

No. 20-16823, No. 20-16857

**In the United States Court of Appeals
for the Ninth Circuit**

RACHEL CONDRY; JANCE HOY; FELICITY BARBER; RACHEL
CARROLL; CHRISTINE ENDICOTT; LAURA BISHOP, on behalf of
themselves and all others similarly situated,

Plaintiffs- Appellees/ Cross-Appellants,

TERESA HARRIS, on behalf of herself and all others similarly situated,

Intervenor Plaintiff- Cross-Appellant,

v.

UNITEDHEALTH GROUP, INC.; UNITEDHEALTHCARE, INC.; UNITED
HEALTHCARE INSURANCE COMPANY; UNITED HEALTHCARE
SERVICES, INC.; UMR, INC.,

Defendants- Cross-Appellants/ Appellees.

On Appeal from the United States District Court for the Northern District of
California, No. 3:17-cv-00183-VC (The Honorable Vince Chhabria)

**PLAINTIFFS'-APPELLEES'/CROSS-APPELLANTS'
SUPPLEMENTAL BRIEF**

Nicholas E. Chimicles
Kimberly Donaldson-Smith
Stephanie E. Saunders
CHIMICLES SCHWARTZ KRINER
& DONALDSON-SMITH LLP
361 W. Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
KMD@Chimicles.com

Nathan Zipperian
SHEPHERD, FINKELMAN,
MILLER AND SHAH, LLP
1625 N. Commerce Pkwy. #320
Ft. Lauderdale, FL 33326
Telephone: (954) 515-0123
nzipperian@sfmslaw.com

Counsel for Plaintiffs, Intervenor Plaintiff - Appellees/ Cross-Appellants

July 14, 2021

TABLE OF CONTENTS

A.	Introduction	1
B.	Pertinent Procedural History and District Court Orders on Appeal.....	3
C.	The Stipulated Final Judgment and Order is a Final Decision.....	6
D.	Plaintiffs’ Appeals Present a Genuine Case or Controversy.....	8

TABLE OF AUTHORITIES

Page(s)

Cases

Brown v. Cinemark USA, Inc.,
876 F.3d 1199 (9th Cir. 2017)..... 7

Microsoft Corp. v. Baker,
137 S. Ct. 1702 (2017) *passim*

Narouez v. Charter Communications, LLC,
591 F.3d 1261 (9th Cir. 2010)..... 9, 10

Rodriguez v. Taco Bell Corp.,
896 F.3d 952 (9th Cir. 2018)..... 7

Woman's Club of Hollywood v. Morgan,
Nos. 18-55293, 18-55324, 2021 U.S. App. LEXIS 6948
(9th Cir. Mar. 10, 2021) 8

Statutes and Other Authorities

28 U.S.C. § 1291..... 1, 6, 8

Rule 23 1, 2, 5, 7

A. Introduction

The answer to both questions posed in the Court’s July 2, 2021 Order requesting supplemental briefing (DktEntry 39) is Yes. The Stipulated Final Judgment and Order (“FJO”, 1-ER-2-11), which incorporates the district court’s summary judgment, class certification and intervention orders (1-ER-3-4), is a “final decision” for purposes of 28 U.S.C. § 1291 and under the Supreme Court’s decision in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). And, the cross-appeals from the FJO and the district court’s orders present a genuine “case” or “controversy” as is required for jurisdiction under Article III of the United States Constitution.

The following information is dispositive as to the questions posed by the Court: The district court issued rulings on the merits of Plaintiffs’ claims. Atypical for putative federal class actions (particularly those not asserting wage and hour claims), the district court below required that summary judgment proceedings and rulings would occur with respect to the Plaintiffs’ individual claims *prior to* any proceedings under Federal Rule of Civil Procedural 23 (“Rule 23”). Such sequencing and scheduling was at Defendants’ behest. 5-SER-963-964; 5-SER-996 at Dkt. No. 145.

Accordingly, in June 2018 the district court entered summary judgment on the merits both for and against the Plaintiffs. 1-ER-23-31; 1-ER-3-4. Subsequently, in 2019, Plaintiffs filed motions for class certification and a motion to intervene, and the district court issued its attendant orders. 3-ER-535-539, 1-ER-12-22, 1-SER-2-3, 1-ER-3-4.

To be clear: the district court’s summary judgment order on the merits and its

subsequently issued orders on class certification and the motion to intervene, which are set forth in the FJO, are the subject of the cross-appeals. “Voluntarily dismissed” claims are not the subject of Plaintiffs’ appeal. Rather, Plaintiffs’ claims for which the district court erroneously granted judgment on the merits in Defendants’ favor, erroneously denied class certification and denied Plaintiffs standing to pursue certain class claims, and, as to the Intervenor Plaintiff, the erroneous denial of her right to intervene, are all the subject of Plaintiffs’ appeal. And, those claims, for which Plaintiffs seek reversal of the erroneous judgment entered against them and denial of their right to Rule 23 certification and intervention, constitute a genuine case and controversy over which this Court has jurisdiction. Also, no piecemeal appeals are being sought nor are there reservation of rights set forth in the FJO that would result in the parties “litigat[ing] the very issues that they purport to resolve” in the appeals. *See Baker*, 137 S. Ct. at 1706-1707. Rather, “every matter in controversy” (*id.* at 1712) as to the Plaintiffs and Intervenor Plaintiff are implicated by their appeals. Further, there is no “one-sidedness” (*id.* at 1715) to the Plaintiffs’ appeal, as demonstrated by Defendants appealing the district court’s granting of summary judgment in Plaintiffs’ favor, as well as the granting of class certification, in part.

Thus, in sum, the “voluntary-dismissal tactic”, which was at the crux of the *Baker* case, and the other concerns raised in *Baker* including whether the *Baker* appeal presented an Article III case or controversy, are not implicated by or applicable to Plaintiffs’ appeal. Accordingly, the answer to both questions posed by the Court is

“Yes”, the Court properly has jurisdiction over the cross-appeals under 28 U.S.C. § 1291 and Article III.

B. Pertinent Procedural History and District Court Orders on Appeal

Plaintiff Rachel Condry, later joined by Plaintiffs Jance Hoy, Christine Endicott, Laura Bishop, Felicity Barber and Rachel Carroll, commenced this class action on January 13, 2017 against UHC. 1-ER-3. All Plaintiffs had health plans administered by UHC that were covered by the ACA and expressly provided coverage for the ACA-mandated preventive services including CLS; all Plaintiffs except Plaintiff Carroll had an ERISA-sponsored health plan. 1-ER-3; 6-ER-1242 ¶ 79; 5-SER-753 ¶ 79; 5-SER-745-748; 6-ER-1221-1227.

Pursuant to the district court’s scheduling order and UHC’s insistence, summary judgment proceedings occurred prior to the filing of any motion for class certification; thus, all parties filed cross-motions for summary judgment in 2018. 5-SER-963-964; 4-SER-683; 4-ER-736; 6-ER-1174. On June 27, 2018, upon consideration of the parties’ summary judgment filings and argument, the district court:

- (1) entered summary judgment in favor of all Plaintiffs on Count I, asserting breach of fiduciary duty claims under ERISA for the failure to provide adequate notice in the denial of their benefit claims (except for Carroll, who was a participant in a non-ERISA health benefit plan and therefore did not bring any claims under Count I) (1-ER-27-29, 1-ER-3-4);

(2) as to Count II, asserting breach of fiduciary duty claims under ERISA for the failure to provide ACA-mandated lactation counseling coverage, **(a) entered summary judgment in favor of Defendants with respect to Plaintiffs Condry and Barber (1-ER-26, 1-ER-3, 7 ¶9);** (b) entered summary judgment in favor of Plaintiffs Bishop and Hoy (1-ER-26, 1-ER-3, 7 ¶7-8); and (c) denied summary judgment for all parties as to Plaintiff Endicott (1-ER-27, 1-ER-3);

(3) as to Count III, asserting claims derivative of Count II that Defendants should be held jointly liable under ERISA, denied summary judgment for all parties (1-ER-30, 1-ER-4);

(4) as to Count IV, asserting sex discrimination claim in violation of Section 1557(a) of the ACA, entered judgment in favor of Defendants (1-ER-29, 1-ER-4);

(5) as to Count V, the non-ERISA analog to Count II brought by Plaintiff Carroll asserting violation of the ACA's preventive care provisions which were incorporated by reference in non-ERISA health benefit plans, denied summary judgment for all parties (1-ER-27, 1-ER-4); and

(6) as to Count VI, asserting a claim by Plaintiff Carroll for unjust enrichment, entered judgment in favor of Defendants. 1-ER-29, 1-ER-4.

Thereafter, merits and expert discovery continued and pursuant to the district

court's scheduling orders in 2019 Plaintiffs twice sought certification under Rule 23(a) and (b)(1) and/or (b)(2) of three classes of UHC insureds: two pertaining to Plaintiffs' ACA CLS coverage claims (Counts II and IV), the "Claims Reprocessing Class"; and, one pertaining to UHC's use of the four Remark Codes held by the district court to have violated ERISA at summary judgment (Count I) (1-ER-27-29), the "Denial Letter Class".

On May 23, 2019, **the district court denied without prejudice Plaintiffs' initial Motion for Class Certification.** 1-ER-535-541; 1-ER-5.

On December 19, 2019, **the district court denied Plaintiffs' Motion to Grant Request for Intervention** which sought to add as a named plaintiff Teresa Harris, a UHC insured, who asserted a claim under Count II. 1-SER-2-3; 1-ER-5.

On December 23, 2019, the district court granted in part and denied in part Plaintiffs' renewed motion for class certification: (a) certifying the Denial Letter Class; and **(b) denying certification of the Claims Reprocessing Class, which proposed certification under Rule 23 of a class of members of Defendants' health benefit plans who were denied coverage or had cost-shares imposed for out-of-network lactation services, which pertained to Counts II, III and V.** 1-ER-12-22; 1-ER-5.

In the wake of the foregoing final, merits rulings, all that remained were solely Plaintiffs Endicott's and Carroll's individual lactation coverage claims under Counts II, III and V, and Plaintiffs' claim for joint and several liability under Count III, tied to Count II. As set forth in the entered FJO, the parties stipulated to entry of judgment on Count III consistent with the district court's summary judgment ruling on Count II

(1-ER-7 ¶¶7-9) and dismissed with prejudice Plaintiffs Endicott's and Carroll's individual lactation coverage claims (1-ER-7-8 ¶¶11-12). Also reflected in the FJO is that all Plaintiffs reserved all rights to move for an award of reasonable attorneys' fees and costs, including Plaintiffs Endicott and Carroll except as to their individual dismissed claims. 1-ER-8 ¶13.

C. The Stipulated Final Judgment and Order is a Final Decision

In Plaintiffs' appeal, they respectfully request this Court to reverse and remand the portions of the district court's orders identified in **bolded text** above in Section B: (a) the summary judgment order entering judgment against Plaintiffs Condry and Barber, (b) class certification orders denying certification of the Claims Reprocessing Class, and (c) order denying the motion to intervene. *See, e.g.*, Opening Brief on Cross Appeal, DktEntry 18 at page 8-9, 35-37 (17-18, 44-46 of 82); Fourth Brief on Cross Appeal, DktEntry 30 at page 1 (7 of 36).

The FJO incorporates the district court's summary judgment orders and enters final judgment against all Plaintiffs. The FJO is an appealable order because it is a "final decision[]." 28 U.S.C. § 1291.

Plaintiffs' appeals of the FJO and the district court's orders do not evoke the "voluntary-dismissal tactic", which was at the crux of the *Baker* case. *Baker* is not on point.

The appeals and circumstances presented here, in which the district court issued

merits rulings on Plaintiffs' claims that are the subject of the appeal, certainly warrant no different result than required by the Court in *Brown v. Cinemark USA, Inc.*, 876 F.3d 1199, 1201 (9th Cir. 2017) in which this Court held that "The resolution of the present case was not a unilateral dismissal of claims, but a mutual settlement for consideration reached by both parties which expressly preserved certain claims for appeal" and retained jurisdiction over the appeal. Likewise, that is consistent with this Court's holding in *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952, 955 (9th Cir. 2018) stating that: "As we recognized in our post-*Baker* decision in *Brown v. Cinemark USA, Inc.*, 876 F.3d 1199, 1201 (9th Cir. 2017), a voluntary dismissal of remaining claims can render the earlier interlocutory order appealable, so long as the discretionary regime of Rule 23(f) is not undermined." Again, the foregoing cases, wherein this Court acknowledged that *Baker* does not prevent appellate jurisdiction when a district court grants partial summary judgment as to some claims and grants the plaintiff's voluntary dismissal as to the remaining claims, *Rodriguez* 896 F.3d at 955, mandate that this Court exercise jurisdiction over Plaintiffs' appeals.

Moreover, the procedural history here does not implicate other concerns raised in *Baker*. There is not "one-sidedness". *Id.* at 1715. The FJO does not permit "plaintiffs only," and "never defendants," to force an immediate appeal. *Id.* Indeed, all parties, including the Plaintiffs have raised all their claims of error in a single appeal following entry of the FJO, which further demonstrates that there is no circumventing of the Court's and Federal Rules' final decision requirement precluding piecemeal appeals that

delay and complicate litigation. As the Supreme Court has explained, the final decision requirement “preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.” *Baker*, 137 S. Ct. at 1712. That principle is adhered to here. Unlike the plaintiffs in *Baker*, the Plaintiffs’ individual claims were litigated with some of the claims resolved by the district court in favor of Defendants, some resolved by the district court in favor of Plaintiffs, and just two individual claims of two out of six plaintiffs were dismissed with prejudice (never to be litigated again) as a result of a partial settlement. The FJO is not a product of a unilateral dismissal of claims, and therefore, does not present the same or remotely analogous issues facing the Court in *Baker*. *See also, Woman's Club of Hollywood v. Morgan*, Nos. 18-55293, 18-55324, 2021 U.S. App. LEXIS 6948, at *2 (9th Cir. Mar. 10, 2021) (“The parties subsequently stipulated to a dismissal of the remanded claims. Accordingly, the district court’s judgment is now final and appealable.”)

Accordingly, the FJO (1-ER-2-11) is a “final decision” for purposes of 28 U.S.C. § 1291 and under the Supreme Court’s decision in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017).

D. Plaintiffs’ Appeals Present a Genuine Case or Controversy

Article III limits the jurisdiction of the federal courts to issues presented “in an adversary context,” in which the parties maintain an “actual” and “concrete” interest. *Baker*, 137 S. Ct. at 1716-17 (internal citations and quotations omitted).

Plaintiffs' claims on appeal were not voluntarily dismissed. Therefore, the Supreme Court's concern in *Baker*, 137 S. Ct. at 1716–17 (Thomas, J., concurring), that when plaintiffs voluntarily dismiss their claims, “they consent[] to the judgment against them and disavow[] any right to relief [from the defendant]” (*id.*) is inapplicable. Simply, Plaintiffs are not appealing from a consensual dismissal of their claims, and Plaintiffs maintain an “actual” and “concrete” interest in the reversal (as set forth above) of the district court orders on appeal.

Likewise, the Parties remain “adverse to each other” as to their claims that are the subject of the cross-appeals, as they are seeking reversal of district court merits rulings (summary judgment, intervention, and class certification), and seeking with their appeals to have this Court “affect their rights” in a legally cognizable manner. *Id.* Thus, Plaintiffs maintain a genuine case or controversy entitling them and their appeal to be heard by this Court.

Furthermore, the circumstances presented by the inclusion with the other Plaintiffs of Plaintiffs Endicott and Carroll in the appeal of the district court's class certification orders are no different than those presented in *Narouz v. Charter Communications, LLC*, 591 F.3d 1261 (9th Cir. 2010). In *Narouz*, the Court addressed the question of mootness in a putative class action after voluntary settlement of individual claims. *Id.* In *Narouz*, a class representative voluntarily settled all claims “aside from those related to [his] class allegation,” after which the district court entered judgment. *Id.* at 1263 (internal quotation marks omitted). On appeal, the defendant

argued that the case was moot because the class representative no longer had any interest in the class claims. *Id.* at 1264. This Court disagreed. *Id.* at 1265. Plaintiffs Endicott and Carroll, as in *Narouzy*, did not release claims for “attorney’s fees and costs.” *Id.*; 1-ER-8 ¶ 13. Accordingly, as in *Narouzy*, all Plaintiffs maintain “a continued financial interest in the advancement of the class claims” such that the case was not moot. *Id.*

Accordingly, Plaintiffs’ appeals from the FJO and the district court’s orders present a genuine “case” or “controversy” as is required for jurisdiction under Article III of the United States Constitution.

Respectfully submitted,

**CHIMICLES SCHWARTZ KRINER &
DONALDSON-SMITH LLP**

By: /s/ Kimberly M. Donaldson-Smith
Nicholas E. Chimicles (*pro hac vice*)
Kimberly M. Donaldson-Smith (*pro hac vice*)
Stephanie E. Saunders (*pro hac vice*)
361 W. Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
Facsimile: (610) 649-3633
nick@chimicles.com
kds@chimicles.com
ses@chimicles.com

Annick Marie Persinger
Sabita J. Soneji
TYCKO & ZAVAREEI LLP
The Tower Building
1970 Broadway, Suite 1070
Oakland, CA 94612
Telephone: (510) 254-6808

Facsimile: (202) 973-0950
apersinger@tzlegal.com
ssoneji@tzlegal.com

Marc A. Goldich (admitted *pro hac vice*)
Noah Axler (admitted *pro hac vice*)

AXLER GOLDICH LLC

1520 Locust Street
Suite 301
Philadelphia, PA 19102
Telephone: (267) 534-7400
Facsimile: (267) 534-7407
mgoldich@axgolaw.com
naxler@axgolaw.com

James E. Miller (CA Bar No. 262553)
Laurie Rubinow

**SHEPHERD, FINKELMAN, MILLER &
SHAH, LLP**

65 Main Street
Chester, CT 06412
Telephone: (860) 526-1100
Facsimile: (866) 300-7367
jmiller@sfmslaw.com
lrubinow@sfmslaw.com

Nathan Zipperian (admitted *pro hac vice*)

**SHEPHERD, FINKELMAN, MILLER &
SHAH, LLP**

1625 N. Commerce Pkwy. #320
Ft. Lauderdale, FL 33326
Telephone: (954) 515-0123
Facsimile: (866) 300-7367
nzipperian@sfmslaw.com

Kolin Tang (CA Bar No. 279834)

**SHEPHERD, FINKELMAN, MILLER &
SHAH, LLP**

1401 Dove Street
Suite 510
Newport Beach, CA 92660

Telephone: (323) 510-4060
Facsimile: (866) 300-7367
ktang@sfmslaw.com

***Counsel for Plaintiffs, Intervenor Plaintiff-
Appellees/Cross-Appellants***

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) No. 20-16823, No. 20-16857

I am the attorney or self-represented party.

This brief contains 2,328 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a cross-appeal brief and complies with the word limit of Cir. R. 28.1-1.
- is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a death penalty case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated July 2, 2021 (DktEntry 39).**
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: /s/ Kimberly M. Donaldson-Smith

Date: July 14, 2021

CERTIFICATE OF ELECTRONIC SERVICE

Rachel Condry, et al. v. UnitedHealth Group, Inc., et al.,

Ninth Circuit Nos. 20-16823, 20-16857

U.S. District Court for the Northern District of California, No. 3:17-cv-00183

I hereby certify that on July 14, 2021 I electronically filed the foregoing Plaintiffs'-Appellees'/Cross-Appellants' Supplemental Brief with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

/s/ Kimberly M. Donaldson-Smith
Kimberly M. Donaldson-Smith