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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through ATTORNEY GENERAL XAVIER BECERRA,

Plaintiff,

v.

ALEX M. AZAR, in his official capacity as Secretary of the U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; DOES 1-100,

Defendants.

Case No. 3:19-cv-02769-WHA

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF STATE OF CALIFORNIA'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b)

Date:	February 13, 2020
Time:	8:00 a.m.
Courtroom:	12
Judge:	The Honorable William Alsup
Action Filed:	May 21, 2019

INTRODUCTION

In its November 19, 2019 Order, the Court determined that this case is "ready for appeal," and suggested that "all sides stipulate to entry of final judgment with reservation of all issues not reached in [the] order in the event of a remand." Dkt. No. 143 at 32. Defendants agreed with the Court's approach and sought plaintiffs' stipulation to secure "appealable order[s]." Dkt. No. 144-1 at 8. Toward that end, Defendants stipulated to entry of judgments in the related cases and judgments were entered on January 8, 2020.[1] By filing its Rule 54(b) motion, Plaintiff State of California seeks to abide by the Court's order, while also ensuring that its rights are protected and that any judgment entered in California's case is legally sound. Defendants' suggestion that California dismiss all unresolved claims without prejudice, while simultaneously reserving those same claims in the event of a remand, does not create an appealable order and is prejudicial to California. As such, the Court should enter partial final judgment under Rule 54(b) because doing so will promote judicial efficiency and the equities warrant such entry.

ARGUMENT

A. Defendants' Approach Would Not Create an Appealable Order

At the hearing on California's Rule 54(b) motion, Defendants offered that if California was willing to dismiss without prejudice its FOIA claim, as well as its Spending Clause and other claims that the Court did not reach, California could reassert those claims in the event that the Ninth Circuit remanded the case. Tr. 7:13–22, 8:18-9:21.[2] But in *Dannenberg v. The Software Toolworks Inc.* 16 F.3d 1073, 1076–77 (9th Cir. 1994), the Ninth Circuit held that it did *not* have jurisdiction under 28 U.S.C. § 1291 over an order granting partial summary adjudication under the same circumstances. In *Dannenberg*, the parties stipulated to dismiss the remaining claims without prejudice, agreeing that the plaintiff could reinstate them in the event of reversal. The Ninth Circuit held this was an impermissible attempt to circumvent Rule 54(b) because "in

[1] At the February 13 hearing, Defendants said they had 90 days from January 8, 2020 to file a notice of appeal in the related cases. In actuality, they have 60 days. Fed. R. App. P. 4(a)(1)(B).

[2] *See also* Dkt. No. 144-1 (Defendants offering that dismissed claims can be "re-urge[d]" later). And to the extent Defendants say they enter into these "sort of stipulations and agreements routinely," Tr. 12:14-21, their viability varies considerably by appellate circuit. *See James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1069-70 (9th Cir. 2002).

essence, the claims [that had been dismissed without prejudice] remained in the district court pending a decision by [the] court." *Id*. at 1077.

The Ninth Circuit, citing *Dannenberg*, continues to dismiss appeals where the parties stipulate to voluntarily dismiss unresolved claims without prejudice and leave open the option to resurrect those claims on remand. *See, e.g.*, *Kile v. USAA Cas. Ins. Co*., 756 Fed. App'x. 761 (9th Cir. 2019) (sua sponte dismissal of appeal where stipulated dismissal of unresolved claims was labeled "with prejudice," but plaintiff conceded at oral argument that "it was not really with prejudice because the parties agreed that a dismissed claim could be reinstated on remand if [the Ninth Circuit] were to reverse."). In order to satisfy the requirements of § 1291, the remaining claims must be dismissed with prejudice. *See DC Comics v. Towle*, 802 F.3d 1012, 1018 (9th Cir. 2015) (appellate court has jurisdiction because the parties stipulated to dismiss other claims with prejudice (citing *Dannenberg*, 16 F.3d at 1074–75)).

The Ninth Circuit views parties' stipulations to dismiss claims without prejudice as engaging in "manipulation" to obtain appellate jurisdiction. *Am. States Ins. Co. v. Dastar Corp*., 318 F.3d 881, 885 (9th Cir. 2003) (dismissing appeal because the parties engaged in manipulation to manufacture appellate jurisdiction by lodging a stipulation to dismiss plaintiff's unresolved indemnification claim without prejudice); *Adonican v. City of Los Angeles*, 297 F.3d 1106, 1108 (9th Cir. 2002) (granting defendant's motion to dismiss appeal for lack of jurisdiction due to parties' agreement granting plaintiff the "right to resurrect her remaining claims at a later point in time, essentially holding them in abeyance in the trial court"); *see also James*, 283 F.3d at 1066 ("We have always regarded evidence of such manipulation as the necessary condition for disallowing an appeal where a party dismissed its claims without prejudice.").

A district court's approval of such a stipulation allowing for dismissal without prejudice is not sufficient to protect an appeal from dismissal. *Dastar Corp*., 318 F.3d at 888 (district court's approval of the stipulation not deemed meaningful participation to guard against appellate jurisdiction manipulation). In *Dastar Corp*., the Ninth Circuit noted that the court-approved stipulation in *Dannenberg* was "patently manipulative" because it "permitted the re-institution of claims if the district court[] [was] reversed on appeal." *Id.* at 887.

Only in *limited circumstances* when unresolved claims are dismissed without prejudice will meaningful district court participation prevent appellate jurisdictional problems. *See James*, 283 F.3d at 1068 (court's dismissal of remaining claims was not manipulation because litigating the remaining claims "would not be an efficient use of time and resources," given the small amount of artwork at issue); *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638 (9th Cir. 2010) (court's dismissal of remaining claims was not manipulation because the remaining claims were state law claims and any future suit would be in state court). The facts here are more akin to *Dannenberg* than *James* and *Sneller* because the parties seek to preserve California's ability to reassert its dismissed claims should the case be remanded. Thus, 54(b) remains the more appropriate route. In fact, in *James*, the court's participation was meaningful *because* in considering the appropriateness of the dismissal without prejudice, it "call[ed] attention to the requirements of 54(b)." 283 F.3d at 1066-69. The Ninth Circuit has also cautioned that:

> *James* should not be read to imply that any entry of an order by a district court after a partial summary judgment is always tantamount to a Rule 54(b) certification. Rather, *James* represents an exception to the general rule that "[i]n the absence of [a Rule 54] determination and direction [from the court of an entry of a final judgment], any order or other form of decision, however designated, which adjudicates fewer than all the claims ... shall not terminate the action as to any of the claims [.]" Fed.R.Civ.P. 54(b). Any other interpretation of *James* would undermine Rule 54(b) and add uncertainty to the final judgment rule.

Dastar Corp., 318 F.3d at 888–89.

These cases confirm that the appropriate vehicle for preserving unresolved claims is for the parties to seek a Rule 54(b) certification. *Dannenberg*, 16 F.3d at 1075 (the parties did not seek Rule 54(b) certification, and their stipulation did not "finalize" the district court's order); *James*, 283 F.3d at 1066 (the stipulation in *Dannenberg* "kept the dismissed claims on ice while appeal was taken from a partial judgment, circumventing the final judgment rule and arrogating to the parties the gate-keeping role of the district court"); *Adonican*, 1297 F.3d at 1107–08 (parties' agreement that plaintiff would voluntarily dismiss her remaining claims without prejudice was an attempt usurp the trial court's Rule 54(b) function).

Because Defendants' approach will not result in an appealable order, it does not satisfy this Court's order. Dkt. 143 at 32. Rule 54(b) thus provides the only viable option.

B. Granting a Rule 54(b) Order Will Promote Judicial Efficiency

California is not forcing Defendants to appeal. Indeed, California is pleased with the Court's ruling and would like it to stand; but, it also wishes to preserve its other viable claims, including its Spending Clause claim, in the event of a remand.

And Defendants already have until March 8 to decide whether to file notices of appeal in the San Francisco and Santa Clara matters. *See* Fed. R. App. P. 4(a)(1)(B). Should Defendants appeal those judgments, the Ninth Circuit will consider those appeals along with Defendants' appeal of the State of Washington case, which is already pending.[3] Because Defendants have already appealed the Washington case and the status of the appeals of the San Francisco and Santa Clara cases are imminent, California's 54(b) motion will advance the policy of preventing piecemeal appeals. Piecemeal appeals "undermine the efficient use of judicial resources." *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 747 (9th Cir. 1989); *see also Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980).

If this Court were to grant a 54(b) certification and Defendants filed an appeal, then the Court could administratively close this case while the appeals proceed in the Ninth Circuit. *See, e.g., State of California v. Health & Human Services*, Case No. 4:17-CV-05783-HSG, Dkt. No. 411 (N.D. Cal. Jan. 22, 2020); *Texas v. United States*, Case No. 4:18-CV-00167-O, Dkt. No. 223 (N.D. Tex. Dec. 31, 2018) (Stay Order and Administrative Closure after the district court granted California's Rule 54(b) motion and entered partial judgment). During that administrative closure, the parties can continue in their efforts to resolve the FOIA claim without court intervention, a more judicially efficient outcome than dismissing the claim without prejudice and filing a new case that would be immediately active on the Court's docket and related to this case.

The district court is the "dispatcher" of final judgments under Rule 54(b), and it is "left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp.*, 446 U.S. at 8. Rule 54(b) ensures that, until there is an express direction for entry of judgment by the court,

[3] Defendants filed their notice of appeal on January 17, 2020. *See State of Washington v. Azar II*, Case No. 2:19-CV-00183-SAB, Dkt. No. 76; Ninth Circuit appeal pending, Case No. 20-35044.

the time for appeal will not run. *See* Fed. R. Civ. Pro. 54(b).

As evidence that the Rule seeks to promote judicial efficiency, Rule 54(b) does not prohibit a prevailing party from filing a 54(b) motion. *See Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co*., 819 F.2d 1519, 1524 (9th Cir. 1987) (district court granted partial summary judgment in favor of McDonnell Douglass and then granted its 54(b) motion); *Curtiss-Wright Corp.*, 446 U.S. at 8 (movant was awarded $19 million and filed a 54(b) motion, which the Supreme Court held was properly granted on equitable grounds); *United States v. All Assets*, No. CV 13-1832 (JDB), 2015 WL 13673819, at *2, (D.D.C. Dec. 17, 2015) (granting prevailing party U.S. Department of Justice's 54(b) motion because the appeal was unlikely to duplicate a future appeal), *aff'd sub nom. United States v. All Assets Held in the Inv. Portfolio of Blue Holding (1) Pte. Ltd. on Behalf of Traceable to Ridley Grp. Ltd*., 712 F. App'x 13 (D.C. Cir. 2018).

Rule 54(b) certification will further judicial efficiency by expediting the final resolution of the adjudicated claims by presenting them cleanly to the appellate court in a single related appeal.

C. The Equities Support Rule 54(b) Certification

No harm will come to Defendants from entry of the partial final judgment because they have already filed a notice of appeal in the State of Washington case and thus they will already be litigating the issues of this case before the Ninth Circuit. Moreover, Defendants' intentions with respect to the appeals of the related cases will be known by March 8. Assuming Defendants appeal these related cases, there will be even less prejudice to Defendants with the entry of partial final judgment for California.

In contrast, California will be gravely prejudiced by being unable to continue to defend against an unlawful rule specifically targeting the State, *see* Reply, n.4, where "a single instance of noncompliance" "could jeopardize [ ] the $63 billion in federal funding it receives for healthcare programs for one-third of Californians." Dkt. No. 143 at 28; *see also* Dkt. No. 144 at 7–8, 146 at 6–8. The equities, and the judicial policy in favor of avoiding piecemeal appeals, favor an immediate appeal of all three cases adjudicated in the November 19, 2019 order.

CONCLUSION

California respectfully requests that the Court enter partial final judgment under Rule 54(b).

Dated: February 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***State of California v. Alex M. Azar, et al.*** No. **3:19-cv-02769-WHA**

I hereby certify that on February 20, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF STATE OF CALIFORNIA'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b)

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 20, 2020, at Sacramento, California.

Ashley Harrison	*/s/ Ashley Harrison*
Declarant	Signature