No. 20-1620

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOANN D. BRITT,

Plaintiff-Appellant,

v.

LOUIS DEJOY, POSTMASTER GENERAL

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(The Honorable Richard D. Bennett, United States District Judge)

SUPPLEMENTAL BRIEF FOR APPELLEE

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INTRODUCTION

Appellee, Louis DeJoy, respectfully submits this response to the Court's October 14, 2021 Order inviting the parties to submit supplemental briefs "on the issue of when a dismissal without prejudice is final, and thus appealable." ECF 34.

This Court's decision in *Domino Sugar Corp v. Sugar Workers Local Union, 392*, 10 F.3d 1064 (4th Cir. 1993), together with subsequent decisions applying *Domino Sugar*, provide the appropriate framework for resolving that question in this case. *Domino Sugar* explains that the Court should consider whether "the grounds of the dismissal make clear that no amendment could cure the defects in the plaintiff's case" in determining the finality of a dismissal without prejudice. *Id.* at 1066. Since *Domino Sugar*, this Court also has recognized that a dismissal without prejudice is final within the meaning of 28 U.S.C. § 1291 when a plaintiff elects to stand on the current complaint. *See, e.g.*, *In re GNC Corp*., 789 F.3d 505, 511 n.3 (4th Cir. 2015); *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 633 n.2 (4th Cir. 2015), *cert. granted, vacated on other grounds*, 136 S. Ct. 2504 (2016); *Chao v. Rivendell Woods, Inc*., 415 F.3d 342, 345 (4th Cir. 2005). This Court should adhere to that precedent, which provides a workable and efficient framework for resolving questions of finality in a manner that permits this Court to exercise jurisdiction over cases in which a plaintiff has elected to stand on the current complaint or in which no further district court adjudication is possible.

Applying *Domino Sugar* and its progeny to the current record, this Court may exercise jurisdiction over this appeal. As explained below, the district court dismissed Britt's retaliation claim without prejudice based on deficiencies in Britt's pleading of that claim. But the district court then directed that Britt's case be closed, apparently contemplating that Britt would file a new complaint if she wished to further pursue her retaliation claim. However, any new suit would now be time-barred, because Britt received her Right-to-Sue letter from the Equal Employment Opportunity Office in November 2018, meaning that Britt's 90-day window to bring suit ran years ago. Moreover, Britt waived or forfeited any right to amend by taking the current appeal and then indicating during oral argument her intent to stand on her current complaint. Under these circumstances, where the Court can be assured that Britt has no further opportunity beyond this appeal to pursue her retaliation claim, the dismissal without prejudice is final and this Court may assert jurisdiction over Britt's appeal.

ARGUMENT

"Dismissals without prejudice" that are rendered under Rule 12(b)(6)[1] "are not unambiguously not-final orders"; rather, "the premise of *Domino Sugar* and its

[1] Dismissals under other Rule 12(b) provisions, such as for lack of subject matter jurisdiction under Rule 12(b)(1) or for lack of personal jurisdiction under Rule 12(b)(2), are properly entered "without prejudice" and are ordinarily appealable as final judgments. *See, e.g.*, *Taubman Realty Grp. Ltd. P'ship v. Mineta*, 320 F.3d 475, 479 (4th Cir. 2003) (affirming district court's Rule 12(b)(1) dismissal "without

progeny is that such orders usually *are* ambiguous and require further analysis to determine whether the district court intended its order to end the case." *Bing v. Brivo Sys., LLC,* 959 F.3d 605, 612 (4th Cir. 2020). As such, this Court to date has employed a pragmatic, "case-by-case" approach to determining whether a dismissal "without prejudice" is a final order appealable under 28 U.S.C. § 1291. *Id.* at 614.

In *Domino Sugar*, this Court concluded that "an appellate court may evaluate the particular grounds for dismissal in each case to determine whether the plaintiff could save his action by merely amending his complaint." *Domino Sugar*, 10 F.3d at 1066-67. In order to promote judicial economy and guard against piecemeal appeals, the Court held "that a plaintiff may not appeal the dismissal of his complaint without prejudice unless the grounds for dismissal clearly indicate that no amendment in the complaint could cure the defects in the plaintiff's case." *Id*. at 1067 (internal quotation marks omitted). Applying that rule, the Court held in *Domino Sugar* that the district court's dismissal without prejudice for failure to exhaust administrative remedies was appealable as of right because "the district court essentially made a final ruling that the Company had to proceed to arbitration before seeking judicial relief." *Id*.

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prejudice"); *Griener v. United States*, 900 F.3d 700, 705 (5th Cir. 2018) (explaining why Rule 12(b)(1) dismissals are necessarily without prejudice). This supplemental brief addresses only dismissals entered under Rule 12(b)(6), which implicate the merits of a plaintiff's claims for relief.

When evaluating finality, *Domino Sugar* also noted the difference between an order dismissing an *action* without prejudice and one dismissing a *complaint* without prejudice, stating that the latter order is generally not appealable. *See Domino Sugar*, 10 F.3d at 1066; *see also Chao*, 415 F.3d at 345 (explaining that the dismissal of an amendable complaint generally is not appealable while dismissal without prejudice of the entire action generally is appealable); *see also Bing*, 959 F.3d at 612 ("Here, by issuing an order rejecting all of the claims asserted by Bing and directing the clerk to close the case, the district court signaled that it was finished with the case, which is an indication that we may treat the order of dismissal as a final order."). However, the administrative closure of a case alone does not convert an unambiguously non-final order into a final, appealable order. *See Penn-America Ins. Co. v. Mapp*, 521 F.3d 290, 295 (4th Cir. 2008) (concluding that an order resolving one of two claims raised in a complaint was not a final appealable order and that the court's order dismissing the case from the active docket did not alter that conclusion: "[A]n otherwise non-final order does not become final because the district court administratively closed the case after issuing the order.").

I. Dismissals Without Prejudice Are Final Orders Under *Domino Sugar* if No Amendment Can Cure the Defects in the Complaint.

Following *Domino Sugar*, this Court has exercised jurisdiction over numerous appeals from orders styled as dismissals "without prejudice." In *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007), this Court exercised jurisdiction

over an order dismissing certain antitrust claims without prejudice. *Id*. at 176. While acknowledging that "[d]ismissals without prejudice naturally leave open the possibility of further litigation in some form," the Court stressed that the "speculative possibility of a new lawsuit" did not render an otherwise final judgment non-final. *Id*. at 176. The Court characterized the finality test under *Domino Sugar* as a "pragmatic rule" designed to serve the "twin purposes" of avoiding piecemeal litigation and preserving the primacy of the district court in controlling the progress of litigation before it. *Id*. Thus, the Court summarized, the critical question is "whether the district court has finished with the case." *Id*. (quoting *Hill v. Potter*, 352 F.3d 1142, 1144 (7th Cir. 2003)) (internal quotation marks omitted). The Court determined that the district court "was utterly finished with GO's case" because the claims dismissed without prejudice were based on antitrust injuries to a third party that GO "never had a right to allege" and could not salvage by amendment. 508 F.3d at 176 ("GO escaped Rule 11 sanctions and won dismissal without prejudice by promising never to raise these claims in federal court again…. The district court thus rendered a final judgment, and we have jurisdiction to consider it.").

In *Chao*, this Court held that it had jurisdiction over an appeal by the Secretary of Labor from the without-prejudice dismissal of the Secretary's complaint for failure to state a claim against an employer under the Fair Labor Standards Act. 415 F.3d at 345-46. This Court noted that the district court "did not merely dismiss the

complaint, but dismissed the 'action … in its entirety,'" suggesting that the Secretary could not amend her complaint to continue the litigation. *Id*. at 345. Likewise, in *Bing*, involving a claim of race discrimination under Title VII, this Court concluded that "the order in this case is appealable because the district court held that the circumstances surrounding Bing's termination did not expose Brivo to legal liability, and Bing has no additional facts that could be added to his complaint." 959 F.3d at 615.

II. A Plaintiff's Election to Stand on His Complaint Guards Against Repetitive Appeals and Helps to Satisfy *Domino Sugar*.

This Court also has considered whether the plaintiff has elected (orally, in writing, or by inference) to stand on his complaint when evaluating whether *Domino Sugar* is satisfied. In *Chao*, the Court concluded that the test in *Domino Sugar* was satisfied at least in part because the Secretary "elect[ed] to stand on the complaint presented to the district court" and thereby "waived the right to later amend unless we determine that the interests of justice require amendment." *Id*. at 345. The Court noted that "[t]he Secretary's election [to stand on her complaint], and consequent waiver, thus protect against the possibility of repetitive appeals that concerned us in *Domino Sugar*." *Id*.

Likewise, in *In re GNC Corp*., *United States ex rel. Badr*, and *Bing*, this Court similarly relied on the plaintiff's election to stand on the complaint. This Court concluded in *In re GNC Corp.* that the district court's order dismissing a complaint

without prejudice and expressly authorizing an amended complaint was nonetheless a final, appealable order because the plaintiffs declined to amend the complaint. 789 F.3d at 511 n.3 ("Because of Plaintiffs' waiver [of the right to amend], we treat this case as if it had been dismissed with prejudice and therefore have jurisdiction over this appeal.").[2] In *United States ex rel. Badr*, the Court exercised jurisdiction over an appeal from a dismissal without prejudice because the government and *qui tam* relator "elected to stand on their complaints and waived the right to later amend." 775 F.3d at 633 n.2 (internal quotation marks omitted)). Similarly, the Court concluded in *Bing* that "[t]he order is likewise appealable under *Chao* and *In re GNC* because Bing has elected to stand on his complaint as filed." 959 F.3d at 615.

It is preferable for a plaintiff to confirm his choice to stand on his complaint in writing in district court. In practice, however, the election may be formalized in the court of appeals, and may be made orally. *See, e.g.*, *Bing*, 959 F.3d at 612 ("[C]ounsel for Bing represented to this court at oral argument that there were no additional facts available to his client to be asserted in the complaint, and counsel therefore stood on the complaint as originally presented to the district court."). In *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001), the plaintiff confirmed during oral

[2] The district court had dismissed the complaint without prejudice and expressly granted the plaintiffs leave to re-file if they could plead "(in accordance with Rule 11) that 'any reasonable expert would conclude from the cited studies that glucosamine and chondroitin do not improve joint health in non-arthritic consumers.'" *In re GNC Corp*., 789 F.3d at 511.

argument that he wished to stand on the complaint. *Id*. at 254. The court of appeals instructed that "[a]lthough generally a plaintiff who decides to stand on the complaint does so in the district court, … we have made clear that such a course, while preferable, is not always necessary." *Id*. Likewise, in its analysis of finality, the Sixth Circuit in *Boxill v. O'Grady,* 935 F.3d 510 (6th Cir. 2019), accepted plaintiff's confirmation in supplemental briefing that her decision to immediately appeal signaled her intent to stand on the complaint. *Id*. at 517. In *Connecticut Nat. Bank v. Fluor Corp*., 808 F.2d 957 (2d Cir. 1987), involving a complaint dismissed with leave to amend, the Second Circuit similarly determined that finality was established when appellant indicated in response to a question from the bench at oral argument that no further amendment would be made. *Id*. at 960-61. However, the Second Circuit noted "that the better practice would have been for counsel to have included in the record on appeal a written disclaimer of intent to amend." *Id*.

Indeed, some courts have concluded that a plaintiff's election to stand on his complaint may be inferred simply from his decision to file a timely notice of appeal rather than seek leave to file an amended complaint. *See, e.g*., *Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 147 (3d Cir. 2014) (finding appellate jurisdiction where "Thompson filed a timely notice of appeal and has not sought leave to file a second amended complaint."); *Robert N. Clemens Trust v. Morgan Stanley DW, Inc*., 485 F.3d 840, 845-46 (6th Cir. 2007) ("[B]y not attempting to

amend their complaint or objecting to the district court's issuance of a judgment, the Plaintiffs must have intended to 'stand' on the dismissed complaint."); *Aldana v. Del Monte Fresh Produce, N.A.,* 416 F.3d 1242, 1244 n.1 (11th Cir. 2005) ("Because Plaintiffs filed their notice of appeal before the time to amend expired, they waived the right to amend later the complaint; and the dismissal became final for appeal purposes."); *Ghana v. Holland*, 226 F.3d 175, 180-81 (3d Cir. 2000) (plaintiff who appealed dismissal without prejudice for failure to exhaust rather than attempt exhaustion effectively stood on the original complaint, establishing appeal jurisdiction).

III. This Court Should Adhere to *Domino Sugar*.

As discussed, since *Domino Sugar* was decided almost three decades ago, this Court has repeatedly had occasion to apply its pragmatic, "case-by-case" approach to assessing finality under 28 U.S.C. § 1291. *Bing*, 959 F.3d at 614. That approach is consistent with the Supreme Court's longstanding guidance that § 1291 be given a "practical rather than a technical construction." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)); *accord GO Computer*, 508 F.3d at 176 ("Section 1291's finality rule" is a "pragmatic rule"). And *Domino Sugar* has adequately accounted for the many diverse procedural scenarios that can arise in district court litigation, and ultimately has served to promote judicial economy and efficiency in both preventing

piecemeal appeals and ensuring prompt disposition of disputes that are ready for appellate resolution. *See Hixson v. Moran*, 1 F.4th 297, 301 (4th Cir. 2021) (acknowledging that a "practical" construction of "[t]he final judgment rule" "serves the important purpose of promoting efficient judicial administration") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

Bright-line rules, though more easily administered, also present significant disadvantages.[3] Some courts of appeals have adopted a categorical rule that any order dismissing a complaint *always* ranks as final under 28 U.S.C. § 1291, even when dismissal is without prejudice. *See, e.g.*, *Umbrella Inv. Grp., LLC v. Wolters Kluwer Fin. Servs., Inc.*, 972 F.3d 710, 712 (5th Cir. 2020) ("[T]he dismissal of an action—whether with or without prejudice—is final and appealable.") (quoting *Ciralsky v. C.I.A.*, 355 F.3d 661, 666 (D.C. Cir. 2004)); Edward H. Cooper, 15A *Federal Practice and Procedure (Wright & Miller*) § 3914.1, n.26 (2d ed.) (collecting cases). But such an approach would provide a plaintiff multiple opportunities to litigate and seek appellate review on the same claim—first on appeal

[3] Existing Supreme Court precedent does not clearly dictate any specific approach. *Compare Jung v. K. & D. Mining Co*., 356 U.S. 335, 337 (1958) (district court order denying relief but "granting further leave to petitioners to amend their complaint" was not final appealable order, despite petitioners' "elect[ion] to stand on their first amended complaint") *with United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 n.1 (1949) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned.").

from the dismissal without prejudice, and then again on appeal from the filing of any amended complaint. That would contravene the basic purpose of the final-judgment rule, under which "'the whole case and every matter in controversy in it must be decided in a single appeal.'" *Keena v. Groupon, Inc.,* 886 F.3d 360, 364 (4th Cir. 2018) (quoting *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017)); *see also Firestone Tire*, 449 U.S. at 374 ("The statutory requirement of a 'final decision' means that 'a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits."); *cf., e.g.*, *Chua v. Ekonomou*, 1 F.4th 948, 957 (11th Cir. 2021) (declining to permit further amendment of complaint after appellate adjudication of the merits because to do so would give plaintiff "'two bites at the apple'" and "turn an appeal from a final judgment into an interlocutory appeal").

On the other hand, a bright-line rule that certain dismissals without prejudice are *never* appealable also poses significant drawbacks. In *Goode v. Central Virginia Legal Aid Society, Inc.*, 807 F.3d 619 (4th Cir. 2015), a panel of this Court concluded that any without-prejudice dismissal "for failure to plead sufficient facts in the complaint" should never constitute a final appealable order. *Id.* at 624. But that approach would apparently require the mandatory dismissal of numerous appeals that are, as a practical matter, clearly ripe for appellate resolution, such as fully briefed appeals in which a plaintiff has clearly waived any right to further amend the

complaint. *See, e.g.*, *United States ex rel. Badr,* 775 F.3d at 633 n.2. Similarly, if there is no way that a plaintiff can amend the complaint to state a valid claim under the district court's dismissal order, it is a waste of judicial resources to require the plaintiff nonetheless to amend the complaint, induce the parties to engage in further motion practice, and litigate to entry of another final judgment. As *Domino Sugar* recognizes, in such circumstances, the values of judicial economy and efficiency are best served by recognizing that the dispute has in substance become final, rather than requiring further formal action to be taken on remand. *See Federal Practice & Procedure* § 3914.1 ("In ordinary cases it is better to tolerate the informal path of taking an immediate appeal, which would not confuse anyone, than to incur the waste of dismissing the appeal, securing entry of judgment, and entertaining a second appeal."). Indeed, a panel of this Court rejected *Goode*'s bright-line rule in *Bing* as inconsistent with *Domino Sugar*, *Chao*, *and In re GNC Corp*. 959 F.3d at 614.

IV. Applying *Domino Sugar,* This Court May Exercise Appellate Jurisdiction Here.

Applying the factors set forth in *Domino Sugar* and its progeny, this Court may conclude that it has appellate jurisdiction over the instant case.

At first glance, the district court's dismissal without prejudice would not appear to foreclose further litigation over Britt's retaliation claim. The district court's decision suggested ways in which Britt could have addressed the pleading

deficiencies in her retaliation claim, including by specifying the date on which she commenced EEO activity and when Defendant became aware of her EEO activity. *See* JA 122 ("The Amended Complaint fails to allege when Britt filed her EEO complaint."); *id*. ("Britt does not allege when Defendant even had notice of her EEO filing."). That reasoning, standing alone, could be read to suggest that an "amendment could cure the defects in the plaintiff's case," which ordinarily would suggest that the court's dismissal was non-final. *Domino Sugar*, 10 F.3d at 1066-67.

Nonetheless, taking the pragmatic approach to finality established by *Domino Sugar*, the district court's order is effectively final. First, despite identifying pleading deficiencies in Britt's complaint, the district court did not grant Britt any leave to amend. Instead, the court dismissed all counts of the complaint and directed the Clerk of Court to close the case. *See* JA 124. Although, as noted above, such an administrative closure is not itself necessarily dispositive, that action does reflect the district court's understanding that it was finished with the case and would undertake no further adjudication (at least absent a request for post-judgment relief). *See Bing*, 959 F.3d at 612.

Second, although a without-prejudice dismissal would not ordinarily prevent a plaintiff from filing a new lawsuit, any new lawsuit here would plainly be time-barred. *See Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir. 1995) (without-prejudice

dismissal does not "give the appellant a right to refile without the consequence of time defenses, such as the statute of limitations"). Under Title VII of the Civil Rights Act of 1964, a plaintiff must file her complaint alleging employment discrimination in district court within 90 days of the EEOC's final decision in her administrative proceedings. *See* 42 U.S.C. § 2000e-5(f)(1). The Rehabilitation Act incorporates by reference this statutorily prescribed period for filing an employment-discrimination action. *See* 29 U.S.C. § 794a(a) (adopting procedures provided in section 2000e-5); *Shiver v. Chertoff*, 549 F.3d 1342, 1344 (11th Cir. 2008) ("The remedies, procedures, and rights of Title VII are available to plaintiffs filing complaints under the Rehabilitation Act."); *see also Spence v. Straw*, 54 F.3d 196, 199-202 (3d Cir. 1995).

For Title VII claims, this Court has concluded that the statute of limitations is not tolled by the filing of a complaint that is later dismissed without prejudice. *See Angles v. Dollar Tree Stores, Inc*., 494 Fed. Appx. 326, 329 (4th Cir. 2011) ("This conclusion is consistent with the general rule that a Title VII complaint that has been filed but then dismissed without prejudice does not toll the 90-day limitations period."); *Quinn v. Watson*, 119 Fed. Appx. 517, 518 n.* (4th Cir. 2005) (citing other circuits' precedent for this point); *Carter v. Univ. of W. Virginia Sys., Bd. of Trustees*, 23 F.3d 400, at *1 n.1 (4th Cir. 1994) (Table opinion) (ruling that a without-prejudice

dismissal was final because the time period for filing Carter's Title VII action had run by the time the case was dismissed.).[4]

Here, Britt was issued a Right to Sue Notice in November 2018 and she filed suit in federal district court on February 10, 2019. JA 5, ¶ 7. Although Britt filed her complaint within the 90-day limitations period, the filing of her initial complaint did not toll the statute of limitations. *See Angles*, 494 Fed. Appx. at 329; *Carter*, 23 F.3d 400, at *1 n.1; *see also Berry*, 975 F.2d at 1191; *Wilson*, 815 F.2d at 28; *O'Donnell,* 466 F.3d at 1111. The dismissal without prejudice left the parties in the position as "if [the complaint] had never been filed." *Mendez*, 45 F.3d at 78. In other words, Britt's ninety-day limitations period expired before the district court's dismissal order. Because Britt is now out of time to file a new complaint to allege further facts in support of her retaliation claim, the district court's without-prejudice dismissal effectively constitutes a final dismissal of that claim.

[4] Other courts of appeals have similarly held. *See, e.g.*, *Berry v. Cigna/RSI-Cigna*, 975 F.2d 1188, 1191 (5th Cir. 1992) ("If a Title VII complaint is timely filed pursuant to an EEOC right-to-sue letter and is later dismissed [without prejudice], the timely filing of the complaint does not toll the ninety-day limitations period."); *Wilson v. Grumman Ohio Corp*., 815 F.2d 26, 28 (6th Cir. 1987) (per curiam) ("We are persuaded that the filing of a complaint which is later dismissed without prejudice does not toll the statutory filing period of Title VII."); *O'Donnell v. Vencor Inc.,* 466 F.3d 1104, 1111 (9th Cir. 2006) ("In instances where a [Title VII] complaint is timely filed and later dismissed, the timely filing of the complaint does not toll or suspend the 90-day limitations period." (internal quotation marks omitted)); *Simons v. Sw. Petro-Chem, Inc.,* 28 F.3d 1029, 1030-31 (10th Cir. 1994) (same).

Third, and finally, this Court can properly find that Britt herself has rendered the dismissal of her retaliation claim effectively final through her litigation conduct and representations to this Court. Despite asserting additional facts outside the record throughout her appeal papers, as noted in the government's panel-stage briefing, *see* DeJoy Br. 13-15 (ECF 12), Britt nonetheless did not seek leave to amend in the district court and instead has moved forward with the current appeal. *See Thompson*, 748 F.3d at 147; *Robert N. Clemens Trust*, 485 F.3d at 845; *Aldana,* 416 F.3d at 1244 n.1. Further, Britt's counsel ultimately represented during oral argument before this Court that Britt intended to stand on her complaint. In these circumstances, where a plaintiff has essentially agreed to convert the without-prejudice dismissal into a with-prejudice one, this Court may properly exercise appellate jurisdiction under 28 U.S.C. § 1291. *See In re GNC Corp.*, 789 F.3d at 511 n.3; *United States ex rel. Badr*, 775 F.3d at 633 n.2; *Chao*, 415 F.3d at 345.

CONCLUSION

For the foregoing reasons, the Court may exercise appellate jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of December 2021, a copy of the foregoing Supplemental Brief was served by ECF on counsel of record.

_____/s/_____
Rebecca A. Koch
Assistant United States Attorney