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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STATE OF CALIFORNIA,

Plaintiff,

v.

ALEX M. AZAR II, *in his official capacity as Secretary of Health and Human Services*, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and DOES 1–100,

Defendants.

Case No. 19-cv-2769-WHA

DEFENDANTS' SUPPLEMENTAL BRIEF

Hon. William H. Alsup

Phillip Burton Federal Building & United States Courthouse, Courtroom 12, 19th Fl., 450 Golden Gate Ave., San Francisco, CA 94102

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INTRODUCTION

Plaintiff State of California has already prevailed in this litigation. Nevertheless, it seeks additional action from this Court in the form of a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure, for the apparent purpose of joining in any appeal that Defendants Alex M. Azar II and the United States Department of Health and Human Services may take of the other cases this Court simultaneously decided. But as this Court has noted, Plaintiff has multiple, alternative options to achieve its desired result: it can dismiss its remaining claims without prejudice or it can participate in any appeal of the *San Francisco* and *Santa Clara* cases as an *amicus curiae*. Instead, Plaintiff continues to utilize this Court's resources to seek to "have it both ways" by continuing to litigate its FOIA claim and its other challenges to the Rule in district court while *also* creating an appealable judgment on the claim this Court already resolved. *See* Tr. of Feb. 13, 2020 Hr'g at 1:21, ECF No. 150. Because Plaintiff fails to provide any just reason for this Court to certify a Rule 54(b) judgment, its motion must be denied.

At oral argument, this Court expressed a desire to learn more about two issues: (1) whether Plaintiff's voluntary dismissal of its remaining claims without prejudice may yield an appealable judgment and (2) whether obtaining a Rule 54(b) final judgment would "force the hand" of Defendants by requiring them to appeal any claim resolved in that judgment now. As discussed more fully below, the answers are as follows: (1) if California voluntarily dismisses its remaining claims without prejudice, there would be an appealable final judgment and (2) Defendants would be required to appeal any claim on which final judgment is entered, including a judgment entered under Rule 54(b), within sixty days.

ANALYSIS

I. Circuit law allows a prevailing party, like Plaintiff here, to create an appealable judgment by dismissing its remaining claims without prejudice.

The Ninth Circuit generally allows for the prevailing party to dismiss claims without prejudice in order to create a final appealable judgment. *See Local Motion, Inc. v. Niescher*, 105 F.3d 1278, 1279, 1281 (9th Cir. 1997) (per curiam); *United Nat'l Ins. v. R & D Latex Corp.*, 141 F.3d 916, 918 n.1 (9th Cir. 1998), *as amended* (May 14, 1998) (prevailing party succeeded in its attempt to facilitate opposing party's appeal from grant of summary judgment by dismissing remaining claims without prejudice); *see also United States v. Cmty. Home & Health Care Servs., Inc.*, 550 F.3d 764, 766 (9th Cir. 2008) ("A prevailing

party's decision to dismiss its remaining claims without prejudice generally renders a partial grant of summary judgment final."); *cf. Anderson v. Allstate Ins.*, 630 F.2d 677, 681 (9th Cir. 1980) ("There is no danger of piecemeal appeal confronting us if we find [appellate] jurisdiction here, for nothing else remains in the federal courts."). In addition, a district court's approval of a plaintiff's motion to dismiss without prejudice "is usually sufficient to ensure that everything is kosher" in this regard. *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1066 (9th Cir. 2002); *see also Pac. Fleet Submarine Mem'l Ass'n v. U.S. Dep't of the Navy*, 524 F. App'x 315, 317 (9th Cir. 2013) (same).

Plaintiffs cite *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1076–77 (9th Cir. 1994), for the contrary proposition, but that case is inapposite because it involved a *losing* party who sought to voluntarily dismiss its remaining claims without prejudice to create an appealable judgment. *See id.* Where the losing party manufactures finality, that is improper manipulation of the appellate process. *See Local Motion, Inc.*, 105 F.3d at 1279. Where, however, the prevailing party clears the way for an appeal, as contemplated here, the Ninth Circuit has concluded that an appealable judgement can be entered as a result of the prevailing party's dismissal of its remaining claims without prejudice. *United Nat'l Ins.*, 141 F.3d at 918 n.1. Thus, if Plaintiff wishes to create a final appealable judgment, it has a ready means at its disposal that will also close this case on this Court's docket: Plaintiff can dismiss its remaining claims without prejudice.

II. If this Court enters judgment for Plaintiff, Defendants would have to appeal that judgment within sixty days.

If Plaintiff succeeds in obtaining entry of judgment, either under Rule 54(b) or otherwise, Defendants must notice any appeal of that judgment within sixty days.[1] *See* Fed. R. App. P. 4(a)(1)(B). In particular, an order certified under Rule 54(b) must be appealed immediately; it is not reviewable on appeal from final judgment on the claims that remain in district court. *See Williams v. Boeing Co.*, 681 F.2d 615, 616 (9th Cir. 1982) (per curiam) (stating that time to appeal begins to run upon entry of judgment under Rule 54(b)); *see also Atchison, Topeka & Santa Fe Ry. Co. v. Cal. State Bd. of Equalization*, 102

[1] Counsel for Defendants stated that he believed Defendants had ninety days from the date of entry of final judgment to appeal, Hearing Tr. At 13:12; he corrects that statement here. Accordingly, any notice of appeal in the *San Francisco* and *Santa Clara* cases is due on March 9, 2020.

F.3d 425, 427 (9th Cir. 1996) (holding that where notice of appeal was not filed within thirty days of partial summary judgment certified under Rule 54(b), later appeal from modified partial summary judgment order was untimely because modification did not adversely affect appellant's interest in a material matter).

Thus, entry of a Rule 54(b) judgment would "force the hand" of Defendants by requiring them to appeal any claims resolved in that judgment within sixty days. Such strong-arm tactics, however, are not a proper purpose of Rule 54(b). *See, e.g.*, *Spiegel v. Trs. of Tufts Coll.*, 843 F.2d 38, 42 (9th Cir. 1988) ("Clearly the purpose of the rule is not to encourage broadly piecemeal appeals just because an appellant may be in a hurry."). And more importantly, as explained above, if Plaintiff wants to create a final appealable judgment, it has a more straightforward way to do so: by voluntarily dismissing any remaining claims without prejudice. This alternative approach has the advantage of both removing this case from this Court's docket and avoiding the possibility of piecemeal appeals in this case. Also, unlike Rule 54(b) certification, this approach is entirely within Plaintiff's control.[2]

[2] Dismissing Plaintiff's alternative theories of the Rule's invalidity as moot is another option that would allow Plaintiff to raise these theories in any appeal as alternative grounds on which to affirm this Court's opinion. *See* Defs.' Opp'n 5, ECF No. 145.

And of course, Defendants do not suggest that Plaintiff is required to forgo its FOIA claim. Rather, Plaintiff has a choice about whether it wants to force Defendants' hand and trigger any appeal of this Court's opinion on the Rule now or whether it wants to obtain a final judgment upon conclusion of its FOIA litigation; using Rule 54(b) to have it both ways is improper. *See Spiegel*, 843 F.2d at 42.

CONCLUSION

Entry of judgment under Rule 54(b) "should not be indulged . . . as a magnanimous accommodation to lawyers or litigants." *Id.* This Court should deny Plaintiffs' motion for a Rule 54(b) final judgment.

Dated: February 20, 2020

Respectfully Submitted,

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