settlement of the individual claims, the district court entered a judgment of dismissal. *Id.* at 389.

An unnamed class member, who until then had not sought to participate in the litigation, moved to intervene to appeal the district court's class determination order. *Id.* The district court granted the motion, and the court of appeals reversed the denial of class certification. *Id.* at 390. The Supreme Court affirmed.

The Court held that the unnamed class member's motion to intervene for purposes of appealing the district court's class certification denial was timely by virtue of having been filed within the time to appeal under FRAP 4(a). The Court found that intervention was authorized once it became clear "that the interests of the unnamed class members would no longer be protected by the named class representatives." *Id.* at 394. The Court also endorsed the unnamed class member's decision to wait to intervene until after judgment had been entered in the would-be class action – noting that earlier intervention would force absent class members to enter the action solely to preserve their appellate rights, creating unnecessary proceedings only to sit idly by in the litigation in case the named plaintiff ceased pursuing the class claims. *Id.* at 394 n.15.

II. *Baker* Reinforced *Livesay* – Which Approved Of *United Airlines* – And Left Undisturbed The Intervention Procedure Followed Here

In *Baker*, plaintiffs brought a putative class action against Microsoft based on an alleged defect in gaming consoles. 137 S. Ct. 1702. After the district court

struck the plaintiffs' class allegations, the plaintiffs voluntarily dismissed their claims. Although they labeled the dismissal "with prejudice," they also reserved the right to appeal the district court's certification order and to pursue their claims if the court of appeals reversed. *Id.* at 1707, 1711. The Supreme Court held that a plaintiff cannot force immediate review of a certification denial by voluntarily dismissing his claims while reserving the right to re-institute them, and then bringing an appeal. *Id.* at 1712.

Disapproval of the *Baker* plaintiffs' attempt to appeal while reserving the right to revive their claims on remand permeates the Court's opinion. *Id.* at 1707 (plaintiffs had "reserved the right to revive their claims should the Court of Appeals reverse the District Court's certification denial"); *id.* at 1715 (noting, in rejecting plaintiffs' arguments, their claims in the briefs and during oral argument that "everything would spring back to life" on remand); *id.* at 1707 (in describing plaintiffs' dismissal of their claims, the Court used quotation to marks around the words "with prejudice," in light of plaintiffs' attempt to reserve the right to pursue the claims on remand); *id.* at 1712 (referring to the dismissal as a "device"). Interpreting the word "final" in § 1291, the Court held a plaintiff cannot "subvert" finality by use of a "tactic" in which it provokes a judgment while at the same time retaining the essential hallmarks of an interlocutory appeal – the right to appeal and

then, if successful, to continue to pursue their claims as if there had never been a dismissal in the first place. *Id.* at 1712–13.

The named plaintiffs here, in comparison, are not appellants. *See* ER 257. And they have never sought to reserve their claims; to the contrary, they have unambiguously disclaimed any right to appeal or to pursue their claims in the future. *E.g.*, ER 240 (Bobbitt's and Sampson's motion for voluntary dismissal; noting it would constitute a full relinquishment of their claims and that an appeal would need to be pursued by another class member); *see also* *Appellant's Response to Milberg's Motion to Dismiss Appeal*, No. 13-15812 (filed Aug. 19, 2013) (Bobbitt and Sampson "were not trying to keep their claims 'on ice.' Just the opposite; they incinerated them."); *Appellant's Reply Brief*, No. 13-15812 (filed July 28, 2014) (Bobbitt and Sampson "permanently gave up the option of pursuing [their] claims"). The dismissal here was not a "device," nor was it "with prejudice" in name only. Bobbitt and Sampson not only fully and finally relinquished their claims, but also disclaimed any intent to try to appeal. Had there been no suitable intervenor willing to seek to intervene and appeal within the appeal deadline, the case would be over.

There is nothing in *Baker* to suggest the Court intended to render *United Airlines* a nullity. The Court did not even mention *United Airlines*, except to include it in a string cite, in a footnote, for the minor point that an order striking

class allegations is the functional equivalent of an order denying class certification. 137 S. Ct. at 1711 n.7. The Court in *Baker* did, however, rely extensively on *Livesay*, where it had rejected the "death knell" doctrine for appeals from denials of class certification and declined to treat such orders as immediately appealable collateral orders. And *Livesay*, importantly, had declined to do so in part ***precisely because*** it recognized that, under *United Airlines*, "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff *or intervening class members*." 437 U.S. at 469 (emphasis added) (citing *United Airlines*). The validity of the *United Airlines* procedure was thus an integral component of the Court's decision in *Livesay*, which in turn formed a basis for the Court's decision in *Baker*. Not only is there not a word in *Baker* suggesting an intent to render *United Airlines* meaningless, its reliance on *Livesay* confirms the opposite.

To be clear, *Baker* does mean the judgment resulting from Bobbitt's and Sampson's dismissal would not have been regarded as "final" if one of *them* had attempted to appeal while also purporting to reserve his right to proceed on remand. In light of the Supreme Court's determination in *Baker* that the statutory word "final" affords room for practical considerations, 137 S. Ct. at 1712, its holding is hardly surprising – the *Baker* plaintiffs' tactical conception of "with prejudice" stretched the word "final" beyond the bounds of reason. But the fact

that the judgment here would not be "final" under *Baker* if Bobbitt or Sampson had sought to appeal and retain their claims does not mean the judgment lacks finality for all purposes.

The question here is whether the judgment is final for purposes of appeal by a previously uninvolved class member, who has been granted intervention by the district court, to protect the rights of the other class members – class members who, of course, did not make the decision to voluntarily dismiss and who, until the named plaintiffs did so, were entitled to rely on the named plaintiffs' pursuit of the claim. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974) ("Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case."). *Baker* does not answer that question; nor does it purport to do so. *United Airlines* ***does*** answer that question, and it answers it in the affirmative. To hold otherwise would undo 40 years of class action jurisprudence.

III. *United Airlines* Has Served As A Foundation For The Supreme Court's Appellate Jurisdiction Jurisprudence In Class Actions

While the issue presented in *United Airlines* was technically whether the motion to intervene was timely for purposes of Rule 24, it has served as a foundational case in a series of decisions in which the Supreme Court has defined the contours of its appellate jurisdiction for class certification denials.

The Term following *United Airlines*, the Supreme Court decided *Livesay*, 437 U.S. 463 (1978). There, the Court addressed whether a named class plaintiff could appeal an interlocutory order denying class certification as a matter of right under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Court held that orders denying class certification do not come within the "small class" of decisions excepted from the final judgment requirement in *Cohen*, because such orders are not "effectively unreviewable on appeal from a final judgment." *Livesay*, 437 U.S. at 468–69. This was in part due to the fact that "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff *or intervening class members*." *Id.* at 469 (emphasis added) (citing *United Airlines*, 432 U.S. 385). In other words, the option for absent class members to appeal by intervening under *United Airlines* was a key reason why the Court in *Livesay* decided against permitting interlocutory appeals.

The Court next decided two important class action appellate jurisdiction cases in 1980, both on the same day: *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), and *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). In *Geraghty*, the Court held that a proposed class representative retains Article III standing to appeal the denial of class certification even after his personal claim has become moot, as his interest in obtaining class certification constitutes a separate

"personal stake" for purposes of Article III. 445 U.S. at 404. In reaching its holding, the Court observed that it had previously, in "two different contexts," discussed the importance of the appealability of class certification denials. *Id.* at 399. First, the Court noted, this dynamic had been important to *Livsay*'s rejection of class certification denials as immediately appealable collateral orders. *Id.* at 399–400. Second, the Court observed:

> [I]n *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393–95 (1977), the Court held that *a putative class member may intervene, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims have been satisfied and judgment entered in their favor*. Underlying that decision was the view that "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs."

Id. at 400 (emphasis added) (quoting *United Airlines*, 432 U.S. at 393).

And, in *Roper*, the Court held the ordinary rule, that only a party aggrieved by a judgment may appeal from that judgment, does not apply with respect to orders denying class certification. A class representative may, the Court held, appeal the denial of certification even if judgment has been entered in the class representative's favor. The Court reasoned that class representatives have an interest in representing the rights of absent class members, which is a separate interest from their stake in their individual claims. 445 U.S. at 331. The Court found this interest to rest not just with named class representatives, but also with "putative class members as potential intervenors," *id.* – an obvious reference back

to the Court's then very-recent decision in *United Airlines*. Indeed, elsewhere in its opinion, the *Roper* Court characterized *United Airlines* as holding "that a member of the putative class could appeal the denial of class certification by intervention, after entry of judgment in favor of the named plaintiff, but before the statutory time for appeal had run." *Id.* at 330. And, as in *Geraghty*, the Court in *Roper* observed that the appealability of the denial of class certification was "an important ingredient" to *Livesay*. *Id.* at 338.[1]

Geraghty, *Roper* and these other cases, accordingly, stand for two important principles that are crucial here. First, they reaffirm what *Livesay* itself had said – that the availability of appeals of class denials by intervenors under *United Airlines* was a significant underpinning of the *Livesay* Court's decision not to extend *Cohen* collateral-order finality to class denials. To kick out one of the legs on which *Livesay* rests (*United Airlines*) would, given *Baker*'s reliance on *Livesay*, likewise remove crucial support for *Baker* itself. The more sensible way to harmonize the Supreme Court's line of cases is to interpret *Baker* as leaving *United Airlines* undisturbed.

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[1] This Court also has recognized the validity of *United Airlines*'s appellate procedure. *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1320 (9th Cir. 1997). The Seventh Circuit has likewise concluded that *United Airlines* means courts of appeals have jurisdiction over appeals from denials of class certification by unnamed class representatives who intervene following settlement by named plaintiffs. *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274 (7th Cir. 1995) ("On this we can be brief.").

Second, although *Geraghty* and *Roper* are Article III cases, not § 1291 cases, their standing analyses depend heavily on – and relied heavily on *United Airlines* for – the principle that absent class members (or named class members whose claims are moot) have a separate, independent interest in protecting the class's interest in appealing class certification denials. These cases have stood for nearly 40 years. Given the choice between holding that *Baker* meant silently to undermine all this law and to undermine the important independent rights of absent class members, or holding that *Baker* simply means a judgment is not "final" as to a named class member when he tries to reserve for himself the right to appeal and later pursue his claims, the Court should opt for the latter.

Milberg has previously argued that an appeal by the named plaintiff and by an intervening class member are functionally the same. That is hardly so for a number of reasons. First, and most significantly, *United Airlines* authorizes the latter. Second, *United Airlines* putative intervenors have an entirely distinct interest from named plaintiffs who elect to no longer pursue their claims. That is the very point of *Geraghty, Roper* and the other cases cited above, which recognize that the right to seek review of a certification denial stands on its own as a cognizable Article III interest. There is not a single word in *Baker* on which to pin an intent by the Court to overrule 40 years of precedent *sub silentio* in a factually

distinct context.[2] Third, intervention is different because it requires a suitable intervenor willing to take on the class's cause within the short time for appeal – no more than 30 days in a case not involving the government. *E.g.*, *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322 (11th Cir. 2017).

Moreover, Milberg's functional-equivalent argument ignores that even where one path to appeal is blocked by lack of finality, the Supreme Court has had no trouble recognizing alternative procedural paths to finality, so long as a party is willing to live with the consequences the alternative procedural path entails. For example, just as the Court in *Livesay* was comforted by the existence of appeal-by-intervention under *United Airlines*, the Court in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), recently was comforted in holding that orders compelling production of arguably privileged information are not final under *Cohen* in part precisely because of the existence of alternative "safety valve" means of obtaining an appeal to vindicate error (such as provoking contempt by failing to produce the privileged information and then appealing the contempt order). *Id.* at 110–11. There is, accordingly, no anomaly in recognizing appeal by intervention under *United Airlines* while blocking appeals under *Baker* by named

[2] Milberg's petition for certiorari offered the Supreme Court the opportunity to backtrack from *United Airlines* had it wished to do so. Though obviously aware of Milberg's petition, the Court declined – neither taking this case for hearing nor discussing *United Airlines* appeal by intervention in its opinion.

representatives who claim to be dismissing "with prejudice" but reserve a right to reappear later.

Bobbitt and Sampson forever relinquished their claims and denounced their right to appeal; Laber subjected himself to the possibility his request for intervention would be denied by the district court or that he would face other obstacles; and the class's viability now depends on the emergence of a suitable class representative other than Bobbitt or Sampson. The path forged by Laber is not, in any sense, a functional equivalent to the "we-pretend-to-dismiss-with-prejudice-but-do-not-really-mean-it" path pursued by Mr. Baker and his co-plaintiffs.

IV. The D.C. Circuit Has, After *Baker*, Re-Affirmed *United Airlines* Intervention

Another court has already decided a question similar to the one presented here. The D.C. Circuit recently held that *Baker* does not undermine *United Airlines* appeals. *In re Brewer*, 863 F.3d 861 (D.C. Cir. 2017).

The *Brewer* case is procedurally complicated, so it requires some unraveling to understand why it is directly relevant here. Mr. Brewer was the named plaintiff in a class action alleging race discrimination. The district court denied certification, and Brewer sought interlocutory review under Fed. R. Civ. P. 23(f). Before his petition could be considered by the court of appeals, however, Brewer settled and voluntarily stipulated to dismissal with the defendant. 863 F.3d at 867.

That same day, other previously absent class members sought to intervene. Importantly, their request was to do two things: (1) pick up pursuit of Brewer's Rule 23(f) petition, and (2) bring a *United Airlines* appeal with respect to the order denying class certification. *Id.* The district court did not resolve the motion to intervene before expiration of the notice of appeal deadline, leaving the putative intervenors in a difficult position. Accordingly, they filed a notice of appeal, appealing both the effective denial of their motion to intervene and from the order denying class certification. *Id.* The district court decided the notice of appeal stripped it of jurisdiction. *Id.*

The court of appeals determined that it had to decide two threshold jurisdiction questions. First was whether Brewer's stipulated dismissal blocked the motion to intervene. And second was the precise issue here: "we must consider how the only named plaintiff's stipulated dismissal of his individual claims affects whether absent members of a putative class can appeal the denial of class certification." *Id.* at 868. On the first question, the court held that intervention is permitted after stipulated dismissal, and, on the second question, citing *United Airlines*, the court found that "intervention for the purpose of appealing a denial of class certification is certainly available." *Id.* at 868.

The court explicitly addressed *Baker*. 863 F.3d at 871. Importantly, the court did not even entertain the idea that *Baker* would prohibit the intervenors from

challenging the class certification denial on appeal under *United Airlines*. The court only addressed whether *Baker* prohibited intervention to pursue the Rule 23(f) petition. *Id.* (explaining that the court did not need to address the "statutory issue" in *Baker* because it was considering only Rule 23(f) petition). It found that question easily resolved in favor of appellate jurisdiction. *Id.*

Notwithstanding its disclaimer about not reaching *Baker's* "statutory issue," the court plainly, implicitly recognized it also had jurisdiction to hear the intervenor's appeal from the order denying class certification under *United Airlines*. Again, this is complicated by the procedural complexity of the case, but the key point is this: After concluding it had jurisdiction to permit the intervenors to pursue Brewer's Rule 23(f) petition, the D.C. Circuit ultimately ***denied*** interlocutory Rule 23(f) review. *Id.* at 873–76. Once it did so, the procedural posture in *Brewer* was effectively the same as it is here: the district court had denied class certification, the named plaintiff had voluntarily dismissed his case without litigating it to conclusion, the court of appeals had denied Rule 23(f) review, and the only parties left to challenge the allegedly erroneous denial of certification were the intervenors. The D.C. Circuit saw no jurisdictional impediment to remanding the case back to the district court with instructions to allow intervenors to seek to substitute a new class representative and re-file for certification. *Id.* at 876.

The court found its power to do so derived from its consolidation of the intervenor's *United Airlines* appeal with the interlocutory Rule 23(f) appeal. *Id.* Obviously, if the D.C. Circuit had believed that, under *Baker*, it lacked jurisdiction to consider the intervenors' *United Airlines* appeal from the final judgment (which, as here, resulted from the named plaintiff's voluntary dismissal), then it would have been obligated to end the case as soon as it rejected Rule 23(f) relief. It did not do so. Indeed, one of the ***very reasons*** the court denied the Rule 23(f) petition was its conclusion that the intervenors had, in fact, appealed the denial of certification under *United Airlines*. *Id.* at 874 (intervenors do not "face a death-knell situation if we decline [Rule 23(f)] review," because "[t]hey have appealed class certification from final judgment, thereby demonstrating their intent to continue the litigation regardless whether we grant the Rule 23(f) petition.").

Thus, although the procedural history is cleaner here, *Brewer* is directly on point: Voluntary dismissal by a named plaintiff does not preclude other class members from stepping forward, within the appeal period, to pursue a *United Airlines* appeal of class denial. S*ee also Love*, 865 F.3d at 1326 (Anderson, J., concurring) (recognizing, in a case decided after *Baker*, that "putative class members who move to intervene *and* file a notice of appeal within the thirty-day time to appeal from the final judgment effected by a Federal Rule of Civil Procedure 41(a)(1)(A)(ii) joint stipulation are not foreclosed from exercising their

conditional right to intervene after final judgment for the purpose of appealing the district court's previous denial of class certification, as contemplated by the Supreme Court in *United Airlines*"). For all the reasons herein, this Court should reach the same result as the D.C. Circuit.

CONCLUSION

Baker held that a judgment provoked by a named plaintiff, who appeals but also reserves the right to re-engage in the district court, is effectively interlocutory and not really "final" with respect to that named plaintiff. *Baker* did not silently overrule *United Airlines*. The Court should reinstate its opinion ruling that the district court erred in denying class certification.

Respectfully submitted, this 9th day of November, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), Circuit Rule 32-1, and this Court's Supplemental Briefing Order of October 10, 2017, the undersigned certifies that the accompanying brief complies with Circuit Rule 32 and the Supplemental Briefing Order. The brief is double-spaced, utilizes 14-point proportionally spaced Times New Roman typeface, and does not exceed twenty pages.

/s/ Jeff A. Siatta

CERTIFICATE OF SERVICE

I hereby certify that on November 9th, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jeff A. Siatta